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# INSPECTOR GENERAL

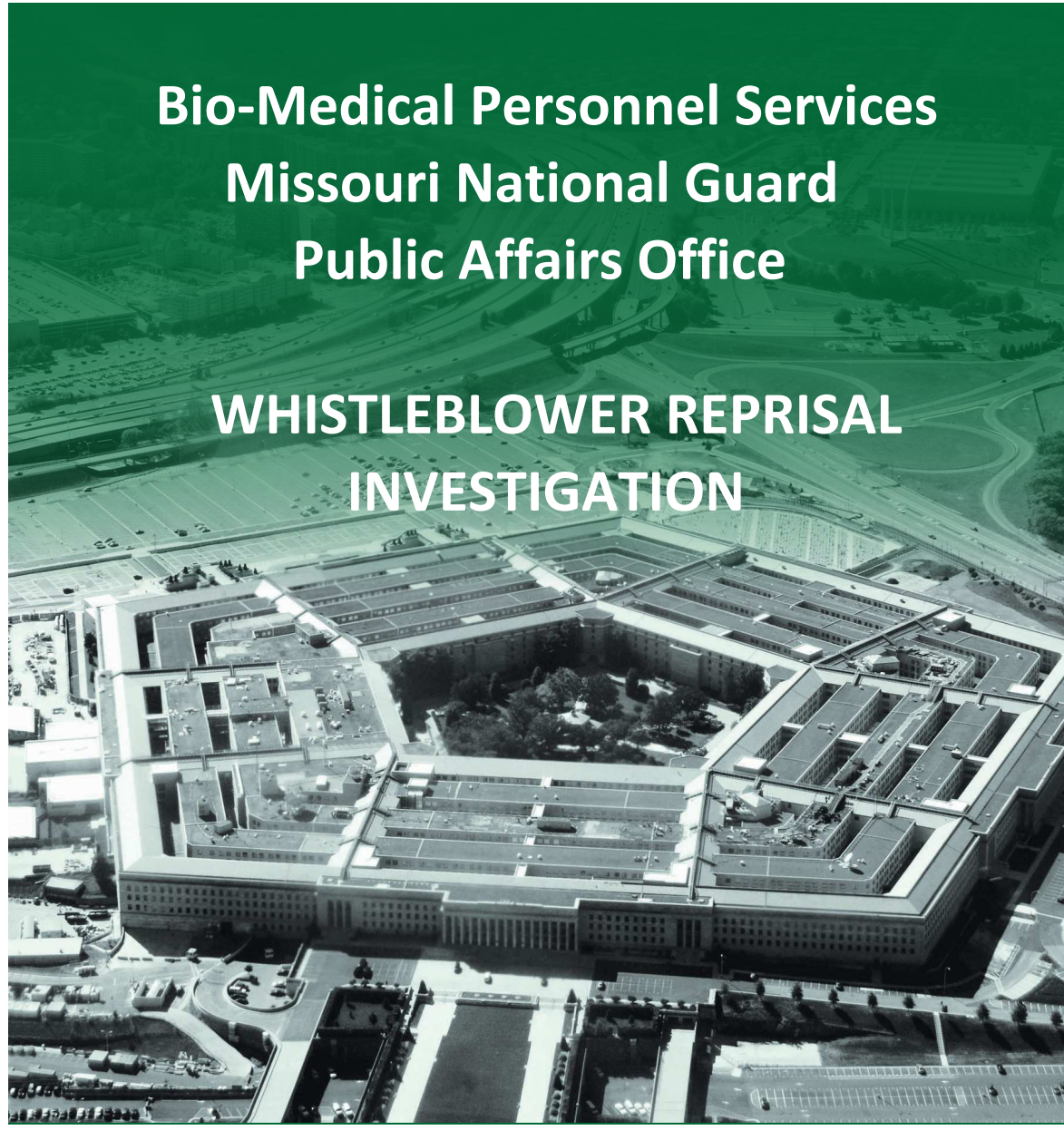
*U.S. Department of Defense*

June 6, 2017



## Bio-Medical Personnel Services Missouri National Guard Public Affairs Office

### WHISTLEBLOWER REPRISAL INVESTIGATION



INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

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## **WHISTLEBLOWER REPRISAL INVESTIGATION**

**BIO-MEDICAL PERSONNEL SERVICES  
MISSOURI NATIONAL GUARD  
PUBLIC AFFAIRS OFFICE**

### **I. EXECUTIVE SUMMARY**

We conducted this investigation in response to an allegation that officials from Bio-Medical Personnel Services (BPSI) Incorporated placed [REDACTED] (Complainant), BPSI, Multimedia Photographer, on unpaid administrative leave and then discharged him in reprisal for making protected disclosures to officials from the Missouri National Guard Joint Force Headquarters Inspector General (MONG JFHQ IG) and to BPSI about not having the proper equipment to do his job and about the assignment of tasks outside the focus of what the contract specified.

We determined that Complainant reported information to the MONG JFHQ IG and BPSI that evidenced a reasonable belief of an abuse of authority relating to a Department of Defense (DoD) contract, and were, therefore, considered protected disclosures. We also determined that BPSI had knowledge of Complainant's protected disclosures and that Complainant experienced personnel actions when BPSI placed him on unpaid administrative leave and subsequently discharged him.

We substantiated the allegation that BPSI placed Complainant on unpaid administrative leave and subsequently discharged him in reprisal for Complainant's protected disclosures, in violation of Title 10, United States Code, Section 2409 (10 U.S.C. § 2409), "Contractor employees: protection from reprisal for disclosure of certain information," as amended by Section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and as implemented by Defense Federal Acquisition Regulation Supplement, Subpart 203.9, "Whistleblower Protections for Contractor Employees" (February 28, 2014).

We recommend that the Secretary of the Army direct National Guard Bureau officials:

- Consider appropriate action against BPSI and any possible successor in interest.
- Order BPSI or any possible successor in interest to reinstate Complainant to the position he held prior to the reprisal, correct Complainant's personnel record to expunge the February 4, 2014, termination letter from his file, and award compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to Complainant in that position if the reprisal had not been taken.

## II. BACKGROUND

Bio-Medical Personnel Services (BPSI) was founded and incorporated by [REDACTED] as a Maryland corporation in 1997, and [REDACTED]. [REDACTED] testified to us that the company dissolved in September 2015.<sup>1</sup> BPSI specialized in biomedical research support, professional and administrative services, and military family and veteran support. BPSI employed over 400 employees across the United States in functions such as program management, training, and human resource management. During the contract period, BPSI aligned with Military Personnel Services Corporation, a Virginia limited liability company that formed in 2006, to form a joint venture characterized as BPSI/MPSC, LLC.<sup>2</sup>

The Missouri National Guard's (MONG) federal mission is to provide support to the Missouri Governor in times of crises and, when needed, provide federal support for national crises. The MONG is headquartered in Jefferson City, Missouri and composed of both Army and Air National Guard units. Major General (MG) Stephen Danner, U.S. Army National Guard (ARNG), has been The Adjutant General (TAG), MONG, since 2009, and Brigadier General (Brig Gen) David Newman, Air National Guard, (ANG), Missouri Air National Guard (MOANG), was the Director, Joint Staff, from July 2012 to August 2015.

On September 2, 2009, the Department of the Army, as the contracting agency, together with the 127th Wing, Michigan Air National Guard, through the National Guard Bureau, as the contracting activity, awarded BPSI/MPSC, LLC, a base plus four option years contract for professional and administrative support services with an award maximum of \$90 million. On November 15, 2011, the 127th Wing awarded BPSI/MPSC, LLC, a bridge contract for professional and administrative support services with a one-year period of performance and a maximum contract award amount of \$58 million. BPSI/MPSC, LLC was not entitled to receive funds from either contract until an ARNG or ANG contracting office in the United States ordered services from the base contract through task orders.

In 2012, MONG awarded BPSI/MPSC, LLC, two task orders for public affairs-related work. Specifically, on March 27, 2012, a contracting officer with MONG awarded a \$249,404.64 task order to BPSI/MPSC, LLC, with a period of performance from March 19, 2012 to August 19, 2012. The task order objective included administrative assistance and public affairs support for the MONG Public Affairs Office (PAO), located in Jefferson City, Missouri.

On September 18, 2012, the MONG contracting officer awarded a \$509,719.64 task order to BPSI/MPSC, LLC, with a period of performance from September 19, 2012 to May 19, 2013. The task order objective included photography; news and video archiving of the MONG; and development and maintenance of an archive program that gathered, indexed and preserved documents, images, interviews and print and video news broadcasts related to the MONG. The work to be performed was in support of the MONG PAO.

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<sup>1</sup> Maryland corporate records show Bio-Medical Personnel Services, Inc., is a dissolved corporation.

<sup>2</sup> Neither BPSI nor MPSC are shown as active according to Maryland and Virginia corporate records.

On February 13, 2013, the Department of the Army, together with the National Guard Bureau, awarded a second bridge contract to BPSI/MPSC, LLC, for professional and administrative services with a one-year period of performance from February 14, 2013 to November 14, 2013, and with a maximum contract award amount of \$50 million. Task orders could be issued to BPSI/MPSC, LLC anytime between February and November 2013.

On August 5, 2013, a contracting officer with MONG awarded a \$211,556.88 task order to BPSI/MPSC, LLC with a period of performance from August 5, 2013 to August 4, 2014. The task order objective included program coordination and video and graphic design support for the MONG PAO, with a focus on creating a monthly, half-hour television program (called MO Guard TV) about the MONG. This represented a change from the two task orders BPSI/MPSC, LLC, received in 2012 for work performed at the MONG PAO.

The two 2013 task order objectives for BPSI/MPSC, LLC included the following:

Provides program coordination services and oversees video and graphic design support (and provide video and graphic design support) in support of Missouri National Guard (MONG) Public Affairs efforts with a focus on creating of (*sic*) monthly, half-hour TV program and producing video, radio and print products that can be used across a range of media including online, social media, broadcast and print. The contractor shall perform tasks at the Public Affairs Office (PAO) as detailed in this PWS.<sup>3</sup>

### III. SCOPE

On May 7, 2015, Complainant filed a DoD Hotline complaint of whistleblower reprisal. Complainant told us that BPSI officials placed him on unpaid administrative leave and then discharged him in reprisal for making a complaint about the MONG PAO to BPSI and the MONG JFHQ IG.<sup>4</sup>

Complainant alleged that [REDACTED], ARNG, MOARNG, [REDACTED], [REDACTED], assigned him tasks unrelated to the production of the half-hour television program, which was the focus of the task order, and that he was not provided proper equipment to complete his job.

On June 23, 2015, DoD OIG notified Complainant that his complaint did not warrant further investigation in that his complaints to BPSI and the MONG JFHQ IG did not constitute protected disclosures under 10 U.S.C. § 2409, because they did not convey information that evidenced a violation of law, rule or regulation related to the contract.

In February 2016, U.S. Senators Claire McCaskill and Charles Grassley expressed concern that the DoD OIG may not have applied the appropriate analysis to reprisal claims by a

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<sup>3</sup> PWS stands for performance work statement.

<sup>4</sup> Complainant's May 7, 2015, DoD Hotline complaint was numbered 20150507-031172-01.

colleague of Complainant. They noted that 10 U.S.C. § 2409 also prohibits reprisal against contractor employees for disclosures that an employee believes constitute gross mismanagement of a DoD contract or grant, a gross waste of Department funds, or an abuse of authority relating to a contract or grant. Senators McCaskill and Grassley requested information about the DoD OIG policy on the analysis and evaluation of contractor reprisal complaints.

On April 11, 2016, the Acting DoD IG notified Senators McCaskill and Grassley that we reconsidered Complainant's complaint and would reopen his case in order to proceed with a full investigation. This report reflects that investigation.

We interviewed Complainant, BPSI's former president, government employees, and relevant witnesses with first-hand knowledge of the matters. We were unable to interview Complainant's supervisor at BPSI, [REDACTED], who did not respond to our attempts to contact her. We also reviewed documentary evidence provided by BPSI, Complainant, and the MONG JFHQ OIG including personnel records and a MONG command investigative report initiated because of a MONG OIG request.

We did not consider [REDACTED], ANG, MOANG, [REDACTED], to be subjects of this investigation. [REDACTED] actions in this matter have previously been addressed by a MONG investigation, which substantiated misconduct by them both, as discussed in this report.

#### **IV. STATUTORY AUTHORITY**

The Department of Defense Inspector General (DoD IG) conducts whistleblower reprisal investigations involving employees of Defense contractors under Title 10, United States Code, Section 2409 (10 U.S.C. § 2409), "Contractor employees: protection from reprisal for disclosure of certain information," as amended by Section 856 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291), and as implemented by Defense Federal Acquisition Regulation Supplement, Subpart 203.9, "Whistleblower Protections for Contractor Employees" (April 28, 2014).

#### **V. FINDINGS OF FACT**

On September 5, 2013, BPSI hired [REDACTED] (Colleague 1) as a [REDACTED] and he began work at the MONG PAO on September 19, 2013.<sup>5</sup>

On September 23, 2013, Complainant signed and returned employment paperwork to BPSI, including a signed receipt for the BPSI Employment Handbook that acknowledged he had received and read the document.

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<sup>5</sup>DoD OIG Whistleblower Reprisal Investigations addressed Colleague 1's allegations of reprisal in a separate report (20150507-031174-CASE-02).

On October 1, 2013, BPSI hired Complainant as a photographer and he began work at the MONG PAO. Later that month, [REDACTED] (Colleague 2) joined Complainant and (Colleague 1) as a BPSI employee who worked at the MONG PAO. Complainant testified to us that although he was hired as a [REDACTED], he performed the duties of a [REDACTED].

Complainant told us his supervisor at BPSI was [REDACTED], and that his understanding of the main goal of the contract (under which he was performing work) was to produce the television series, and afterwards his responsibility was to help the PAO wherever necessary. Complainant described how he, Colleague 1, and Colleague 2 were a three-person team, and that Colleague 1 was:

The producer of the show, and the producer's job is to tell myself and [Colleague 2] to, what to do with that scenario. Basically [Colleague 1] showed us what we were to do with the cameras, where we would go, who we would speak to, all that sort of thing.

Colleague 1 and Colleague 2 corroborated Complainant's characterization that Colleague 1 led Colleague 2 and Complainant in the execution of their duties. [REDACTED] testified to us that Colleague 1 was responsible for the production of the monthly half-hour television program while ensuring Complainant and Colleague 2 completed their job duties. [REDACTED] testified to us that the "intent of the program was for [Complainant] to receive his direction of work from [Colleague 1]."

[REDACTED] also testified, "[MO Guard TV] while definitely it is part of the contract, was in no way, shape, or form the sole thing in the contract. So, we had a number of things that we could have been having them do that they didn't do so they could concentrate on that half-hour product."

Colleague 2 testified to us he was hired to help produce the half-hour television program, and that he and Complainant were responsible for going out and obtaining the video stories, and that Colleague 1 would remain at the station to find stories for them and to set the production schedule.

The task order noted the COR [REDACTED] assumed certain quality assurance duties with respect to the contract with BPSI, and provided an example quality assurance worksheet (QAW) for the COR to fill out on a monthly basis and provide to BPSI and the Contracting Office. The task order required the COR to:

... monitor contractor performance, complete and sign the [QAW] provided below at least monthly, but you can submit the worksheet more frequently if needed. This worksheet allows you to document compliance with the task order and fill a regulatory requirement to ensure adequate oversight is being performed ...

***(Bold in task order)* [QAWs] are to be sent directly to the Schedule Holder (BPSI) and Administering Contracting**



**Office, not later than the 5th day of the month following the service (every month).** The quality rating may change from “Green” to “Red” without notice, however we encourage the COR to utilize the “Yellow” quality rating to alert the Contracting Office and the Schedule Holder of quality issues that have the potential for a “Red” quality rating if corrective action is not taken.

Any time the rating is less than “Green” the COR shall clearly document the worksheet to indicate what did or did not occur per the PWS requirement. When an observation indicates other than a “Green” rating, the COR will require the Contractor to initial the observation ... Notify the Contracting Officer if there is a deficiency. If the Contractor’s response to an identified quality deficiency is unsatisfactory, the Contracting Officer along with the COR will contact the Schedule Holder (BPSI) to implement a plan of action to remedy the identified deficiency.<sup>6</sup>

According to Complainant, he was initially assigned secretarial tasks, including answering phones and “writing little articles” on public affairs matters, and that these assignments contributed to his inability to help with MO Guard TV, as these tasks kept him focused on other work. Complainant told us he believed the assignment of tasks outside the production of the half-hour television program was a violation of the contract, because he was “taken from the primary focus of the contract to cover events where either [REDACTED] or [REDACTED] were present where they could have done the exact same duty as what [he] was performing [writing newspaper articles for PAO].”

Complainant also testified that MONG PAO only provided him and his colleagues one video camera, one laptop, and “possibly” two wireless microphones, and in his opinion, the team should have been provided three laptops, three cameras and six microphones. According to Complainant, they were not given the proper equipment to do their job, specifically because they were only provided one video camera, and that the camera was unable to produce high definition video.

Complainant also noted that [REDACTED] was unwilling to accept their suggestions on creative content for the half-hour television program, and said, “We attempted to explain it to her that for a television show, you needed specific items to actually go on to TV that would play well to an audience, and she basically ignored our advice or told us to, ‘Be quiet and do what I say.’”

Colleague 1’s testimony corroborated Complainant’s account as Colleague 1 told us he performed an inventory shortly after beginning with BPSI and found one video camera, one tripod, one wireless microphone, one light kit, and one laptop computer. Colleague 1 also corroborated Complainant’s allegation that the BPSI contractors were not given the proper

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<sup>6</sup> A Contracting Officer is a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. A Contracting Officer’s Representative is an individual designated and authorized in writing by the contracting officer to perform specific technical or administrative functions.

equipment to do their job, and that at a minimum each individual should have received a camera, laptop, tripod, and set of microphones.

Colleague 2, however, did not agree with Colleague 1 or Complainant's position on equipment. When asked if he believed the equipment MONG provided was sufficient to perform their responsibilities, Colleague 2 said, "It was." Colleague 2 told us that the MONG mobile public affairs division (MPAD) offered them one or two additional cameras, and they used them occasionally.

According to the task order technical specifications, the BPSI contractors would be provided with adequate office space located at MONG PAO, including a complete workstation and chair, expendable supplies, computer hardware and software (and support), internet/intranet/Local Area Network (LAN) (and support), telephone and fax, copy machine and printer, mail service and postage. The task order also noted that BPSI and government representatives would determine the working condition of all equipment, and that the government would replace or repair any item not in working order.

According to Colleague 1, the one laptop computer MONG PAO provided "crashed" the first week of October and never regained its ability to run editing equipment. Colleague 1 said he "ran a diagnostic" on the computer, and that Colleague 2 called an Apple store in St. Louis, and was told the laptop could be repaired for about \$200.00, but that [REDACTED] and [REDACTED] told them the money wasn't available. According to Colleague 1, he continued to shoot footage but at that time had no editing equipment available.

[REDACTED] testified to us that she recalled Colleague 1 telling her the laptop "went out," and although she said she could not remember having a conversation with Colleague 1 directing him to obtain additional equipment from the MPAD, she said she believed she gave him and Complainant access to other computers, and that there were multiple computers in the PAO and in the MPAD for their use.

[REDACTED] told us that he could not recall exactly what the issue was with the laptop computer, but that he thought [REDACTED] would have coordinated obtaining equipment from the MPAD. Colleague 2 testified to us that the crashed laptop computer was the same computer he used, and that he obtained a replacement laptop computer from the MPAD around the same day it malfunctioned.

[REDACTED], [REDACTED], worked for [REDACTED], USA, MOARNG, [REDACTED]. [REDACTED] attended weekly PAO meetings and recalled that TAG, through Brig Gen Newman, began inquiring into the progress of the half-hour television program. [REDACTED] testified to us that production of the television show was "taking forever," corroborated Colleague 1's contention that there were equipment issues, which they were trying to "wade" through, and stated it was readily evident there was a significant difference of opinion concerning what "they were trying to produce versus what was being produced. It seemed, it seemed very emotional between all of them ... they were not very happy with each other ..."



According to the timeline that [REDACTED] provided BPSI, during an October 8, 2013, PAO weekly meeting, the BPSI contractors (including Complainant) communicated their intent to complete two MO Guard TV programs for review by November 6, 2013, in time for Veteran's Day, but that they were advised by [REDACTED] to aim for just one program. The timeline reflected that the November 6, 2013, suspense was not met and that no interviews were completed in connection with the planned program.

When asked about Complainant's performance, [REDACTED],

On the 10th of October, we sent [Complainant] to cover a [Judge Advocate General] graduation, which required heavy editing with very basic stuff. I mean, AP style, DoD style. A lot of it had to be rewritten. There were no quotes in the original draft. I basically had to rewrite it. On the 12th, they attended a departure ceremony for [Detachment 40] which was our C-12, I think it was C-12s they flew in Afghanistan ... the print product that [Complainant] did, again, required very heavy editing. One of the errors in there, to just show the carelessness, was they spelled the adjutant general's name wrong.

Of these two press articles, Complainant told us,

To my knowledge, they were never edited directly by [REDACTED] or [REDACTED], and were never published ... [REDACTED] also mentioned me not writing in 'DoD style,' of which I had never heard of in my education. She never provided me with a stylebook or any resources to improve. Both [REDACTED] and [REDACTED] attended a number of the events they sent me to cover. They were there to be present, they never wrote any articles, took any pictures, or shot any video at the events in which I was present.

[REDACTED] also noted in the timeline he submitted to BPSI that Colleague 1 told him that equipment problems had led to the delay in accomplishing their tasks, and that he, Colleague 1 and Colleague 2 discussed a way forward and produced a new set of deadlines and expectations in a draft schedule. While the timeline noted that Complainant, Colleague 1 and Colleague 2 had traveled to Kansas City to interview a MONG mixed martial arts instructor, the timeline noted the following concerns, missed deadlines, and tasks that had not been accomplished:

- a missed October 15, 2013, suspense to turn in a list of interviewees for the first half-hour television program;
- missed deadlines on two written stories;
- a Skype interview with deployed soldiers that was not completed;
- a history lesson that was not completed;
- that MONG social media tasks that were not completed; and
- an interview with the TAG that was not completed.

On October 23, 2013, [REDACTED] contacted the contracting officer and courtesy copied [REDACTED], and told them that with regard to contractor performance, "we've already started seeing signs that a couple of them might not quite work out, and we want to make sure we're documenting everything correctly in case, at some point, we need to start looking at other options in the future."

However, at this time [REDACTED] had not completed a single QAW or provided the contracting office or BPSI a completed QAW for the month of October, as required by the task order. [REDACTED] offered the following explanation:

By the time the October one would've been filled out [it] coincided pretty directly with the transfer over the (*sic*) [REDACTED] ... [he] was supposed to do the trainings as the COR, but never did it, or at least didn't do it until, I want to say December. So, since he was over the program, and I didn't have any visibility on it, but he couldn't sign the paperwork because he wasn't the COR, you know, I didn't fill out the QA forms. I didn't feel comfortable doing it ... I didn't have any oversight over the program ...

Brig Gen Newman had administrative control of the PAO and reported directly to MG Danner. He testified that [REDACTED] briefed him weekly on PAO accomplishments, and then he would pass these updates to TAG. Brig Gen Newman stated there was friction between the contractors and [REDACTED], and that [REDACTED] was probably not the easiest person to work for, I would guess ... and [REDACTED] would be in my office, I would ask her if the videos were online, you know, on time, and stuff like that. On timeline (*sic*). And she was constantly saying that these guys weren't doing their job, or she was just having problems with them."

[REDACTED] said, "As [Complainant] went, his job was at a sort of lower level, and I didn't interact [with] him a ton ... he was pretty far behind the power curve as far as video experience went." [REDACTED] stated that Colleague 1 was "showing him the ropes."

[REDACTED] testified that Complainant was, "unable to put forth any public affairs duties. He could not write a story. He could not write, he could not write a sentence. He could not do any public affairs duties." When asked if she ever notified Complainant of his deficiencies, she said "we addressed [the issues] at the time" although she said she did not recall ever having a counseling session with him on the matter.

[REDACTED] told us that the BPSI contractors had taken much video, but that nothing had been produced into the half-hour television program. [REDACTED] stated, "it seems to me at some point in time, no matter what [Colleague 1] and [Complainant and Colleague 2] showed them, it was not right. It was not good enough. It wasn't right."

██████████ characterized the relationship between ██████████ and ██████████ and the contractors as:

‘I don't like purple, why didn't you use green,’ kind of stuff, you know? ... Here is my cold stone summation of what I felt like was going on down there. I felt like no matter, that there was such a toxic relationship between them and the PAO that these guys could have recorded an alien invasion of the United States, and they would've gotten ripped for doing something wrong. I just don't feel like there was anything that they were going to do that was going to pass muster down there.

██████████ said that as a result, he and ██████████ began “politicking” with Brig Gen Newman to have Complainant, Colleague 1, and Colleague 2 transferred under ██████████ and ██████████ guidance so that the contractors could complete the half-hour television program.

*Tuesday, November 5, 2013, Transfer to ██████████ and ██████████*

On November 5, 2013, Complainant, Colleague 1, and Colleague 2 were transferred from ██████████ and ██████████ oversight to ██████████ and ██████████. Although Brig Gen Newman did not recall the specific details surrounding their transfer, he stated that, while he believed the idea came from either ██████████ or ██████████, he was the one who made the decision.

On November 14, 2013, ██████████ e-mailed ██████████ and told him the contracting officer ██████████

stated that there are monthly quality assurance reports or plans due on each contractor. Were you able to do any yet? It is needed if we were interested in releasing a contractor.

██████████ responded to ██████████ and courtesy copied ██████████ and ██████████:

I didn't do one for the first invoice because at that point there was nothing to report. For the second invoice, the plan was to fill it out with all the shortfalls we'd observed.

At this time, however, ██████████ had not completed or provided the contracting office or BPSI a completed QAW for the month of November, as required by the task order.

██████████ stated that he requested ██████████ and ██████████ put together “a brief history of the team.” On November 15, 2013, ██████████ e-mailed ██████████, and courtesy copied ██████████, ██████████ and ██████████, and provided her a historical timeline of his observations of the BPSI contractors from September 20, 2013 to November 13,

2013, with a section titled, “Overarching Concerns.” [REDACTED] told us she fully participated in the development of this timeline that noted, in part, the following issues:

- [Colleague 1] and [Complainant and Colleague 2] have done nothing on the web site ...;
- [Complainant] does not appear to be fully qualified for the position to which he was hired. After more than a month, he is still viewed by [Colleague 1] as a trainee and is not able to function autonomously. Training [Complainant] has become an additional expense, as not only are his hours being used to attain skills he should have had coming into the job, but they are taking the time we need the other videographers (*sic*) [Colleague 2] to be using creative products to train him.

[REDACTED] testified that [REDACTED] shared [REDACTED] timeline with her sometime in “mid-November” and stated that:

[REDACTED] and I] were disappointed that they were under performing on the contract and our response was to provide them counseling and give them an opportunity to improve their skills so that they could continue to perform. So, that was our immediate response is that we would, we would look at the issues very carefully and then share those issues with the employees and hope that they would be able to resolve their performance issues.

[REDACTED] provided a sworn statement to an Investigating Officer (IO) in a MONG administrative investigation, which we discuss in more detail below. The statement noted:

From 20 November - 24 January 2014, we were able to develop a full 30-minute product and begin work on a second 22-minute show. The [BPSI contractors] had begun to make huge strides in daily production and quality work improved from the initial start under my supervision.

[REDACTED] told us that he had no issues with Complainant, and that he worked well within the team and showed progress on assigned tasks.

[REDACTED] told us that after Complainant was moved he became much more engaged and part of the team, and that:

[REDACTED] created a much more relaxed, non-confrontational working environment, I think prior to that there was so much tension [Complainant] was just was trying to ‘not get into trouble,’ which is a far cry from being relaxed and getting the job done.

[REDACTED] added that in a matter of days [after the contractors’ move], Colleague 1 had put together the different segments for the half-hour television program, that he and [REDACTED] were “quite impressed.” He believed they showed it to the TAG who,

██████████ told us, blessed off on the program. However, ██████████ also told us he didn't "know that it actually had made it out into the TV world."

Complainant told us that after the transfer, he and his colleagues "performed a number of tasks that ██████████ said were excellent."

Colleague 2 told us that during the time he, Colleague 1, and Complainant worked under ██████████ and ██████████ guidance, they still were not able to produce a half-hour television program. Colleague 2 said that by December they were still no closer to putting a show together, despite having filmed different segments for the show. Colleague 2 stated that he thought [the transfer to ██████████] took away from ██████████ mission and was a waste of his time, and that he thought ██████████ ultimately decided to return them to ██████████ and ██████████.

██████████ did not provide BPSI or the contracting officer a QAW for the month of December, as required by the task order.

*Monday, January 27, 2014, Transfer back to ██████████ & ██████████*

On January 27, 2014, Brig Gen Newman notified ██████████ that Complainant, Colleague 1, and Colleague 2 would return to work under ██████████. ██████████ corroborated Brig Gen Newman's testimony.

When asked to explain why the BPSI contractors were returned to ██████████ supervision, Brig Gen Newman speculated that he thought ██████████ might have asked the TAG to have the BPSI contractors returned to her because the work they performed was inherently a PAO function, and the videos were a public affairs product. Brig Gen Newman stated that during a meeting to discuss the videos, the TAG directed that the BPSI contractors be returned to ██████████, but that the TAG did not tell him why.

According to Complainant, after ██████████ notified them they were being returned to ██████████, he and his colleagues protested the move but ██████████ told them he could not do anything about it. According to Complainant, after ██████████ left the room, ██████████ came in and:

[she] immediately put on a tone of disdain and told us, "You should shut up, sit down and listen to what I have to say. You will be doing what I say you do and nothing more." It was at that point that she said, "We will be having a briefing later, which [Colleague 1] gets to come to, neither of you two," meaning myself and [Colleague 2].

Later that same day, Colleague 1 filed a complaint with the MONG JFHQ IG alleging that ██████████ failed to provide BPSI contractors with adequate equipment to produce the half-hour television program, which Colleague 1 believed was his primary responsibility based upon the PWS. Colleague 1 also alleged that ██████████ assigned him and the other BPSI contractors tasks other than production of the half-hour television program.

From contemporaneous notes [REDACTED] took, [REDACTED] noted that he and M [REDACTED] met with Complainant, Colleague 1, and Colleague 2 that day to set future program goals, and that “they” (he and [REDACTED]) learned that Colleague 1 had been complaining about using his personal equipment to do his job. [REDACTED] testified to us that this was information he learned of from the IG.

*Tuesday, January 28, 2014, Collective IG Complaint*

On January 28, 2014, Complainant attended a follow up meeting with [REDACTED], [REDACTED], Colleague 1 and Colleague 2. Complainant stated that issues continued to “crop up” and to illustrate this point said that during the meeting [REDACTED] tasked him with ten items that he, “had to go and cover, personally in the one day, and it was, and that to me was just an unprecedented number of items that I would have to go and cover.”

That same day, Complainant, Colleague 1 and Colleague 2 collectively went to the MONG JFHQ IG. Complainant filed a Department of Army Form 1559, Inspector General Action Request with the IG that requested resolution for “issues with working under the PAO” and noted on the form, “We have been prevented from doing our primary mission through misdirection, misinformation, overtasking and obfuscation. This appears to be coming directly from the PAO.”

Complainant testified that he told the IG that [REDACTED] was creating an unhealthy work environment and that [he, Colleague 1 and Colleague 2] were unable to accomplish their duties under her guidance. Complainant told us, “We felt like we were being set, set up for failure, especially me, personally. [REDACTED] in that complaint form that she submitted to BPSI, she stated that I was not performing adequately. That I was not, she doubted my ability to perform with this job ... [and BPSI] said that she mentioned nothing about me to them.”

Complainant provided the IG a number of documents including draft copies of the JAG graduation and Detachment 40 deployment articles he authored, and e-mails reflecting his submission of the articles to [REDACTED] and his responses.

According to officials from the MONG JFHQ IG, Complainant, Colleague 1 and Colleague 2 “all had the same complaint” and that the “IG engaged the three as they expressed their concerns ... they feel they are being unjustly targeted by the PAO.”

Colleague 2’s complaint reflects that the purpose of his IG visit was to “talk and get information” and Colleague 2 told us that he went to the IG because “[Colleague 1] told me I was supposed to go with him because we’re a team.” He added that he “did not actually have any complaints,” and stated, “If I did not go into that [IG] office, then I feel like I would have had to explain myself to [Colleague 1] ... and I didn’t want to deal with all that stuff.” Colleague 2 testified that, “I didn’t want to say no, because I didn’t want controversy going on between [Colleague 1] and myself.”

When asked if she was aware Complainant had gone to the IG to file a complaint, [REDACTED] testified, "No. I think in retrospect it was mentioned that he went to the IG, but I didn't know that at that time."

*Wednesday, January 29, 2014*

According to the MONG JFHQ IG notes, at around 12:00 p.m. on January 29, 2014, Complainant returned to its office and:

reported to the CMD IG that matters in the PAO office are getting worse. [Complainant] would like additional information to assist him in getting his company notified of the harsh work environment created by the PAO office. [Complainant] stated that [Colleague 1] and [Colleague 2] had a meeting mid-morning with the PAO who (via hear say [sic]) on several times told [Colleague 1] to not talk and take the task. [Colleague 2] had stated it was very humiliating. After receiving "instructions" from the PAO, [Colleague 1] just walked out and keeps walking ... it was during this time that [Complainant] noted emotional concerns to the IG about [Colleague 1, who] seemed very despondent after the meeting earlier and was disengaged from everything.

At 12:42 p.m. [REDACTED] e-mailed [REDACTED] the following:

As you know, on Jan 27 ... we switched administrative control of the program from [REDACTED], our special projects officers, back to the public affairs office. We met with the media team that afternoon to outline our goals for the future. We already have issues that we wanted to make sure we had documented for your awareness.

On Jan. 28, we learned that [Colleague 1] approached our inspector general to complain. Chief among his complaints was that he was using personal equipment in creating products ... [Colleague 1] and [Complainant and Colleague 2] have never been asked to do anything outside the parameters of the contract. Since September, their focus has solely been on the half-hour television program.

[REDACTED] acknowledged [REDACTED] e-mail that day and told him she would respond the next day. [REDACTED] did not, however, provide the contracting officer or BPSI a completed QAW for the month of January, despite the apparent seriousness of his concerns, as outlined by the task order.

At 1:01 p.m. that day, Complainant sent BPSI an e-mail directed to [REDACTED] that said it was from himself, Colleague 1 and Colleague 2. In the e-mail Complainant identified that they were having great difficulty fulfilling their contractual obligations, and that the team felt it



was through little fault of their own, as they were not provided the equipment or support needed to fulfill the contract. Complainant wrote, in part, that they had tried communicating their difficulties but had been met with “derision, silence and dismissiveness,” that they had been “yelled at, lectured to and talked to” but not listened to. Complainant noted that he, Colleague 1 and Colleague 2 were all in agreement that their performance improved under [REDACTED], but that being moved back to [REDACTED] was not going to work. Complainant also said that:

The primary goal of our contract has been to produce a half-hour show. Under the direction of [REDACTED], we are being tasked to do things more along the lines of Electronic News Gathering. While we admit this is a part of our contract, we are seeing that become our primary focus, to the detriment of the half-hour show production guideline ... in summation, we feel as though we are not able to follow (*sic*) contract due to lack of support, lack of equipment, and lack of adequate management.

We are now advising you on the situation, and are asking what needs to be done in order to resign from our positions.

[REDACTED] testified to us that [REDACTED] shared Complainant’s e-mail with her and that she recalled reading it. When asked about her reaction to Complainant’s e-mail, [REDACTED] said:

Well, that was the first I think we were aware that there was insufficient equipment, and then over the course of the next 24 hours we received a lot of feedback from the military about their performance. I don’t know what exactly [REDACTED] discussed with [REDACTED] in terms of the equipment, and whether that was part of the conversation or not. But it was clear from everything that they detailed that they missed multiple deadlines, and they, [Complainant’s] grammar was poor. His attention to detail in terms of spelling people’s name correctly and how to use quotes, and how to capitalize appropriately within the context of a sentence. That has nothing to do with equipment. And that was, there were complaints that, there were concerns in terms of his performance that went well beyond equipment.

However, Colleague 1 notified BPSI on January 16, 2014, nearly two weeks prior to significant equipment issues the team was experiencing.

When asked about the letter Complainant provided BPSI, Colleague 2 told us the following:

During the writing of the letter [Colleague 1] and [Complainant] wrote, I kept my ears in headphones and eyes on my laptop editing

for the show. I wanted nothing to do with this letter being written. I didn't speak with [Complainant] about the letter. I did have concerns that [Colleague 1] was dragging [Complainant] into trouble though I had no hard evidence and if I were to let [Complainant] know my stance against the rebellious nature, [Complainant] would have let [Colleague 1] know where I stood, then the friction in our office would be very tense. I just buried myself into working on the shows the best I could.

The MONG JFHQ IG notes also reflect that on January 29, 2014, the IG inquired about Colleague 1 who was sitting in his car in parking lot and was "somewhat" despondent. The IG noted:

key words that [Colleague 1] used to describe everything was that he feels belittled by the PAO and that [REDACTED] is so not wanting the TV show and only wanting the team to do news's (*sic*) links or straight journalism links. The degrading commentary is just overwhelming. [Colleague 1] stated that when they moved from PAO to [REDACTED] the entire environment changed. Then back to the PAO and it's like nothing changed. [Colleague 1] just sees the Contractors being the fall guys for the PAO's office when the TV show that the general wants is not produced ...

*Thursday, January 30, 2014*

According to the BPSI Employment Handbook,

BPSI is the first contact for all issues, concerns, or questions related to your employment. At no time should a BPSI employee approach a BPSI client or customer on any employment matters.

On January 30, 2014, Colleague 1 did not show up to work, and according to [REDACTED], [REDACTED] requested a document outlining the MONG PAO's concerns. [REDACTED] did not, however, request a QAW from [REDACTED].

At 2:42 p.m., [REDACTED] responded to Complainant that she could not entertain a document written on behalf of an entire group, and could only discuss employment matters with each individual. [REDACTED] also told Complainant:

You mention that we received a complaint – if I receive a complaint about your work or a poor performance indication on the monthly report, you will receive a counseling statement from me directly to you.

She provided Complainant a copy of the PWS and reiterated that BPSI had a contract with the MONG to provide the services listed in the PWS, and that Complainant was not under any contractual agreement and was free to resign at any time. Complainant thanked her for the

response and said, "this has cleared up a number of issues." Notwithstanding [REDACTED] telling Complainant that a complaint about his work or poor performance would be indicated on "the monthly report," [REDACTED] did not provide BPSI any such report, including a QAW concerning Complainant's alleged performance problems.

That day, members from the MONG JFHQ IG office visited the contractor's office and spoke to Complainant and Colleague 2. According to the IG notes, [REDACTED] entered the office and the, "IG asked her to leave. [REDACTED] did, but asked the contractor to come to her office when done."

At 4:24 p.m., [REDACTED] e-mailed [REDACTED] and courtesy copied, among others, [REDACTED] and [REDACTED]. In his e-mail, [REDACTED] told [REDACTED] that he and [REDACTED] had compiled a list of issues that she had requested earlier that day, that they wanted to terminate Colleague 1 and were open to terminating Complainant, or "possibly retaining him on a probationary basis," and that they wanted to keep Colleague 2. [REDACTED] attached a nearly one-page long chronology that specified Complainant's deficiencies and the missed suspenses identified earlier in this report.

*Friday, January 31, 2014, Unpaid Administrative Leave*

On January 31, 2014, BPSI notified Complainant by telephone that he was being placed on unpaid administrative leave. BPSI noted in its response to our request for information that Complainant was placed on administrative leave to allow them "to review and address the further complaints from MONG" after BPSI received [REDACTED] January 30, 2014 e-mail describing Complainant's "lack of experience, repeated mistakes in his work requiring heavy editing, and failure to complete required work on time or at all."

At 1:42 p.m., [REDACTED] sent [REDACTED] and [REDACTED] an e-mail with the subject line, "FW: Unpaid administrative leave", that read:

[REDACTED]: Please make certain [Complainant and Colleague 1] do not have access to the military site until we resolved (*sic*) this issue.

That day at 3:42 p.m., [REDACTED] e-mailed [REDACTED] and [REDACTED] and notified them:

For your awareness, after you informed [Complainant] he had been placed on admin leave, he promptly went to the IG office and not finding anyone specific to the prior days events came down to the contracting office looking for myself. I informed him he had no business being in our office and made him leave.

When asked if Complainant's visit to the IG had any impact on BPSI's decision to discharge Complainant, [REDACTED] testified, "No impact at all." When asked if Complainant's earlier complaint to [REDACTED] had any impact on BPSI's decision to terminate

Complainant, [REDACTED] testified, “No, because his, the reason for [Complainant’s] termination was based exclusively on performance.”

*February 4, 2014, Discharge*

[REDACTED] testified that she became a “part of the conversation” after receiving the list of issues [REDACTED] had put together, and when asked whether she discussed [REDACTED] request for Complainant’s possible termination with [REDACTED], [REDACTED] said:

What we decided together was that the issues in terms of performance that [Complainant] was having couldn’t be remedied in a short period of time, within the context of the year contract. It couldn’t be remedied in the short period of time. These were fundamental issues that related to mastery of the English language, and grammar, and how to use quotes appropriately. And he simply did not have these skills, and we just didn’t think that he, he could be trained where he could be able to meet the expectations of the contract, and in the period of time that we would need him to.

On February 4, 2014, BPSI provided Complainant a termination letter signed by [REDACTED] that read:

I have reviewed your e-mail dated January 29, 2014 regarding your position. I responded to you thoroughly explaining the reason that you were hired was to provide support services to the MONG. I explained the job relationship, and I explained to you that I cannot entertain your list of complaints submitted by you for the ‘team’ or ‘group.’ I received documentation that your work skills and performance are not satisfactory. Your attitude is not acceptable. You sharing my response to you with others is not appropriate. As an employee of BPSI, it is inappropriate for you to ‘complain’ about members of the military service up the military chain of command. Your actions created turmoil and disruption to the mission at hand. Your note to me indicated that ‘we feel that this placement is not going to work.’ We agree. Without the proper skill set and without the cooperation and willingness to work within the statement of work to follow the military mission, we cannot continue to pay you for services that you are not providing.

The letter noted BPSI offered Complainant the option to resign in lieu of termination, but that he elected termination.

We asked both [REDACTED] and [REDACTED] if they provided BPSI any negative information about Complainant as the termination letter noted that documentation BPSI received indicated Complainant’s work skills and performance were not satisfactory. [REDACTED] and

██████████ told us they did not recall providing any feedback to BPSI on Complainant's performance. ██████████ stated, "If I did, I'm sure it would have been positive."

When asked why BPSI let Complainant go, Colleague 2 testified, "Now, I don't know why [Complainant] got fired, but the only way I could think of is [Complainant] was just kind of sucked in to [Colleague 1's] stuff that was going on, you know."

Colleague 2 also stated that they had filmed and put together three stories and filmed one additional story that was not put together, but that during Complainant's and Colleague 1's tenure at BPSI no half-hour television programs were approved or released. Colleague 2 reported that within approximately one week after BPSI discharged Complainant, he finished producing the first episode of MO Guard TV, which he said was approved by ██████████, ██████████ and TAG, and that it aired approximately one week later. As evidence to support this claim, Colleague 2 directed us to the Defense Video & Imagery Distribution System (DVIDS) website which listed the air date of "Episode 2" (Episode 1 aired in 2012 prior to Complainant joining BPSI) as February 24, 2014. ██████████ corroborated the information Colleague 2 provided us about the release date of Episode 2.

To emphasize his contention that the equipment the MONG PAO provided was sufficient to do the job, Colleague 2 testified that after Complainant was discharged from BPSI, he (Colleague 2) produced six half-hour programs with the equipment provided and that the equipment "worked fine." Colleague 2 said that in March he developed a second show, and continued to develop the programs through Episode 7, which aired on September 2, 2014. A review of the DVIDS website reflected Colleague 2's name on Episode 7.

When asked if BPSI considered reassigning Complainant to another position within the company, ██████████ testified:

Yes, we always do. We always look to see that if there is another fit. If we have another task order or contract that would be appropriate for their skill set, but unfortunately there wasn't anything available ... I mean, [Complainant and Colleague 1] simply were missing deadline, after deadline, after deadline, and in something like news and video and broadcasting, if you don't show up to an event there's no way to make that up.

When asked to comment on allegations the equipment the contractors received was not adequate, ██████████ testified:

Well, I could see that the equipment was adequate for several other people working in the same capacity. So, BPSI had several employees working in the [PAO] prior to the employment of [Complainant] and [Colleague 1]. We probably employed 15 to 20 people over the course of the years who worked in that department and never was there a complaint about the adequacy of the equipment.

██████████ went on to say that they hired replacements for Complainant and Colleague 1 (who was subsequently discharged), and the replacements began in March or April, 2014, and stayed through the remainder of the task order period of performance (August 2014). When asked if MONG PAO was able to produce the videos (half-hour television program) in this time period, ██████████ told us it was, and that she never received another complaint from the PAO about the performance of the contract or the adequacy of the equipment.

### *MONG Investigation*

On February 5, 2014, ██████████, ARNG, MONG JFHQ IG, provided Brig Gen Newman a memorandum that notified him the MONG JFHQ IG office had received an action request concerning the work environment of contract employees and the PAO, and that in accordance with Army Regulation 20-1, Inspector General Activities and Procedures, the IG referred the matter to him for action. The memorandum requested Brig Gen Newman conduct an inquiry into the matter and provide a copy to the IG upon completion. The memorandum requested that Brig Gen Newman determine, at a minimum, the following:

- if contract employees associated with the PAO's office were working within their contract and if the MONG Contracting Officer has been apprised of any issues with the contracted employees;
- if the employees were afforded opportunities to use their system of redress; and
- if the PAO office create a healthy work environment (i.e., are people treated with dignity and respect).

On February 7, 2014, Brig Gen Newman appointed an Inquiry Officer (IO) to conduct an investigation into whether contract employees associated with the PAO worked within their contract, and if the MONG contracting officer had been apprised of any issues with the contract employees. The appointment also directed the IO to investigate whether contract employees were afforded opportunities to use their system of redress, whether the PAO created a healthy work environment, and whether people were treated with dignity and respect.

The IO collected e-mails, documents and eleven sworn statements. The IO concluded in his memorandum to Brig Gen Newman that the contractors were working within the contract, but:

Proper video equipment was not available for the [contractors] ... they had continual problems with equipment, having only one functioning video editing laptop. Under ██████████ supervision the [contractors] did receive some additional equipment and were able to produce a 30 minute video ... a former employee of the PAO with 17 years professional broadcast experience, in is (*sic*) sworn statement, said the [contractors] didn't have sufficient equipment to complete the mission.

The IO also noted that the contractors were not afforded proper redress as outlined by the contract. The IO added that [REDACTED] as the COR was required to complete QAWs at the end of each month, beginning with an employee's start date, but that at the time Complainant was discharged, no worksheets had been completed. The IO noted that, per the contract, if employee performance dropped below "green" to "yellow" or "red" (demonstrating a performance decline), the employee was to be counseled and initial the worksheet acknowledging his or her lack of acceptable performance. The IO found that [REDACTED] as the COR "knew the requirements stating he read the contract and that the COR was responsible for the QAW."

The IO also found that the only performance issue ever raised to BPSI came from [REDACTED] and [REDACTED] and was about Colleague 1 (not Complainant), and that the performance issue was resolved while Colleague 1 worked under [REDACTED]

The IO also found that:

[Complainant] inquired with BPSI about rumors of his lacking performance working with the National Guard. He was informed by BPSI on 30 January 2013 (exhibit 4, [Complainant]) 'that there would be reports to his performance if there were any concerns.' As of 30 January, there were no reports or QAWs from the National Guard about poor performance concerns about [Complainant]. [Complainant] was informed by BPSI on 31 January he was being terminated by the BPSI on request of the National Guard.<sup>7</sup>

The IO also found that [REDACTED] demeanor did not allow for a healthy, productive work environment, and "the improper handling of the [contractors], directing the removal of the contract employees was negligent and a direct reflection of the work environment and failure of the leadership of both [REDACTED] and [REDACTED]."

The IO recommended that [REDACTED] and [REDACTED] be counseled, and that [REDACTED] technician appraisal note the negative effects of her leadership style. The IO recommended that [REDACTED] technician appraisal highlight, in part, the liability, importance and consequences of being a COR, and how his negligence in improperly following the contract reflected negatively on the MONG and would not be tolerated.<sup>8</sup>

On May 5, 2014, a legal review was completed and sent to Brig Gen Newman. The legal review indicated the IO's findings were supported by competent and substantial evidence.

According to MONG JFHQ OIG case notes from June 5, 2014, Brig Gen Newman met with [REDACTED] and notified him he had verbally counseled [REDACTED] on her leadership style,

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<sup>7</sup> Although the IO noted that Complainant was terminated on January 31, 2014, this was actually the date BPSI placed Complainant on administrative leave.

<sup>8</sup> A technician appraisal is a U.S. National Guard Bureau service member's annual performance appraisal.



and that he intended to follow up with [REDACTED] to ensure he understood the contracting process. The case notes also reflected that Brig Gen Newman considered the matter complete with regard to [REDACTED] and, with regard to [REDACTED], it would be complete once he spoke to him.

## **VI. ANALYSIS**

Under 10 U.S.C. § 2409, reprisal is proven in a 2-step process. First, a preponderance of the evidence must establish that one or more protected disclosures could have been a contributing factor in the company's decision to discharge, demote, or take another unfavorable action against the employee who made the protected disclosures. The complaint is thus substantiated, unless clear and convincing evidence establishes that the contractor or subcontractor would have discharged, demoted, or taken or failed to take another action with respect to Complainant, absent the protected disclosure.

### **A. Did Complainant make a protected disclosure? Yes**

We determined that Complainant made two protected disclosures under 10 U.S.C. § 2409.

#### *IG Complaint*

On January 28, 2014, Complainant alleged to the MONG JFHQ IG that [REDACTED] failed to provide him, Colleague 1 and Colleague 2 adequate equipment to produce the half-hour television program, which was the focus of the contract. Complainant alleged that [REDACTED] assigned him, Colleague 1 and Colleague 2 tasks other than production of the show, and that they were being "set up for failure." Complainant's report to the IG is protected because he provided information about the lack of equipment and assignment of tasks outside the focus of his primary responsibility, and this was information that he reasonably believed evidenced an abuse of authority relating to a DoD contract. Furthermore, an IG is a recipient qualified to receive such disclosures under 10 U.S.C. § 2409.

#### *BPSI Complaint*

On January 29, 2014, Complainant e-mailed BPSI and identified that he, Colleague 1, and Colleague 2 had "great difficulty" fulfilling their contractual obligations, and that the team felt it was through little fault of their own as they had not been provided the necessary equipment or support. Complainant told BPSI that they had been met with "derision, silence, and dismissiveness," and that they had been "yelled at, lectured to and talked to" but not listened to. Complainant also reported that under [REDACTED] direction, news gathering tasks had become the primary focus, "to the detriment of the half-hour show production."

Complainant's e-mail to BPSI is protected because he provided information about the lack of equipment and assignment of tasks outside the focus of his primary responsibility to a management official with the responsibility to investigate, discover or address misconduct. Further, Complainant reported information that he reasonably believed evidenced an abuse of

authority relating to a DoD contract. Further, [REDACTED], as the BPSI [REDACTED], was a management official of the contractor with the responsibility to investigate, discover or address misconduct.

As described above, a preponderance of the evidence established that Complainant made two protected disclosures.

**B. Did the contractor or subcontractor discharge, demote, or take or fail to take another action with respect to Complainant? Yes**

We determined that BPSI took two actions with respect to Complainant.

*Unpaid Administrative Leave*

On January 31, 2014, BPSI officials placed Complainant on unpaid administrative leave. Unpaid administrative leave constitutes an action that may dissuade a reasonable employee from making a protected disclosure. Accordingly, unpaid administrative leave is a covered action under 10 U.S.C. § 2409.

*Discharge*

On February 4, 2014, BPSI discharged Complainant. Discharge of a contractor employee is a specific covered action under 10 U.S.C. § 2409.

As described above, a preponderance of the evidence established that BPSI took two actions with respect to Complainant.

**C. Could a reasonable person conclude that one or more protected disclosures were contributing factors in the contractor or subcontractor's decision to take or fail to take an action with respect to Complainant? Yes**

"Contributing factor" means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. To determine whether a protected disclosure was a contributing factor in a decision to take or fail to take, or threaten to take or fail to take, any action, our analysis ordinarily weighs the following factors: knowledge of the protected disclosures on the part of the officer or employee involved in the decision and the decision's proximity in time to the protected disclosure. In most instances, these two factors together suffice to establish that a protected disclosure was a contributing factor. However, if knowledge and timing alone fail to establish that a disclosure was a contributing factor, any other circumstantial evidence may also be considered, such as the strength or weakness of the company's stated reasons for the action, whether the protected disclosure was personally directed at the company, or whether the company had a desire or motive to retaliate against the complainant.

We determined that Complainant's protected disclosures were a contributing factor in BPSI's decision to take actions with respect to Complainant. Discussion of the factors weighed together follows the factor-by-factor analysis below.

### *Knowledge*

When asked if she knew Complainant went to the IG on January 28, 2014, [REDACTED] testified that she "did not know at the time" although she believed in retrospect "it was mentioned that [Complainant] went to the IG." However, on January 29, 2014 at 12:42 p.m., [REDACTED] notified BPSI that Colleague 1 had gone to the IG, and that same day at 1:01 p.m., Complainant e-mailed BPSI about his concerns that [REDACTED] was diverting the team's focus from the production of MO Guard TV, that she was hostile, and that the team had not been provided adequate equipment to do their job. Complainant's e-mail to BPSI was signed by Complainant, Colleague 1, and Colleague 2. BPSI's termination letter to Complainant noted it was "inappropriate for [Complainant] to 'complain' about members of the military service up the military chain of command."

BPSI had knowledge of the e-mail Complainant sent them on January 29, 2014, that was signed by Complainant, Colleague 1 and Colleague 2, and that same day knew Colleague 1 had complained to the IG. In the termination letter, BPSI told Complainant it was "inappropriate" for him to "complain about members of the military service up to the military chain of command", which, together with [REDACTED] notification to BPSI that Colleague 1 had gone to the IG, indicate it was more likely than not that BPSI perceived Complainant had also made an IG complaint. Accordingly, BPSI had knowledge of both of Complainant's protected disclosures.

### *Timing of Actions Taken*

The timing between Complainant's protected disclosures and the actions taken against him was only a matter of days. Complainant's first protected disclosure occurred on January 28, 2014, with the second on January 29, 2014. The actions taken against him occurred on January 31, 2014 and February 4, 2014. The close timing between the protected disclosures and the actions taken raises an inference of reprisal.

Based on the factors analyzed above, a preponderance of the evidence established that Complainant's protected disclosures could have been a contributing factor in BPSI's decision to place Complainant on unpaid administrative leave and discharge him.

**D. Does clear and convincing evidence indicate that the contractor or subcontractor would have discharged, demoted, or taken or failed to take another action with respect to Complainant absent the protected disclosure(s)? No**

Once a preponderance of the evidence establishes that one or more protected disclosures contributed to the decision to discharge, demote, or take or fail to take another action with respect to Complainant, the case is substantiated unless clear and convincing evidence establishes that the action would have been taken or fail to be taken even in the absence of the

protected disclosure. For each action, our analysis weighs together the following factors: the strength of the evidence in support of the stated reasons for taking or failing to take the action; the existence and strength of any motive to retaliate on the part of the company officials who were involved in the decision; and any evidence that they take or fail to take or fail to take similar actions with respect to employees who are not whistleblowers, but who are otherwise similarly situated.

We determined that BPSI would not have taken the same actions with respect to Complainant absent his protected disclosures. Discussion of the factors weighed together follows the factor-by-factor analysis below.

*BPSI's stated reasons for unpaid administrative leave and discharge*

BPSI noted that Complainant was placed on administrative leave "to review and address the further complaints from MONG" after BPSI received [REDACTED] January 30, 2014, e-mail outlining Complainant's "lack of experience, repeated mistakes in his work requiring heavy editing, and failure to complete required work on time or at all."

BPSI's February 3, 2014, termination letter notified Complainant that:

I have reviewed your e-mail dated January 29, 2014 regarding your position. I responded to you thoroughly explaining the reason that you were hired was to provide support services to the MONG. I explained the job relationship, and I explained to you that I cannot entertain your list of complaints submitted by you for the 'team' or 'group.' I received documentation that your work skills and performance are not satisfactory. Your attitude is not acceptable. You sharing my response to you with others is not appropriate. As an employee of BPSI, it is inappropriate for you to 'complain' about members of the military service up the military chain of command. Your actions created turmoil and disruption to the mission at hand. Your note to me indicated that 'we feel that this placement is not going to work.' We agree. Without the proper skill set and without the cooperation and willingness to work within the statement of work to follow the military mission, we cannot continue to pay you for services that you are not providing.

*Motive to Retaliate*

Complainant's protected disclosures to the IG and to BPSI on January 28 and 29, 2014, respectively, were substantially the same, and blamed the government for the contractor's lack of success. He stated the team had not been provided the necessary equipment to do their job because they had been assigned tasks other than focusing on the monthly half-hour television program, and because of hostile treatment by [REDACTED]. Complainant specifically told BPSI that the contractors had been "yelled at, lectured to and talked to" but not listened to, and that

under [REDACTED] direction, news gathering tasks had become the primary focus, “to the detriment of the half-hour show production.”

This information Complainant provided to the IG and BPSI could have motivated BPSI to reprise against Complainant because his complaint reflected conflict between the contractors and the MONG, and could have caused BPSI concern that its contract was in jeopardy. Moreover, MONG complaints about Complainant and Colleague 1 expressed its desire that Complainant be terminated or moved to a probationary status reasonably could have caused BPSI to believe its contract was in jeopardy of non-renewal or termination.

### *Disparate Treatment of Complainant*

BPSI employed only two employees other than Complainant under contract at the MONG PAO, and we uncovered no evidence that BPSI either discharged or placed a similarly situated non-whistleblower on unpaid administrative leave. Furthermore, we found that BPSI treated a similarly situated whistleblower consistent with its treatment of Complainant in that we determined BPSI reprised against Colleague 1 for making protected disclosures.<sup>9</sup>

### *Discussion*

BPSI’s stated reasons for placing Complainant on unpaid administrative leave and discharging him are not supported by clear and convincing evidence.

BPSI told Complainant that if it received a complaint about his work or “poor performance indication on the monthly report, you will receive a counseling statement from me directly to you.” However, the MONG investigation conducted after Complainant’s discharge found that as of January 30, 2014, there were no reports or QAWs from the MONG PAO about Complainant’s poor performance. This finding does not capture the November 15, 2013, e-mail [REDACTED] sent BPSI where he noted that Complainant did not “appear to be fully qualified for the position.” However, at this point in November Complainant had already been transferred to [REDACTED] and [REDACTED], and according to their assessments was making progress. Furthermore, we uncovered no evidence that BPSI ever received QAWs from [REDACTED] as required by the task order, or that BPSI requested QAWs from [REDACTED].

[REDACTED] did not provide any QAWs for the months October 2013 through January 2014 as required by the task order (the months that Complainant was employed). BPSI made no attempts to solicit these QAWs to gain a month-by-month evaluation of Complainant, Colleague 1, or Colleague 2’s performance. BPSI did not afford its employees the opportunity to compare how their performance was measured against the PWS. The task order also noted, “If the Contractor’s response to an identified quality deficiency is unsatisfactory, the Contracting Officer along with the COR will contact the Schedule Holder (BPSI) to implement a plan of action to remedy the identified deficiency.”

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<sup>9</sup> 20150507-031174-CASE-02

BPSI made no attempt to provide Complainant an opportunity to remedy the performance deficiencies [REDACTED] identified on January 29, 2014, only two days after he reacquired oversight responsibility of Complainant. BPSI also did not question Complainant about the performance issues [REDACTED] identified on January 29, and did not give Complainant an opportunity to remedy these issues, as BPSI placed him on unpaid administrative leave on Friday, January 31, 2014, and discharged him the following Tuesday.

BPSI notified Complainant in his termination letter that it would not “entertain your list of complaints submitted by you for the ‘team’ or ‘group.’” Although BPSI told Complainant that “sharing my response to you with others is not appropriate,” we uncovered no evidence that BPSI took steps to address the concerns Complainant, Colleague 1, and Colleague 2 presented, despite being aware of the team’s collective concerns about the lack of equipment as explained in Colleague 1’s e-mail to BPSI on January 16, 2014.

Furthermore, BPSI’s own Employment Handbook required Complainant to contact BPSI on all employment related issues. In accordance with BPSI’s policy as set forth in its handbook, Complainant notified BPSI of his concerns with the lack of focus on MO Guard TV, and of the hostilities he encountered at the PAO.

BPSI also told Complainant in his termination letter that it had received documentation that his work skills and performance were not acceptable. However, BPSI offered no counseling statements supporting this assertion. Further, for nearly 13 of the 16 weeks BPSI employed him, Complainant worked under [REDACTED] and [REDACTED] oversight, and they reported no issues with his performance to BPSI. Furthermore, BPSI was well aware Complainant, Colleague 1, and Colleague 2 had been transferred to [REDACTED] and [REDACTED], in particular because BPSI was in contact [REDACTED] about Colleague 1’s performance as late as December 2014. Despite every opportunity to inquire about Complainant’s performance, BPSI did not do so, which, in light of BPSI’s inquiry [REDACTED] about Colleague 1, suggests it had no concerns about Complainant’s performance. Only after Complainant complained to the IG and to BPSI on January 28 and 29, 2014, did BPSI take issue with Complainant’s performance.

Finally, we note that 10 U.S.C. § 2409(a)(3)(B) prohibits Defense contractors such as BPSI from engaging in reprisal against a whistleblower “even if it is undertaken at the request of a Department or Administration official, unless the request takes the form of a nondiscretionary directive and is within the authority of the Department or Administration official making the request.” Even though BPSI received complaints about Complainant from [REDACTED] and [REDACTED], the mere existence of such complaints from government officials does not relieve BPSI of its burden to demonstrate by clear and convincing evidence that it would have taken the same actions in the absence of the protected disclosures. Based on the discrepancies identified above, we find that BPSI has failed to satisfy this burden.

Weighed together, we determined the evidence analyzed above does not clearly and convincingly establish that BPSI would have placed Complainant on unpaid administrative leave and discharged him absent the protected disclosures.

Accordingly, in the absence of clear and convincing evidence to the contrary, we determined that BPSI placed Complainant on unpaid administrative leave and discharged him in reprisal for his protected disclosures.

## **VII. CONCLUSION(S)**

We conclude BPSI placed Complainant on unpaid administrative leave and discharged him in reprisal for making protected disclosures.

## **VIII. RECOMMENDATION(S)**

We recommend that the Secretary of the Army direct National Guard Bureau officials:

- Consider appropriate action against BPSI, and any possible successor in interest.
- Order BPSI or any possible successor in interest, to reinstate Complainant to the position he held prior to the reprisal, correct Complainant's personnel record to expunge the February 4, 2014, termination letter from his file, and award compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to Complainant in that position if the reprisal had not been taken.



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