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Report No. CRI-HL 110281

February 11, 2011

# Inspector General

United States

Department of Defense



APPROPRIATED FUND EMPLOYEE  
WHISTLEBLOWER REPRISAL INVESTIGATION

BLUE GRASS CHEMICAL ACTIVITY  
BLUE GRASS ARMY DEPOT

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INSPECTOR GENERAL  
DEPARTMENT OF DEFENSE  
400 ARMY NAVY DRIVE  
ARLINGTON, VIRGINIA 22202-4704

FEB 11 2011

MEMORANDUM FOR [REDACTED]  
COMMANDER, BLUE GRASS CHEMICAL ACTIVITY,  
BLUE GRASS ARMY DEPOT, RICHMOND, KY

SUBJECT: Investigation under 5 U.S.C. § 2302(b)(8)

We recently completed our investigation into allegations that [REDACTED], Blue Grass Chemical Activity (BGCA), Richmond, KY, and [REDACTED], BGCA, reprised against Mr. Donald P. Van Winkle, a former WG-5205-10, Monitoring Systems Operator/Mechanic, BGCA, via a lower annual performance evaluation.

We substantiated the allegations. We concluded the Agency did not establish by clear and convincing evidence that it would have taken the same actions absent Mr. Van Winkle's disclosures and that [REDACTED] and [REDACTED] reprised against Mr. Van Winkle.

If you have any questions, please contact me or Mr. John Hickey, Acting Director, Civilian Reprisal Investigations, at (703) 604-[REDACTED]

Donald M. Horstman  
Deputy Inspector General for  
Administrative Investigations

Attachment:  
As stated

cc: Mr. Donald Van Winkle

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WHISTLEBLOWER REPRISAL INVESTIGATION

Mr. Donald P. Van Winkle

INTRODUCTION AND SUMMARY

We initiated this investigation in response to a Defense Hotline complaint on April 15, 2009, from Mr. Donald P. Van Winkle, a former WG-5205-10, Monitoring Systems Operator/Mechanic, Blue Grass Chemical Activity (BGCA), Richmond, KY, a tenant organization of Blue Grass Army Depot (BGAD), Richmond, KY.<sup>1</sup> Mr. Van Winkle was referred to the Office of the Inspector General, Department of Defense (DoD IG), Civilian Reprisal Investigations Directorate (CRI), after he filed a whistleblower reprisal complaint with the DoD Hotline.

Mr. Van Winkle alleged that he suffered 10 acts of reprisal after making four protected disclosures. The disclosures pertained to improper installation of a key component to an air monitoring system used to detect VX nerve gas leaks within storage igloos housing chemical munitions. Since Mr. Van Winkle established a *prima facie* case, the investigation shifted the burden of proof to the Agency, requiring clear and convincing evidence establishing that one of the personnel actions would have been taken absent Mr. Van Winkle's disclosures.

We concluded the Agency was unable to establish by clear and convincing evidence that the personnel action at issue would have been taken absent the protected disclosures. Therefore, we substantiated that [REDACTED], BGCA, Richmond, KY, and [REDACTED], BGCA, Richmond, KY, reprised against Mr. Van Winkle.

This report sets forth our findings and conclusions based on applicable evidentiary standards.

BACKGROUND

BGAD is one of six Army installations in the United States that currently stores chemical weapons. Located near Richmond, KY, BGAD is a subordinate installation of the Joint Munitions Command (JMC) and encompasses approximately 14,600 acres of land. The depot is primarily involved with industrial and related activities associated with the storage and maintenance of conventional and chemical munitions. BGCA, a tenant organization of the Depot reporting to the U.S. Army Chemical Materials Agency (CMA), is responsible for the safe, secure storage of the chemical weapons stockpile housed at the depot. The stockpile is comprised of 523 tons of nerve agent, including VX.<sup>2</sup>

<sup>1</sup> All titles and ranks identified pertain to the position(s) held at the time the incident took place and do not necessarily reflect an individual's current rank or title.

<sup>2</sup> U.S. Army Chemical Materials Agency Web site at <http://www.cma.army.mil/bluegrass.aspx>.

A U.S. Army Colonel commands BGAD. BGCA has its own leadership and is led by a Lieutenant Colonel. The Colonel who is in command of BGAD has no relationship with BGCA except for providing security and environmental support in the event of an incident. BGAD and BGCA each have separate Civilian Executive Assistants (CEAs).<sup>3</sup>

Chemical munitions at BGCA are housed in storage facilities known as igloos. The chemical munitions require constant monitoring for leaks. A leak can pose a danger to both employees and the general public. Monitoring the munitions for leaks is a team effort. It involves both air quality inspections as well as visual inspections, with the latter involving members of the inspection team going inside the igloo.<sup>4</sup>

The technology currently employed by chemical monitoring teams at BGCA is relatively new. Up until the mid 1980's, there were no low-level monitoring systems available. Until that time, a relatively low-tech approach was used to test the air inside the igloos. This approach involved placing a caged rabbit inside the igloo. BGCA would gauge the safety of their work environment's air by observing the rabbits health.<sup>5</sup>

Today, the technology employed at BGCA for monitoring chemical munitions involves computer technology and air sensors. Critical in safely monitoring munitions containing VX is an instrument known as "MINICAMS." MINICAMS is an automatic, near-real-time continuous air monitoring system. MINICAMS collects an air sample, performs an analysis, and reports the result.<sup>6</sup> These instruments are located in vehicles similar to a small recreational vehicle known as a Real Time Analytical Platform (RTAP).<sup>7</sup>

Prior to a team of inspectors entering an igloo, an RTAP/MINICAMS operator connects a trace line from the RTAP to a line outside of the igloo.<sup>8</sup> The trace line goes to a pad known as a "V to G" conversion pad. The pad is supposed to be installed both inside and outside the igloo. BGCA had improperly installed the pads.<sup>9</sup> V to G conversion pads are a critical component of what is known as the Depot Area Air Monitoring System.<sup>10</sup> The pads are used to convert the nerve agent VX to a more easily detectable and volatile agent.<sup>11</sup> This allows the

<sup>3</sup> DoD IG Interview of [REDACTED], BGAD, Richmond, KY (June 23, 2009) at 5-6.

<sup>4</sup> DoD IG Interview of [REDACTED] (June 24, 2009) at 56.

<sup>5</sup> DoD IG Interview of [REDACTED], BGCA, Richmond, KY (June 23, 2009) at 24; DoD IG Interview of [REDACTED], BGCA, Richmond, KY (June 24, 2009) at 21.

<sup>6</sup> O.I. Analytical Web site at <http://www.oico.com/default.aspx?id=product&productID=75>.

<sup>7</sup> DoD IG Interview of [REDACTED] (June 24, 2009) at 32.

<sup>8</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 5.

<sup>9</sup> U.S. Army IG Completion Report, HL 97059/DIH 05-8278 (Dec. 8, 2005) at 1-2

<sup>10</sup> Camseco Manufacturer Web site at [http://www.camseco.com/daams\\_tubes.htm](http://www.camseco.com/daams_tubes.htm).

<sup>11</sup> Camseco Manufacturer Web site at [http://www.camseco.com/vgt\\_nox.htm](http://www.camseco.com/vgt_nox.htm); Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 5.

RTAP/MINICAMS operator to test the air inside the igloo for evidence of a chemical leak before the visual inspection team enters the igloo. If no leak is detected, members of the visual inspection team go inside to perform the inspection. While the visual inspection team is within the igloo, the RTAP/MINICAMS operator continues to monitor the air until the visual inspection team concludes its tasks and exits the igloo.<sup>12</sup>

As a Monitoring Systems Operator/Mechanic, Mr. Van Winkle's duties further included monitoring toxic chemical storage magazines and associated facilities/equipment (igloos) in order to detect possible contamination. His tasks included operating, installing, and calibrating complex instruments and equipment used in the installation's air monitoring systems.<sup>13</sup>

Given the nature of both the weapons stored at BGCA and Mr. Van Winkle's job responsibilities, he was required to maintain a Secret clearance as well as certification under Chemical Personnel Reliability Program (CPRP).<sup>14</sup>

### SCOPE AND AUTHORITY

Under the Inspector General Act of 1978, as amended, the DoD IG is responsible for improving the economy, efficiency, and effectiveness of the Department's operations through prevention and detection of fraud, waste, and mismanagement. To fulfill those responsibilities, Congress granted the DoD IG broad powers to **conduct and supervise investigations** relating to the Department's programs and operations. The DoD IG achieves this goal, in **part, by acting** upon information provided by federal employee(s) in investigations conducted **under Sections 7(a) and 8(c)(2) of the Inspector General Act**. The DoD IG protects the **confidentiality of** sources providing information under the authority of Section 7(b) of the Inspector General Act.

DoD Directive 5106.01 mandates that the Inspector General "[m]aintain a whistleblower protection program in the DoD that encourages personnel to report fraud, waste, and abuse to appropriate authorities; provides mechanisms for addressing complaints of reprisal; and recommends remedies for whistleblowers who encounter reprisal, consistent with applicable laws, regulations, and policies."<sup>15</sup> One component of this whistleblower protection program is to "[r]eceive and investigat . . . complaints of reprisal made by civilian appropriated-fund employees" consistent with title 5, United States Code, Section 2302 (5 U.S.C. Section 2302).<sup>16</sup>

Employees of the DoD are required to report "waste, fraud, abuse and corruption to appropriate authorities."<sup>17</sup> Title 5 U.S.C. Section 2302 (b)(8) provides protection to DoD employees who make a "protected disclosure." A protected disclosure is a disclosure of

<sup>12</sup> DoD IG Interview of [REDACTED] (June 24, 2009) at 56.

<sup>13</sup> Base System Civilian Evaluation Report, DA Form 7223, *Mr. Van Winkle* (Feb. 9, 2006).

<sup>14</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 5.

<sup>15</sup> DoD Directive 5106.01 (Apr. 13, 2006) at 5.19.

<sup>16</sup> DoD Directive 5106.01 (Apr. 13, 2006) at 5.19.1.

<sup>17</sup> Executive Order 12731 (Oct. 17, 1990)

information the employee reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such a disclosure is not specifically prohibited by law and if such information is not specifically required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.<sup>18</sup>

Title 5 U.S.C. Section 2302 (a)(2)(A)(i) through (xi) lists personnel actions, which, if taken, withheld, or threatened in reprisal for a protected disclosure, constitute “prohibited personnel practices.” These personnel actions include disciplinary or corrective action; a detail, transfer, or reassignment; a performance evaluation; a decision to order psychiatric testing or examination; a decision concerning pay, benefits, or award; or any other significant change in duties, responsibilities, or working conditions.

We employ a two stage process in conducting whistleblower reprisal investigations. The first stage focuses on the alleged protected disclosures, personnel actions, and acting official’s knowledge. The second stage focuses on whether or not the Agency would have taken, withheld, or threatened the personnel actions absent the protected disclosure. The first stage of the whistleblower reprisal analysis is held to a preponderance of the evidence.<sup>19</sup> “Preponderance” of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.<sup>20</sup>

In order to progress to the second stage of the investigative process, there must be sufficient evidence based on proof by a preponderance of the evidence to make three findings:

1. the complainant made a protected disclosure;
2. the complainant was the subject of a personnel action; and
3. the protected disclosure was a contributing factor in the personnel action.<sup>21</sup>

If a preponderance of the evidence supports the three findings above, the investigation will proceed to the second stage of the analysis. At that point, the Agency is afforded the opportunity to provide evidence regarding the allegations and specifically, evidence that would establish the Agency would have taken, withheld, or threatened the personnel actions against the

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<sup>18</sup> 5 U.S.C. Section 2302 (b)(8)(A)(i-ii)

<sup>19</sup> 5 C.F.R. Section 1209.7.

<sup>20</sup> 5 C.F.R. Section 1201.56 (c)(2)

<sup>21</sup> This third finding may be established where the acting official had knowledge, actual or imputed, of the complainant’s disclosure and the personnel action took place within a period of time subsequent to the disclosure, such that a reasonable person could conclude that the disclosure was a contributing factor in the decision to take the action. *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 635 (2001), review dismissed, 32 Fed. Appx. 543 (Fed. Cir. 2002). In deciding whether a personnel action occurred within a period of time sufficient to conclude the disclosure was a contributing factor, the probative value of the evidence may be affected by the passage of time. Weak but substantiating evidence may be sufficient to prove reprisal after a short time frame; stronger evidence may be required to prove reprisal over relatively longer time frames.

complainant absent the protected disclosure. The second stage of analysis is held to a clear and convincing evidence standard.<sup>22</sup> "Clear and convincing" evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than preponderance of the evidence but a lower standard than beyond a reasonable doubt.<sup>23</sup>

To address the fourth element, we consider the following three factors for presence of "clear and convincing" evidence:<sup>24</sup>

1. the strength of the Agency's evidence in support of its personnel action;
2. the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the decision; and
3. any evidence that the Agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

We interviewed 12 witnesses including the complainant, Mr. Van Winkle, and [REDACTED] [REDACTED] and [REDACTED]. We also reviewed documentation provided by Mr. Van Winkle, the Agency, and other independent sources.

Mr. Van Winkle had standing to file a Section 7 complaint with the Defense Hotline because he was a full-time civilian employee of the DoD and his position was financed with appropriated funds.<sup>25</sup> We reviewed this complaint consistent with Title 5 U.S.C. Section 2302 (b)(8). Mr. Van Winkle alleged that he was reprised against for disclosing information that he reasonably believed evidenced a violation of law, rule, or regulation.

### CHRONOLOGY

On May 14, 1998, Mr. Van Winkle retired and was honorably discharged as a sergeant, United States Army.<sup>26</sup>

On November 22, 1999, Mr. Van Winkle began working at BGAD as a security guard for the Directorate of Law Enforcement and Security.<sup>27</sup>

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<sup>22</sup> 5 U.S.C. Section 1221(e)(2).

<sup>23</sup> 5 C.F.R. Section 1209.4(d).

<sup>24</sup> *Carr v. Social Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (stating it is appropriate to consider the strength of the Agency's evidence in support of its personnel action when determining whether the Agency has shown by clear and convincing evidence that it would have taken that action in the absence of the employee's protected disclosure).

<sup>25</sup> Title 5 U.S.C. Appendix 3 Section 7(A)(2008) (provisions by which a DoD employee may file complaints with the Inspector General).

<sup>26</sup> Certificate of Release or Discharge from Active Duty, DD Form 214, *Mr. Van Winkle* (May 14, 1998).

<sup>27</sup> Notification of Personnel Action, Standard Form 50 (SF-50), *Mr. Van Winkle* (Nov. 22, 1999).

On August 25, 2002, Mr. Van Winkle was hired as a Toxic Materials Handler/Explosive Inspector with BGCA.<sup>28</sup> On May 18, 2003, he became a Monitoring Systems Operator/Mechanic, an RTAP/MINICAMS operator.<sup>29</sup>

In February 2005, Mr. Van Winkle attended a MINICAMS training course in Pelham, AL. This course was presented by MINICAMS manufacturer O.I. Analytical, CMS Field Products. During this training course, the sampling configuration for VX in use at BGCA was discussed. [REDACTED], O.I. Analytical, CMS Field Products, informed students that he recommended against having the V to G conversion pads installed only on the outside of the igloo because, based on his experience, the setup would not work and may result in a leak not being detected. The procedures [REDACTED] advised against were the procedures employed at BGCA.<sup>30</sup> Mr. Van Winkle and a fellow BGCA coworker, [REDACTED], BGCA, Richmond, KY, became concerned about the placement of the V to G conversion pads. They subsequently contacted [REDACTED], relaying what they learned.<sup>31</sup>

On February 24, 2005, [REDACTED], BGCA, Richmond, KY, convened an "all-hands" meeting.<sup>32</sup> Mr. Van Winkle voiced his concern about the placement of the V to G pads violating procedures and the effect it may have upon the health and safety of BGCA employees.<sup>33</sup> Following the all-hands meeting [REDACTED] directed that the igloos be immediately closed; that upon reentry to the igloos, full protective gear be of the highest priority; that [REDACTED], BGCA, Richmond, KY, and [REDACTED], BGCA, Richmond, KY, investigate the V to G pad matter and issue a report to him; that the BGCA's reporting authority, CMA, be notified of these activities; and that a Chemical Quality Assurance Team be authorized by the CMA to conduct an audit to review the V to G pad issue.<sup>34</sup>

Between February 24, 2005, and March 10, 2005, a Chemical Quality Assurance Team conducted its evaluation and ordered changes to the V to G pad configuration. This change conformed with the training session's recommended procedures by placing the V to G pads inside the igloo. [REDACTED], also Mr. Van Winkle's [REDACTED] and [REDACTED], was ordered by [REDACTED] to oversee the V to G pad conversion.

On June 5, 2005, Mr. Van Winkle filed a complaint with the BGCA Safety Office stating that he believed that BGCA was improperly laundering clothing worn by employees who entered

<sup>28</sup> Notification of Personnel Action, SF-50, *Mr. Van Winkle* (Aug. 25, 2002).

<sup>29</sup> Notification of Personnel Action, SF-50, *Mr. Van Winkle* (May 18, 2003).

<sup>30</sup> U.S. Army IG Completion Report, HL 97059/DIH 05-8278 (Dec. 8, 2005) at 2-3.

<sup>31</sup> DoD IG Interview of Mr. Van Winkle (June 4, 2009) at 19-20; DoD IG Interview of [REDACTED] (June 24, 2009) at 4, 11-12.

<sup>32</sup> DoD IG Interview of [REDACTED] (June 24, 2009) at 14; Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 5.

<sup>33</sup> DoD IG Interview of Mr. Van Winkle (June 4, 2009) at 21; Affidavit of Mr. Van Winkle (Aug. 24, 2005).

<sup>34</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 5.



igloos to inspect for chemical leaks and further relayed his concerns about the V to G pad placement.<sup>35</sup>

On June 8, 2005, [REDACTED], BGCA, Richmond, KY, issued a report concluding that no unsafe/unhealthful conditions existed at the "suit laundry." However, the report noted, "Certain administrative inconsistencies were discovered, and corrective actions have been taken, which in themselves may provide those employees who follow you [Mr. Van Winkle], with ample information, providing assurances of adequate protection."<sup>36</sup>

Between June 1, 2005, and August 3, 2005, following complaints that Mr. Van Winkle asked coworkers to sign a statement he wrote about the V to G pad matter and that he may have threatened coworkers with a subpoena [REDACTED] directed [REDACTED] to lead an informal investigative team. The team was directed to determine whether Mr. Van Winkle was non-cooperative and had a disrespectful attitude to his certifying official, displayed a lack of trust, and threatened or coerced crewmembers with future legal or subpoena action creating a disruptive and questionable work environment. [REDACTED] formed a "board" consisting of himself, [REDACTED], BGCA, Richmond, KY, and [REDACTED], BGCA, Richmond, KY.<sup>37</sup> The board narrowed its scope to the following questions: (1) whether Mr. Van Winkle initiated a legal action against BGCA regarding its mistaken configuration of the MINICAMS; (2) whether he solicited coworkers to discuss workplace activity in this matter; (3) whether he attempted to get questioned employees to sign an affidavit concerning this matter; and/or (4) whether he threatened employees with a subpoena if they refused to cooperate with his inquiry.<sup>38</sup>

On August 3, 2005, following the investigative findings, [REDACTED] temporarily disqualified Mr. Van Winkle from CPRP based upon allegations of suspect queries to crew members and his contemptuous and arrogant behavior and attitude towards his Certifying Official.<sup>39</sup> During the course of an interview in the investigation, Mr. Van Winkle only answered the investigative board's first question, refused to answer the others, and left.<sup>40</sup> In its report, the board concluded that Mr. Van Winkle contacted 17 employees. They found that he engaged in conduct that was creating an uncomfortable environment of mistrust and fear within the workplace, and that he had refused to talk to them and to answer their questions. The

<sup>35</sup> Memorandum from [REDACTED] to Mr. Van Winkle, *Employee Report of Alleged or Unhealthful Working Conditions, DA Form 4755 dated 5 June 2005* (June 8, 2005); *Employee Report of Alleged Unsafe or Unhealthful Working Conditions of Mr. Van Winkle* (June 5, 2005).

<sup>36</sup> Memorandum from [REDACTED] to Mr. Van Winkle, *Employee Report of Alleged or Unhealthful Working Conditions, DA Form 4755 dated 5 June 2005* (June 8, 2005).

<sup>37</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 7.

<sup>38</sup> *Id.*

<sup>39</sup> Memorandum from [REDACTED] to Mr. Van Winkle, *Temporary Disqualification* (Aug. 3, 2005).

<sup>40</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 7.

investigative committee recommended that Mr. Van Winkle's CPRP be temporarily suspended.<sup>41</sup> That same day, [REDACTED] directed [REDACTED] [REDACTED], BGCA, Richmond, KY, to conduct an informal Army Regulation (AR) 15-6 investigation to determine whether Mr. Van Winkle was non-cooperative and had a disrespectful attitude to his Certifying Official, whether Mr. Van Winkle displayed a lack of trust and was untrustworthy, and whether Mr. Van Winkle threatened or coerced crewmembers with future legal or subpoena action creating a disruptive and questionable work environment.<sup>42</sup> Consequently, the AR 15-6 investigation commenced.<sup>43</sup> Mr. Van Winkle was subsequently detailed to Building 1147, the laundry facility, by [REDACTED] [REDACTED].<sup>44</sup>

On August 24, 2005, Mr. Van Winkle filed a complaint with DoD IG requesting outside agencies investigate the V to G conversion pad matter.<sup>45</sup>

On August 24, 2005, Mr. Van Winkle attested in an affidavit his concerns pertaining to the V to G pad matter. The Public Employees for Environmental Responsibility (PEER) published Mr. Van Winkle's affidavit on its website and issued a press release pertaining to the V to G pad issue at BGCA.<sup>46</sup>

On August 26, 2005, *The Richmond Register* published an article about safety concerns at BGCA and identified Mr. Van Winkle as the whistleblower.<sup>47</sup> [REDACTED] issued the AR 15-6 report of investigation. He concluded that Mr. Van Winkle seemed to have been harboring negative feelings towards BGCA management; that he was less than forthcoming when questioned about legal action against BGCA or the Army; that the majority of those questioned during the course of the investigation referred to recurring difficulties Mr. Van Winkle had in maintaining his equipment; that Mr. Van Winkle had been characterized as a negative presence by the majority of those interviewed; and that Mr. Van Winkle's affidavit with PEER "cannot be supported by any objective evidence and serves no purpose other than raising public concern needlessly, indicating a disregard for the truth and for the role of the staff at BGCA."<sup>48</sup> The report recommended that Mr. Van Winkle's enrollment in CPRP should be terminated.<sup>49</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 7; Memorandum from [REDACTED] to [REDACTED], *Appointment of an Informal Investigator* (Aug. 3, 2005).

<sup>43</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 7.

<sup>44</sup> Base System Civilian Evaluation Report, DA Form 7223, *Mr. Van Winkle* (Feb. 9, 2006); DoD IG MFR, *Detail of Mr. Van Winkle to Laundry Facility* (Jan. 6, 2011).

<sup>45</sup> Complainant Matrix of Mr. Van Winkle; DoD IG internal database

<sup>46</sup> PEER web site at <http://www.peer.org>.

<sup>47</sup> Ronica Brandenburg, *Whistleblower Claims Leak Detectors Inoperative*, *The Richmond Register* (Aug. 26, 2005) at A1 & A3.

<sup>48</sup> Memorandum from [REDACTED] to [REDACTED], *Summary of Findings Pursuant to an Informal Investigation Conducted Under the Provisions of AR 15-6* (Aug. 26, 2005).

<sup>49</sup> *Id.*

On September 2, 2005, Mr. Van Winkle filed a reprisal complaint with the Department of Labor.<sup>50</sup>

In October 2005, the V to G pad "conversion," or corrective action, was completed.<sup>51</sup>

On October 19, 2005, a meeting took place with Mr. Van Winkle, [REDACTED], [REDACTED], and others where [REDACTED] asked Mr. Van Winkle, [REDACTED], and [REDACTED] whether they trusted one another. When asked if Mr. Van Winkle trusted [REDACTED] Mr. Van Winkle "jumped up, turned a deep red, pointed his finger at [REDACTED] and said, 'Absolutely not . . . I would never trust that individual, ever.'"<sup>52</sup>

On December 8, 2005, as a result of Mr. Van Winkle's disclosure, the Army IG issued the Report of Investigation (ROI) pertaining to the V to G pad matter. Among the findings, it concluded that [REDACTED] at BGCA, improperly ordered the removal of the MINICAMS V to G conversion pads from their proper position in violation of the Chemical Agent Standard Analytical Reference Manual (CASARM) Quality Assurance Plan Revision 4 (dated March 2003, and approved April 25, 2003) and Revision 5 (dated November 2004, and approved December 2005) as well as the U.S. Army Chemical Materials Agency Programmatic Monitoring Concept Plan dated June 2004.<sup>53</sup>

On January 30, 2006, [REDACTED] recommended that Mr. Van Winkle be permanently disqualified from the CPRP program.<sup>54</sup>

On February 13, 2006, [REDACTED] gave Mr. Van Winkle an evaluation rating of three, a lower rating compared to prior evaluations. The justification for the lower evaluation was that "Mr. Van Winkle has been temporarily disqualified out of the Personnel Reliability Program (PRP) since August 3, 2005. He has been unable to perform his regular duties."<sup>55</sup>

On March 9, 2006, [REDACTED], BGCA, Richmond, KY, issued a letter concurring with [REDACTED] recommendation to permanently disqualify Mr. Van Winkle from the CPRP program. This effectuated Mr. Van Winkle's permanent disqualification.<sup>56</sup>

<sup>50</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 2

<sup>51</sup> *Id.* at 5.

<sup>52</sup> *Id.* at 7.

<sup>53</sup> U.S. Army IG Completion Report, HL 97059/DIH 05-8278 (Dec. 8, 2005) at 1, 23.

<sup>54</sup> Memorandum from [REDACTED] to Mr. Van Winkle, *Recommendation for Permanent Disqualification from Blue Grass Chemical Activity (BGCA) Chemical Personnel Reliability Program (CPRP)* (Jan. 30, 2006).

<sup>55</sup> Base System Civilian Evaluation Report, DA Form 7223, *Mr. Van Winkle* (Feb. 13, 2006).

<sup>56</sup> Letter from [REDACTED] to Mr. Van Winkle, *Permanent Disqualification from Assignment to Blue Grass Chemical Activity (BGCA) Chemical Personnel Reliability Program (CPRP)* (Mar. 9, 2006).

On October 27, 2006, Mr. Van Winkle resigned his position at BGCA effective October 31, 2006.<sup>57</sup>

On December 5, 2008, a Department of Labor Administrative Judge issued an opinion concerning Mr. Van Winkle's reprisal complaint pursuant to authority to consider alleged reprisal for protected activities under provisions of the Clean Air Act and the Solid Waste Disposal Act. The Administrative Judge concluded he did not have jurisdiction to review the substance of Mr. Van Winkle's CPRP disqualifications. However, the Administrative Judge found that the CPRP disqualifications were procedurally correct.<sup>58</sup>

On April 15, 2009, Mr. Van Winkle filed a complaint with the Defense Hotline alleging that he was reprisal against for disclosing matters that he reasonably believed evidenced a violation of law, rule, or regulation.

### FINDINGS AND ANALYSIS

#### **1. Did Mr. Van Winkle make a protected disclosure? Yes.**

To determine whether a disclosure qualifies as protected, we employ a two step process based on statute and case law. First, we determine whether the disclosure fits within the definition of 5 U.S.C. Section 2302 (b)(8). Next, we determine whether the disclosure fits within the categories of disclosures recognized by the U.S. Court of Appeals for the Federal Circuit in *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1353 (Fed. Cir. 2001).

Title 5 U.S.C. Section 2302 prohibits an Agency from taking, failing to take, or threatening to take a personnel action against a civilian employee, organized under Title 5 (appropriated fund), for making a disclosure. Section 2302 defines a protected communication as any disclosure of information which the employee reasonably believes evidences:

1. a violation of any law, rule, or regulation; or
2. gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.<sup>59</sup>

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<sup>57</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 15.

<sup>58</sup> Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008).

<sup>59</sup> To satisfy this element the complainant is not required to disclose information that actually evidences one of those conditions. Rather, the complainant is only required to make a non-frivolous allegation that the matters disclosed were ones that a reasonable person in his or her position would believe evidenced one of those conditions. *Rusin v. Dep't of the Treasury*, 92 M.S.P.R. 298, 318 (2002). *Garst v. Dep't of the Army*, 60 M.S.P.R. 514, 518 (1994). Reasonable belief is an objective standard. That is, a disinterested observer with knowledge of essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidence a violation of a law, rule, or regulation. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

In *Huffman*, the U.S. Circuit Court of Appeals for the Federal Circuit outlined the following three categories into which a disclosure may fall. Only the latter two constitute disclosures that are protected under the Whistleblower Protection Act:

1. disclosures made as part of normal duties through normal channels;
2. disclosures made as part of normal duties outside of normal channels; and
3. disclosures outside of assigned duties.

Additionally, to qualify as a protected disclosure under *Huffman*, the allegation of wrongdoing must be made to someone other than the wrongdoer.<sup>60</sup>

We identified four communications made by Mr. Van Winkle on February 24, 2005, June 6, 2005, August 24, 2005, and August 25, 2005. These communications are analyzed to determine whether they are protected disclosures under 5 U.S.C. Section 2302 and *Huffman*.

1. On February 24, 2005, Mr. Van Winkle communicated his concerns about the V to G conversion pads at an all-hands meeting. This meeting was attended by many BGCA employees including the [REDACTED]. [REDACTED] was not Mr. Van Winkle's first or second-line supervisor. Mr. Van Winkle's disclosure pertained to his reasonable belief that the V to G conversion pads at BGCA were installed incorrectly, resulting in their inability to detect VX nerve agent in the event of a leak and violating regulations;<sup>61</sup>
2. On June 6, 2005, Mr. Van Winkle communicated to the BGCA Safety Office pertaining to his belief that the laundry facility was not properly laundering clothing worn by employees entering igloos containing chemical weapons and further elaborated on his concern about the MINICAMS inability to detect VX nerve agent.<sup>62</sup> [REDACTED] subsequently issued a report concluding that no unsafe/unhealthful conditions existed at the facility. However, the report noted, "Certain administrative inconsistencies were discovered, and corrective actions have been taken, which in themselves may provide those employees who follow you, with ample information, providing assurances of adequate protection";<sup>63</sup>

<sup>60</sup> *Huffman*, supra, at 1348-1350, citing *Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998); *Horton v. Dep't of Navy* 66 F.3d 279, 282 (Fed. Cir. 1995).

<sup>61</sup> U.S. Army IG Completion Report, HL 97059/DIH 05-8278 (Dec. 8, 2005); DoD IG Interview of [REDACTED] (June 24, 2009) at 14; Recommended Decision and Order, Dep't of Labor Office of Administrative Law Judges, *Mr. Van Winkle* (Dec. 5, 2008) at 5; DoD IG Interview of Mr. Van Winkle (June 4, 2009) at 21; Affidavit of Mr. Van Winkle (Aug. 24, 2005).

<sup>62</sup> Memorandum from [REDACTED] to Mr. Van Winkle, *Employee Report of Alleged or Unhealthful Working Conditions, DA Form 4755 dated 5 June 2005* (June 8, 2005); Employee Report of Alleged Unsafe or Unhealthful Working Conditions of Mr. Van Winkle (July 6, 2005).

<sup>63</sup> Memorandum from [REDACTED] to Mr. Van Winkle, *Employee Report of Alleged or Unhealthful Working Conditions, DA Form 4755 dated 5 June 2005* (June 8, 2005).

3. On August 24, 2005, Mr. Van Winkle communicated with the DoD IG. Mr. Van Winkle requested outside agencies investigate whether the V to G pad configuration was ineffective in detecting chemical leaks.<sup>64</sup> This disclosure resulted in the Army IG conducting an investigation. The Army IG subsequently issued an ROI on December 8, 2005. The ROI substantiated that [REDACTED] improperly ordered the removal of the MINICAMS V to G conversion pads in violation of the CASARM Quality Assurance Plan Revision 4 and Revision 5, dated March 2003, and approved 25 April 2003, and dated November 2004, and approved December 2005, respectively, and the U.S. Army Chemical Materials Agency Programmatic Monitoring Concept Plan dated June 2004; and<sup>65</sup>
4. On August 24, 2005, Mr. Van Winkle communicated to PEER through a signed affidavit. PEER subsequently issued a press release and published Mr. Van Winkle's affidavit on their website. This disclosure pertained to Mr. Van Winkle's reasonable belief that the V to G conversion pad configuration was ineffective in detecting chemical leaks.<sup>66</sup> This disclosure subsequently resulted in the local press publishing an article about the issue and identifying Mr. Van Winkle as the whistleblower.<sup>67</sup>

We determined that Mr. Van Winkle met the requirements of 5 U.S.C. Section 2302 because he had a reasonable belief that the V to G conversion pad configuration was ineffective in detecting chemical leaks and violated rules and procedures and created a possible safety risk to the public. His reasonable belief was predicated on a course he attended that was offered by MINICAMS manufacturer O.I. Analytical, CMS Field Products. Further, Mr. Van Winkle's reasonable belief was corroborated by an Army IG report where the improper removal of the MINICAMS V to G conversion pads violated CASARM Quality Assurance Plan Revision 4 and Revision 5 and the U.S. Army Chemical Materials Agency Programmatic Monitoring Concept Plan.<sup>68</sup>

None of Mr. Van Winkle's disclosures pertained to his job duties. With respect to the disclosures regarding the V to G conversion pads, his duties did not require that he monitor and investigate the manner in which the conversion pads were configured. That subject matter expertise was charged to other employees working at BGCA. Mr. Van Winkle was a Monitoring

<sup>64</sup> Complainant Matrix of Mr. Van Winkle; DoD IG internal electronic database

<sup>65</sup> U.S. Army IG Completion Report, HL 97059/DIH 05-8278 (Dec. 8, 2005) at 23. The U.S. Army CMA Programmatic Laboratory and Monitoring Quality Assurance Plan (LMQAP) shall be used at all CMA activities to support laboratory and air monitoring programs. The CMA Programmatic LMQAP will be implemented when chemical detection (chemical agent and industrial chemicals), screening, and analyses are required. This LMQAP supersedes all other quality control/quality assurance documentation for all CMA monitoring and laboratory activities. This document provides requirements for laboratories and monitoring teams to implement a quality system in accordance with programmatic requirements. The CMA-Risk Management Directorate (RMD) is the governing authority for this document and will provide final interpretation on all requirements. U.S. Army CMA, Programmatic Laboratory and Monitoring Quality Assurance Plan (June 2004) at i.

<sup>66</sup> PEER Web site at <http://www.peer.org>; Affidavit of Mr. Van Winkle (Aug. 24, 2005).

<sup>67</sup> Ronica Brandenburg, *Whistleblower Claims Leak Detectors Inoperative*, The Richmond Register, (Aug. 26, 2005) at A1&A3.

<sup>68</sup> U.S. Army IG Completion Report, HL 97059/DIH 05-8278 (Dec. 8, 2005) at 23.

Systems Operator/Mechanic. He was charged with operating and maintaining the MINICAMS system in order to monitor the air within igloos. Finally, all of the above disclosures were made to someone other than the wrongdoer.

Accordingly, as Mr. Van Winkle made disclosures that constituted reasonable belief that violations of rule or regulation occurred and created a possible safety risk, and where those disclosures fell outside the scope of his work duties and were made outside normal channels, all of the communications constituted protected disclosures as defined under 5 U.S.C. Section 2302 and *Huffman*.

**2. Was Mr. Van Winkle the subject of personnel actions? Yes.**

Mr. Van Winkle alleged that he suffered 10 personnel actions for making four disclosures. Specifically, Mr. Van Winkle alleged:

1. Between February 2005 and August 2006, hostile work environment by fellow BGCA coworkers;
2. On June 9, 2005, assigned to faulty equipment by the BGCA laboratory;
3. On August 3, 2005, temporary disqualification from CPRP by [REDACTED];
4. After August 3, 2005, removal of job duties by [REDACTED] and [REDACTED] due to temporary CPRP disqualification;
5. After August 3, 2005, denial of overtime by [REDACTED] and [REDACTED] due to temporary CPRP disqualification;
6. After August 3, 2005, denied training and educational opportunities by [REDACTED] and [REDACTED];
7. September 2005, received a counseling from [REDACTED];
8. February 13, 2006, received a lower performance evaluation from [REDACTED] and [REDACTED];
9. March 9, 2006, permanently disqualified from CPRP by [REDACTED] per [REDACTED] recommendation; and
10. October 31, 2006, constructive discharge from federal employment by BGCA officials.

We determined that of the 10 alleged personnel actions, we would review one for evidence of reprisal: allegation eight concerning the lower performance evaluation. Section 2302 of title 5 includes a performance evaluation among its list of qualifying personnel actions.

Allegations one, two, and seven do not qualify as personnel actions under 5 U.S.C. Section 2302. Further, we did not review allegation ten, constructive discharge, as we determined Mr. Van Winkle resigned due to disability and to avoid a possible Hatch Act violation.<sup>69</sup>

With regard to the remaining allegations, we deferred to Mr. Van Winkle's choice to take those matters to the Occupation Health and Safety Administration (OSHA) and Department of Labor. As a matter of policy, we do not examine issues that DoD personnel have taken to other administrative bodies for resolution. In this case, Mr. Van Winkle raised in his complaints to, and in hearings before, OSHA and the Department of Labor his CPRP status and actions premised on that status.<sup>70</sup> As Mr. Van Winkle did not raise the matter of his performance evaluation to OSHA and the Department of Labor, we will review that evaluation for evidence of reprisal.

**3. Did the responsible management officials have knowledge, actual or constructive, of the complainant's protected disclosures, and did the personnel action take place within a period of time subsequent to the disclosures, such that a reasonable person could conclude that the protected disclosures were a contributing factor in the decision to take the personnel action? Yes.**

We found by a preponderance of the evidence that the acting officials had knowledge of the protected disclosures and took the personnel actions within a period of time after the protected disclosures to conclude that the disclosures were a contributing factor. The following facts and analysis explain our finding.

<sup>69</sup> Letter from [REDACTED] [NFI] to OPM, *Disability Retirement* (Dec. 21, 2006); Violation of Rule of Mr. Van Winkle (Nov. 21, 2007); Request for Appeal of Mr. Van Winkle (Mar. 21, 2007).

<sup>70</sup> Ultimately, the Department of Labor Administrative Law Judge determined that he lacked authority to substantively review the merits of the CPRP actions, issued a written Decision and Order on December 5, 2007, and gave Mr. Van Winkle 10 days to appeal the Decision and Order to the Department of Labor Administrative Review Board. Mr. Van Winkle and his counsel chose not to do so. We note that Mr. Van Winkle's appeal would have likely succeeded as it appears the Administrative Law Judge had the authority to review the merits of CPRP and related actions. See *Jacobs v. Department of the Army*, 62 M.S.P.R. 688 (1994) (M.S.P.B. had authority to review disqualification from CPRP underlying termination/suspension). See also *McGillivray v. Federal Emergency Management Agency*, 58 M.S.P.R. 398, 402-03 (1993) (revocation of procurement authority underlying termination); *Siegert v. Department of the Army*, 38 M.S.P.R. 684, 687-88, 690-91 (1988) (revocation of clinical privileges underlying termination); *Boulineau v. Department of the Army*, 57 M.S.P.R. 244, 247-49 & n. 6 (1993) (medical disqualification and removal from helicopter flight position); *Dodson v. Department of the Army* 35 M.S.P.R. 562, 564-65 & n.1 (1987) (disqualification from PRP and removal); *Boone v. Army*, 2005 M.S.P.B. LEXIS 6022 (2005) (disqualification from CPRP and removal); *Gabriel v. Army 2007* M.S.P.B. LEXIS 4661 (2007) (disqualification from CPRP and removal); and *Sanchez v. DOE* M.S.P.B. LEXIS 5305 (2010) (revocation of Human Reliability Program certification and removal).



[REDACTED]

[REDACTED] As the [REDACTED] concurred with [REDACTED], Mr. Van Winkle's [REDACTED], about the performance evaluation at issue in this investigation.

[REDACTED] had actual knowledge of four of Mr. Van Winkle's disclosures. [REDACTED] was present at the all-hands meeting where Mr. Van Winkle made his disclosure on February 24, 2005, and testified that he knew of Mr. Van Winkle's June 6, 2005, laundry facility disclosure. [REDACTED] learned of the laundry facility disclosure when the Safety Officer approached him and inquired into Mr. Van Winkle's complaint.<sup>71</sup> The Safety Officer issued his report on June 8, 2005. Further, [REDACTED] had knowledge of the Army IG investigation, which stemmed from Mr. Van Winkle's August 24, 2005, DoD IG disclosure.<sup>72</sup> Although we could not establish exactly when he had knowledge of this disclosure, [REDACTED] was interviewed by Army IG Investigators on October 11, 2005.<sup>73</sup>

Finally, [REDACTED] testified that he recalled PEER publishing Mr. Van Winkle's affidavit on the internet as well as the resulting news articles in the local press, however we were unable to establish exactly when he learned of it.<sup>74</sup> A review of the archives established that on August 26, 2005, the day after Mr. Van Winkle's affidavit was posted on PEER's Web site, *The Richmond Register* ran a front page article, above the fold, titled *Whistleblower claims leak detectors inoperative*. A photograph of LTC Shuplinkov with an explanation of how MINICAMS operate appeared on the front page as well. Mr. Van Winkle's name was used throughout the story.<sup>75</sup> The article read:

A Blue Grass Army Depot employee is claiming that nerve agent monitoring devices used to detect leaking chemicals in storage igloos have been inoperative until very recently. Donald Van Winkle of Berea, who has worked as a air systems monitoring operator at the depot since 2002, prepared a sworn statement that was released Thursday by PEER (Public Employees for Environmental Responsibility), based in Washington, D.C. PEER is asking the Department of Defense to conduct an inspection of the facility. . . Rumors of [Mr.] Van Winkle releasing a statement and getting another agency involved began to circulate and he was suspended from his duties about three weeks ago. "An internal investigation began and it will conclude in the very near future," [LTC] Shuplinkov said. Any employee who works directly with the chemical stockpile is enrolled in the Army's Personal (sic)

<sup>71</sup> DoD IG Interview of [REDACTED] (June 25, 2009) at 16, 32, 41-42; DoD IG Interview of [REDACTED] (June 24, 2009) at 13-14.

<sup>72</sup> DoD IG Interview of [REDACTED] (June 25, 2009) at 26-27.

<sup>73</sup> U.S. Army IG Completion Report, HL 97059/DIH 05-8278 (Dec. 8, 2005) at 5.

<sup>74</sup> DoD IG Interview of [REDACTED] (June 25, 2009) at 26-28.

<sup>75</sup> Ronica Brandenburg, *Whistleblower Claims Leak Detectors Inoperative*, *The Richmond Register* (Aug. 26, 2005) at A1 & A3.

Reliability Program. If suspicious behavior begins or if an ulterior motive is displayed by an employee, he or she [is] suspended from duty while the investigation is concluded. "It's a program that ensures we only have the best people working with the stockpile," he said. "I think our community demands it, plus, it's an Army regulation."<sup>76</sup>

Accordingly, [REDACTED] had knowledge all of Mr. Van Winkle's disclosures.

[REDACTED]  
[REDACTED] had actual knowledge of three of Mr. Van Winkle's four disclosures. [REDACTED] had knowledge of Mr. Van Winkle's February 24, 2005, disclosure because he was present at the all-hands meeting where Mr. Van Winkle made his disclosure; however, [REDACTED] denied knowledge of Mr. Van Winkle's June 6, 2005, laundry facility disclosure.<sup>77</sup> Further, [REDACTED] testified that he believed Mr. Van Winkle was the source of various investigations, which stemmed from the August 24, 2005, DoD IG disclosure, however we were unable to ascertain exactly when he had this belief.<sup>78</sup> [REDACTED] was interviewed by Army IG Investigators on October 11, 2005.<sup>79</sup>

While [REDACTED] did not have knowledge of Mr. Van Winkle's laundry facility disclosure, he had knowledge the disclosure pertaining to the V to G pad matter as early as February 24, 2005.

Accordingly, both [REDACTED] and [REDACTED] had knowledge of Mr. Van Winkle's protected disclosures.

We also concluded that the acting officials took the personnel action within a period of time after the protected disclosures to reasonably conclude that the disclosures were a contributing factor. Mr. Van Winkle received his performance evaluation 11 months, 16 days after the all-hands meeting; eight months, three days after the laundry facility disclosure; five months, 15 days after publication of the affidavit; and five months, 14 days after the *The Richmond Register* article. Accordingly, we concluded that the acting officials took the personnel action within a period of time after the protected disclosures to reasonably conclude that the disclosures were a contributing factor.

<sup>76</sup> *Id.*

<sup>77</sup> DoD IG Interview of [REDACTED] (June 24, 2009) at 13-14, 20-21, 26, 86-87.

<sup>78</sup> *Id.* at 26.

<sup>79</sup> U.S. Army IG Completion Report, HL 97059/DIH 05-8278 (Dec. 8, 2005) at 10.

**4. Is there clear and convincing evidence that the Agency would have taken, withheld, or threatened the personnel action against the complainant absent the protected disclosures?**

No.

In determining whether the Agency has established by clear and convincing evidence that the personnel action would have been taken, withheld, or threatened absent the protected disclosures, we consider three factors: (1) the strength of the Agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the decision; and (3) any evidence that the Agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated.

We determined that the Agency did not provide clear and convincing evidence that Mr. Van Winkle's lower performance evaluation would have occurred absent the protected disclosures, primarily because supervisors failed to comply with regulatory requirements for rating detailed employees.

Strength of evidence in support of the performance evaluation:

██████████, Mr. Van Winkle's ██████████, gave Mr. Van Winkle a lower performance evaluation on February 9, 2006, as compared to prior evaluations. ██████████, Mr. Van Winkle's ██████████ and agreed with the rating. ██████████ signed off on the evaluation on February 9, 2006.

The performance evaluation rating system utilizes ratings numbered one through five. One through three denote "successful," four denotes "fair," and five denotes "unsuccessful." This evaluation rated Mr. Van Winkle as a three, successful. There are no comments in the evaluation pertaining to Mr. Van Winkle's job performance responsibilities. However, there is one comment at the bottom of the second page of the evaluation. This comment is located in the senior rater section, which would have been filled out by ██████████. The comment was drafted by ██████████ and reads as follows:

Mr. Van Winkle has been temporarily disqualified out of the Personnel Reliability Program since 3 August 2005. He has been unable to perform his regular duties.<sup>80</sup>

The duty description section of the evaluation pertains to Mr. Van Winkle's monitoring systems operator/mechanic duties. This section stated:

Monitors toxic chemical storage magazines and associated facilities/equipment, in order to detect possible contamination. Operates, installs, calibrates and repairs complex instruments and equipment used in the Directorate of Chemical Operations air monitoring systems. Troubleshoots, replaces, repairs, rebuilds and

<sup>80</sup> Base System Civilian Evaluation Report, DA Form 7223, *Mr. Van Winkle* (Feb. 9, 2006).

tests a wide variety of monitoring system components; e.g., indicators, timers, regulators, records, pumps, etc., in accordance with established procedures.<sup>81</sup>

We reviewed Mr. Van Winkle's past performance evaluations. Mr. Van Winkle received a successful rating of one on both the February 2004 and 2005 evaluations. Mr. Van Winkle received numerous comments in both evaluations. The February 2004 evaluation comments include:

Mr. Van Winkle possesses an excellent technical knowledge. His work is always done right and on time. Employee is very team supportive and on numerous occasions has volunteered to help other crew members accomplish their work. Employee is very dependable and reliable. He does an excellent job maintaining equipment and facilities.<sup>82</sup>

In the February 2004 evaluation, [REDACTED] concurred with the above statements and noted in the senior rater comments section that Mr. Van Winkle "constantly strives to expand his technical knowledge and skills" and "willingly accepts 'special projects' and volunteers to support BGCA off-post missions."<sup>83</sup>

The February 2005 evaluation is largely similar. Mr. Van Winkle received a successful rating of one. The comments drafted by [REDACTED] include:

Mr. Van Winkle possesses an excellent technical knowledge. His work is always done right and on time. Mr. Van Winkle is very supportive and on numerous occasions has volunteered to help other crew members accomplish their work task. Mr. Van Winkle is very dependable and reliable. He does an exceptional job maintaining his equipment.<sup>84</sup>

In the senior rater comments, [REDACTED] noted that Mr. Van Winkle "constantly seeks to improve his skills and knowledge."<sup>85</sup>

With respect to Mr. Van Winkle's January 2003 performance evaluation, he received a successful rating of three. This performance evaluation was for when he was an Ammunition Inspector with different job duties from the monitoring systems operator/mechanic. Further, that evaluation noted that as of January 22, 2003, Mr. Van Winkle was in the process of being

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<sup>81</sup> *Id.*

<sup>82</sup> Base System Civilian Evaluation Report, DA Form 7223, *Mr. Van Winkle* (Feb. 2, 2004).

<sup>83</sup> *Id.*

<sup>84</sup> Base System Civilian Evaluation Report, DA Form 7223, *Mr. Van Winkle* (Feb. 15, 2005).

<sup>85</sup> *Id.*

certified, and was thus not yet certified into the CPRP.<sup>86</sup> This is noted on the second page of the performance evaluation beneath the rating and was the basis for the successful rating of three.<sup>87</sup>

AR 690-400, Total Army Performance Evaluation System (TAPES), is the applicable regulation when reviewing civilian personnel performance evaluations. The regulation outlines the Senior Rater's responsibilities:

Senior Raters, when utilized, are responsible for communicating goals, for setting standards of performance, and for making DA values and ethics visible to facilitate understanding and adherence by all members in their organizations. They are responsible for assessing individual contributions in the broader perspective of overall mission accomplishment. In fulfilling these responsibilities, they will:

- (1) Review and approve Performance Plans at least at the beginning of each rating period and at any other time during the rating period when major changes to expectations occur (e.g. new or revised missions that requires changed priorities and resources distribution).<sup>88</sup>

The regulation states that raters are:

. . . responsible for assigning work and for either assisting Ratees in or for establishing job-related expectations for Ratees. They provide information to and obtain feedback from Ratees on DA values and ethics, work unit goals and priorities, performance, and professional development plans. To accomplish their responsibilities, Raters will:

- (2) Communicate organizational goals and priorities to Ratees, both at the beginning of each rating period and throughout the year as changes occur.
- (3) Develop Ratee performance plans for each rating period. Work with Ratees in establishing individual performance and professional development goals and expectations that should be attainable and that reflect organizational needs.

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<sup>86</sup> ██████ noted this evaluation as an example where Mr. Van Winkle was treated similarly in the past. We note that this evaluation is dissimilar as it pertained to *qualifying* into CPRP. The evaluation in question pertained to temporary disqualification.

<sup>87</sup> Base System Civilian Evaluation Report (DA Form 7223) of Mr. Van Winkle (Jan. 22, 2003); DoD IG Interview of ██████ (June 24, 2009) at 80.

<sup>88</sup> AR 690-400, *Civilian Personnel, Chapter 4302 Total Army Performance Evaluation System* (Oct. 16, 1998) at 1-4(b)(1).

(6) Prepare timely written performance appraisals that describe specific accomplishments and that accurately assess the Ratee's total contributions when compared with documented expectations.<sup>89</sup>

Further, the regulation establishes what managers must do when an employee is temporarily detailed to a position outside his or her normal job duties. The regulation states:

*j. Ratings for Temporary Promotions and Details.* Temporary promotions and details for 120 days or more require performance plans and normally are documented by special appraisals.

(2) Conversely, a Ratee who is detailed continues to occupy the position from which detailed for official purposes. Thus, the Rater of the detailed position prepares a special appraisal if the Ratee's annual rating cycle ends during the detail. The Rater for the position from which the Ratee is detailed may either attach the special appraisal to the annual appraisal he/she prepares or, if the detailed lasted for most of the rating period, adopt the special appraisal as the annual appraisal.<sup>90</sup>

It is clear from the regulation that employees are to be evaluated solely on work to which they were assigned. The employee's duties and expectations should be clear to both the rating officials as well as the employee. This is accomplished by describing, on the performance plan, the scope of the employee's daily duties upon which their evaluation will be based. Further, the regulation mandates that if an individual is detailed to another position for 120 days or more, that new performance plans are required and are normally documented through special appraisals. The only exception to this is temporary promotions.

Mr. Van Winkle was detailed to another position upon being temporarily disqualified from CPRP. Specifically, on August 3, 2005, Mr. Van Winkle was detailed to Building 1147, the laundry facility.<sup>91</sup> We reviewed Mr. Van Winkle's February 2006 annual performance evaluation. By the end of the performance evaluation period on December 31, 2005, Mr. Van Winkle was detailed to the laundry facility for 150 days. Given that Mr. Van Winkle was detailed for more than 120 days, he should have received a special appraisal, which evaluated him against the performance plan required for his detailed position.

However, in this annual evaluation Mr. Van Winkle was rated based upon his duties as a Monitoring Systems Operator/Mechanic and not a laundry facility detailee. Page two of this evaluation is entirely void of comments pertaining to his responsibilities, working relationships, etc., except for one comment on the bottom of the page next to the evaluation noting that Mr. Van Winkle was temporarily disqualified from CPRP and was unable to perform his duties. Mr. Van Winkle's detail precluded him from performing those duties for a portion of the rating period and he was not rated on those duties which he performed prior to his detail.

<sup>89</sup> *Id.* at 1-4(d)(2-3).

<sup>90</sup> *Id.* at 1-5 (j)(1-2).

<sup>91</sup> DoD IG Interview of [REDACTED] (June 24, 2009) at 86.

We had [REDACTED], Civilian Personnel Advisory Center, BGAD, Richmond, KY, review the evaluation in question. She testified that, "What I would have recommended, he had to be performing some type of duties. That probably should have been what he was graded on, or rated on, the duties he was doing in the meantime."<sup>92</sup> [REDACTED] view is consistent with AR 690-400 and, had it been followed, would have resulted in Mr. Van Winkle being appropriately rated on the duties to which he was assigned in the laundry facility.

The regulation mandates that raters rate their employees not only on duties assigned to them in the performance plan, it also mandates that they have personal knowledge of the quality of work being completed by the employee. [REDACTED] admitted in testimony that he was unable to testify as to Mr. Van Winkle's job performance while he was detailed to Building 1147, the laundry facility.<sup>93</sup> In fact, he testified, "[Mr. Van Winkle] was working for an entirely different supervisor . . . [REDACTED], Laundry Facility, BGCA, Richmond, KY] . . . He answered solely to that supervisor. I had no clue what he done all day. I mean, he [REDACTED] even took care of his time and attendance."<sup>94</sup> [REDACTED] testified that, "You're a successful employee, you do your job and you do it in accordance with the requirements of the job . . . I mean, why would you give them anything less than a successful but why would you give them something more unless they did something more?"

[REDACTED] testified that he was completely unaware what Mr. Van Winkle was doing during his detail and was precluded from awarding Mr. Van Winkle a higher rating. Conversely, [REDACTED] testified that an employee is "successful" if they do their job in accordance with the job requirement, a statement that appears to be in the spirit of the regulation. However, [REDACTED] testified in the very next sentence that if an employee is unable to complete their job duties, for reasons such as failing to maintain CPRP certification, then the employee cannot be rated any higher or lower than the mandatory three.

We determined that Mr. Van Winkle's evaluation was inconsistent with AR 690-400. Because he was detailed for more than 120 days, he required a performance plan for the detailed position, and a special appraisal based on that plan. [REDACTED] and [REDACTED] were required to either attach that special appraisal to Mr. Van Winkle's annual appraisal or adopt the special appraisal as the annual appraisal. They did neither.

Existence and strength of motive to retaliate on the part of the Agency officials who were involved in the decision:

[REDACTED] stated that he believed Mr. Van Winkle's concerns were "bogus." In fact, his response to Mr. Van Winkle's disclosures was "Oh, God, here we go [again]. More stuff. I'll have to do more paperwork and we'll have more meetings and all that sort of thing."<sup>95</sup> Not only

<sup>92</sup> DoD IG Interview of [REDACTED] (June 22, 2009) at 13.

<sup>93</sup> DoD IG Interview of [REDACTED] (June 24, 2009) at 86.

<sup>94</sup> *Id.* at 75-76.

<sup>95</sup> DoD IG Interview of [REDACTED] (June 25, 2009) at 29-30

was [REDACTED] not pleased that the disclosures created more work for BGCA supervisors and managers, his concerns were in line with those of [REDACTED], who also noted Mr. Van Winkle's disclosures created more work. He testified, "Well, it just put a lot of, at that time all the activity as a whole was under a lot of pressure. I mean, the V to G conversion pads plus just the normal daily life, I mean, it's just a lot of pressure on management, workers, doing what we do, plus we have all types of inspections coming in."<sup>96</sup>

Accordingly, we found evidence that both [REDACTED] and [REDACTED] had motive to reprise against Mr. Van Winkle.

BGCA was unable to establish that Mr. Van Winkle was treated in a similar manner to other individuals similarly situated:

We solicited both BGCA and BGAD for comparators to determine whether the Agency treated Mr. Van Winkle in a manner that was consistent with individuals who were similarly situated, namely those who had performance evaluations downgraded after being temporarily disqualified from CPRP. We reviewed the data and the associated performance evaluations.

BGCA/BGAD provided a list of 13 individuals who were temporarily disqualified. Of those 13, four could not be fully analyzed as either full information was not available or the performance evaluations standards changed to the National Security Personnel System (NSPS), precluding comparison and analysis. Accordingly, we reviewed nine individuals.<sup>97</sup>

Of the nine individuals, only two had their performance evaluations downgraded. One of those individuals had their CPRP disqualification noted as a basis for the downgrade. Both of those individuals, like Mr. Van Winkle, went from a rating of one to three. However, seven individuals either maintained their prior rating or, in fact, improved. While three individuals maintained their previous evaluation rating, four individuals had their ratings increase despite being temporarily disqualified from CPRP during some portion of the rating period.

BGAD/BGCA was not consistent in rating the performance of employees who were temporarily disqualified from CPRP. Despite being temporarily disqualified, these comparators establish that managers in seven instances did not hold the employee's temporary disqualification against them. In the case of Mr. Van Winkle, they did.

[REDACTED] and [REDACTED] were unable to establish by clear and convincing evidence that Mr. Van Winkle's lower performance evaluation would have occurred absent the protected disclosures. In reviewing other employees similarly situated, BGCA/BGAD treated Mr. Van Winkle differently than the majority of the employees.

<sup>96</sup> DoD IG Interview of [REDACTED] (June 24, 2009) at 26-27.

<sup>97</sup> DoD IG Performance Evaluation Comparator Chart.



Based on the testimony taken and the evidence presented, primarily the failure to comply with regulatory requirements for rating detailed employees, we conclude that Mr. Van Winkle's lower performance evaluation would not have occurred absent the protected disclosures.

CONCLUSION

We substantiated that [REDACTED] and [REDACTED] reprised against Mr. Van Winkle through a lower performance evaluation.

RECOMMENDATION

Accordingly, we recommend that BGCA consider taking appropriate action to address the actions of [REDACTED] and [REDACTED].

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# Inspector General Department of Defense

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