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June 29, 2010

# Inspector General

United States  
Department of Defense



Whistleblower Reprisal Investigation

Arlington National Cemetery

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DEPARTMENT OF DEFENSE  
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JUN 29 2010

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY  
(CIVIL WORKS)

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

We recently completed an investigation into allegations that Arlington National Cemetery (ANC) officials terminated Ms. Jennifer "Gina" Gray from her public affairs position in June 2008 in reprisal for making protected disclosures.

We did not substantiate Ms. Gray's allegation of reprisal. Although Ms. Gray was a whistleblower, we conclude that her protected disclosures were not contributing factors in the personnel action taken against her because responsible ANC management officials lacked knowledge of the disclosures.

However, we determined that, with respect to the employment and termination of Ms. Gray, ANC management demonstrated an obvious failure to exercise sound personnel management. Contrary to Agency regulations and practice, ANC management elected to terminate Ms. Gray, rather than make a reasonable effort to address public affairs policy issues that she raised, provide her suitable guidance, or document performance deficiencies that ANC management later claimed formed the basis for the termination.

Our report of investigation is attached. We recommend that you consider corrective action with respect to responsible ANC officials and an appropriate remedy for Ms. Gray. A response within 60 days would be appreciated. If you have any questions, please contact me or Mr. Dan Meyer, Director, Civilian Reprisal Investigations, at [REDACTED]

A handwritten signature in black ink, appearing to read "Donald M. Horstman", is written over a large, stylized circular flourish.

Donald M. Horstman  
Deputy Inspector General for  
Administrative Investigations

Attachment:  
As stated

WHISTLEBLOWER REPRISAL INVESTIGATION

Arlington National Cemetery

INTRODUCTION AND SUMMARY

We initiated this investigation in response to a Defense Hotline complaint on October 10, 2008, from Ms. Gina Gray, a former GS-12, Public Affairs (PA) Specialist, U.S. Army, Arlington National Cemetery (ANC), Arlington, VA. Ms. Gray was referred to the Office of the Inspector General, U.S. Department of Defense (OIG DoD), Civilian Reprisal Investigations Directorate (CRI), by the Project on Government Oversight.

Ms. Gray alleged that she suffered 12 acts of reprisal for making protected disclosures. Ms. Gray's disclosures pertained to the restriction of media access to service personnel funeral ceremonies, and in particular, the funeral of Lieutenant Colonel (LtCol) William G. Hall, U.S. Marine Corps (hereinafter referred to as the Hall funeral), and other matters at ANC.

We concluded that Ms. Gray was a whistleblower as she made four communications that qualified as protected under Title 5, United States Code, Section 2302. However, none of those protected disclosures were contributing factors in the personnel action taken against her, because responsible ANC management officials were not aware of those disclosures at the time they made adverse decisions concerning Ms. Gray. We therefore did not substantiate Ms. Gray's allegation of reprisal.<sup>1</sup>

However, we determined that with respect to the employment and termination of Ms. Gray, ANC management demonstrated an obvious failure to exercise sound personnel management. That is, based on public affairs policy issues that Ms. Gray raised during her first weeks of employment, ANC management elected to terminate her, rather than make a reasonable effort to address those policy issues, provide suitable guidance to Ms. Gray, or document performance deficiencies that ANC management later claimed formed the basis for Ms. Gray's termination.

Accordingly, we recommend that the Assistant Secretary of the Army for Civil Works consider corrective action with respect to responsible ANC officials and an appropriate remedy for Ms. Gray.

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

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<sup>1</sup> We acknowledge that Ms. Gray's whistleblowing activities continued after her termination and we understand that she contributed relevant information during a recently concluded investigation by the Army Inspector General into ANC operations. Because those later whistleblowing activities are not germane to the matter of her termination, we do not discuss them further in this report.

## BACKGROUND

Since 1864, ANC has been a fully operational national cemetery, drawing more than four million visitors annually. ANC is an American shrine and hallowed ground: it is a place of immense importance to the United States, to the military community, and to the families whose loved ones are buried there. Today, ANC is actively involved with the funerals of military casualties from the Iraqi and Afghanistan war fronts, as well as aging World War II veterans. Funerals average about 27 each workday. At the family's request, many of these military funeral ceremonies receive media coverage.

Ms. Gray's primary duties and responsibilities as a PA Specialist from April 14 to June 27, 2008, included, but were not limited to, promoting the understanding of the mission, programs, and activities of ANC; serving as the principal PA staff advisor to ANC staff on all matters involving PA; serving as the official spokesperson and primary contact for local and national media; responding to media queries; preparing and reviewing information material for public dissemination; and coordinating PA activities for official visits, funerals with media interest, and special events.<sup>2</sup> Ms. Gray reported to her [REDACTED] ANC.

## SCOPE AND AUTHORITY

Under the Inspector General Act of 1978, as amended, the OIG DoD 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 OIG DoD broad powers to conduct and supervise investigations relating to the Department's programs and operations. The OIG DoD 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 OIG DoD 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 Department of Defense that encourages personnel to report waste, fraud, 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>3</sup> One component of this whistleblower protection program is to "[r]eceive and investigate... 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>4</sup>

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<sup>2</sup> U.S. Army PA Specialist (GS-1035-12) Position Description.

<sup>3</sup> DoD Directive 5106.01, (Apr. 13, 2006) at 5.19.

<sup>4</sup> DoD Directive 5106.01, (Apr. 13, 2006) at 5.19.1.

Employees of the DoD are required to report “waste, fraud, abuse, and corruption to appropriate authorities.”<sup>5</sup> Title 5 U.S.C. Section 2302 (b)(8) provides protection to DoD employees who make or prepare to make a “protected disclosure.” A protected disclosure is a disclosure of 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 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>6</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 disclosure, 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 action(s) absent the protected disclosure. The first stage of the whistleblower reprisal analysis is held to a preponderance of the evidence.<sup>7</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>8</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 disclosure was a contributing factor in the personnel action.<sup>9</sup>

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<sup>5</sup> Executive Order 12731 (October 17, 1990).

<sup>6</sup> 5 U.S.C. Section 2302 (b)(8)(A)(i-ii).

<sup>7</sup> 5 C.F.R. Section 1209.7.

<sup>8</sup> 5 C.F.R. Section 1201.56(c)(2).

<sup>9</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.

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 action against the complainant absent the protected disclosure. The second stage of analysis is held to a clear and convincing evidence standard. “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 lower than beyond a reasonable doubt.<sup>10</sup>

To address the fourth element, we consider the following three factors for presence of “clear and convincing” evidence:<sup>11</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 10 witnesses, including the complainant, Ms. Gray, and the responsible management officials (RMOs), [REDACTED] and Mr. John Metzler (Senior Executive Service), Superintendent, ANC. We also reviewed documentation provided by Ms. Gray, the Agency, and other independent sources.

Ms. Gray had standing to file a Section 7 Complaint<sup>12</sup> with the Defense Hotline because she was a full-time civilian employee of the DoD and her position was financed with appropriated funds. We reviewed this complaint consistent with 5 U.S.C. Section 2302 (b)(8). Ms. Gray alleged that she was reprimed against for disclosing information that she reasonably believed evidenced a violation of rule.

### CHRONOLOGY

On April 14, 2008, Ms. Gray was hired at ANC as a PA Specialist in probationary status for one year.<sup>13</sup>

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<sup>10</sup> 5 C.F.R. Section 1209.4(d).

<sup>11</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>12</sup> 5 U.S.C. Appendix, Section 7(A)(2008) (provisions by which a DoD employee may file complaints with the Inspector General).

<sup>13</sup> Standard Form 50-B – Notification of Personnel Action (Apr. 14, 2008).

On April 17, 2008, ██████████ expressed “her wishes for civilian media to cover the funeral ceremony” of her husband, LtCol Hall. LtCol Hall was a Marine killed by an improvised explosive device in Iraq on March 29, 2008.<sup>14</sup>

On April 23, 2008, ██████████ set the ropes where the media was to be designated for the Hall funeral.<sup>15</sup> When Ms. Gray escorted the media to the funeral site, she testified that the original designated location had been moved and the media became upset over the distance from and their obstructed view of the funeral site. ██████████ testified that Ms. Gray requested her to see if the media “could get closer” to the funeral site. ██████████ asked ██████████ if he would “speak with the media because they [the media] were complaining about the distance that they were from the gravesite” and that “they could not see [the funeral site].” ██████████ did so, however, because the family was approaching “it was just too late to do anything.” Both ██████████ and ██████████ testified that there were “larger monuments” and “[head]stones” that obstructed the media’s view of the funeral at the location where the media was placed.<sup>17</sup> That morning, LtCol Hall was laid to rest at ANC. He was the most senior officer casualty of the Iraq war at the time.<sup>18</sup>

On April 24, 2008, the *Washington Post* reported on the funeral ceremony of LtCol Hall. Specifically, the *Post* wrote,

Journalists were held 50 yards from the service, separated from the mourning party by six or seven rows of graves, and staring into the sun and penned in by a yellow rope. Photographers and reporters pleaded with Arlington officials... ‘We’re not going to be able to hear a thing,’ a reporter argued. ‘Mm-hmm,’ an Arlington official answered. The distance made it impossible to hear the words of Chaplain Ron Nordan... Nor does the blocking of funeral coverage seem to be the work of overzealous bureaucrats. Gina Gray, Arlington’s new public affairs director, pushed vigorously to allow the journalists more access to the service yesterday but she was apparently shot down by other cemetery officials.<sup>19</sup>

Ms. Gray testified that she was not a source for *Washington Post* reporter Mr. Dana Milbank’s article.<sup>20</sup>

<sup>14</sup> Memorandum from ██████████, Marine Barracks Washington, D.C., to OIG DoD, *Media Coverage concerning the funeral of ██████████ at ANC* (Apr. 8, 2009).

<sup>15</sup> OIG DoD Interview of ██████████ (Apr. 29, 2009) at 31. ██████████ testified that the original location was changed “because the Marine Corps, and the Air Force, and the Navy put their escorts at the foot of the grave” and “we [ANC] just can’t put you [the media] in the middle of the funeral.”

<sup>16</sup> OIG DoD Interview of ██████████ (Apr. 28, 2009) at 26 and 28.

<sup>17</sup> OIG DoD Interview of ██████████ (Apr. 29, 2009) at 31 and OIG DoD Interview of ██████████ (Apr. 28, 2009) at 26.

<sup>18</sup> *William Gregory Hall*, ANC, <http://www.arlingtoncemetery.net/wghall.htm>.

<sup>19</sup> Dana Milbank, *What the Family Would Let You See, the Pentagon Obstructs*, *Washington Post* (Apr. 24, 2008) at A3.

<sup>20</sup> OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 22.

On or about April 24, 2008, Ms. Gray asked [REDACTED], “Who says where the media goes?”<sup>21</sup> [REDACTED] testified that Ms. Gray’s “biggest complaint was that the media could not see and were not close enough”<sup>22</sup> and that “she (Ms. Gray) just thought that the policy was not right and what we were doing was not right (in reference to the Hall funeral).”<sup>23</sup>

On April 24, 2008, Ms. Gray sent an e-mail to [REDACTED], U.S. Army Office of the Chief of Public Affairs (OCA); [REDACTED] OCA; and [REDACTED] U.S. Army; regarding media access restriction. Citing a legal review of proposed regulations for media at the cemetery, Ms. Gray wrote, “there is some very strong language in favor of allowing media coverage (within reason) and directly contradicts what I have been verbally directed to do...” She continued,

Memorandum published on 18 Mar 2004 and distributed by MG Jackman [MG Galen Jackman, former Military District of Washington (MDW) Commanding General] clearly establishes ground rules... memorandum further states that ‘media will be allowed in an area designated by the U.S. Army MDW and placed by the Superintendent of ANC. The distance will be between 75 to 100 feet from the ceremony or gravesite. The U.S. Army MDW PAO (Public Affairs Office) may allow slight media movement to the left and right to ensure the media have an unobstructed view of the service.’ ... While it sets a good standard, I believe some improvements could and should be made as soon as possible.

Further, with regard to the Jackman Memo, Ms. Gray stated, “I know that this was prior to the breakaway of the public affairs from MDW and putting it in ANC’s hands, but I think there are some guidelines and precedents that have been put out.”<sup>24</sup>

On April 25, 2008, Ms. Gray sent an e-mail to Mr. Ryan McCarthy, Special Assistant to the Secretary of Defense; [REDACTED] [REDACTED], whereby Ms. Gray attached several documents “outlining the rules of media coverage at the cemetery.” In this e-mail, Ms. Gray also wrote that [REDACTED] briefed her that ANC used media guidance in the current Code of Federal Regulations (CFR), and that he handed her the proposed revision to the applicable section of the CFR and told Ms. Gray to “use [it] as a guideline in the future until it becomes policy.” Ms. Gray continued,

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<sup>21</sup> OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 39.

<sup>22</sup> *Id.* at 40.

<sup>23</sup> *Id.* at 36.

<sup>24</sup> E-mail from Ms. Gray to [REDACTED] [REDACTED] and [REDACTED] *More Documentation* (Apr. 24, 2008, 9:10 p.m.).

██████████ told me this afternoon that he would contact legal to see if we could publish this [proposed CFR 553] and issue this as firm guidance until the proposed changes have been codified... with regards to the events of LtCol Hall's funeral, I have attached a timeline of events from my perspective.<sup>25</sup>

Approximately one to two days following the Hall funeral and as a consequence of the April 24, 2008, *Washington Post* article, ██████████ testified that "the Secretary of the Army or the Secretary of Defense called Mr. Metzler and asked us to explain what occurred at the Hall service."<sup>26</sup> Additionally, sometime in this time frame, Ms. Gray communicated orally to ██████████ Joint Force Headquarters - National Capital Region, MDW PA Office, her concerns regarding media access during the Hall funeral. Specifically, ██████████ testified that Ms. Gray discussed the events surrounding the Hall funeral and that she "was concerned because she felt that the media were being blocked... she basically stood up and said we need to move folks (the media attending the Hall funeral)."<sup>27</sup>

On April 28, 2008, ██████████ sent an e-mail to Mr. Metzler, whereby the Office of Secretary of Defense (OSD) requested an executive summary of the events surrounding the Hall funeral.<sup>28</sup> Later on this day, Ms. Gray sent an e-mail to ██████████ whereby she wrote, "They have not given me a copy of the exsum (executive summary)... there are variations of the truth being written up... the answers coming out of here are not my answers, against my advice, not based on facts, and I will not be part of it. Very anti-media sentiment coming from deputy [██████████]"<sup>29</sup>

On April 28, 2008, ██████████ sent an e-mail to Mr. Metzler, ██████████, and other U.S. Army officials requesting "a summary of the policy about media access. We want to send SD (Secretary of Defense) as a back-up to your EXSUM (Executive Summary)... control of the media during the ceremonies... distances that are allowed... if family not available, who makes that decisions for media access"<sup>30</sup>

On April 29, 2008, ANC issued a media release stating,

In light of heightened interest surrounding the recent events regarding USMC LtCol William Hall's funeral services, ANC is reviewing its current procedures on media coverage and will publish standard guidelines that will provide transparency in the expectation for members of the press, not interfere with military funeral protocol, and respect the family's right to mourn privately. A media roundtable with ANC officials will be held on Wednesday

<sup>25</sup> E-mail from Ms. Gray to ██████████ ██████████ and ██████████ *ANC Documents* (Apr. 25, 2008, 7:19 p.m.).

<sup>26</sup> OIG DoD Interview of ██████████ (Apr. 28, 2009) at 24-25.

<sup>27</sup> OIG DoD Interview of ██████████ (Apr. 15, 2009) at 10 and 12-13.

<sup>28</sup> E-mail from ██████████ to Mr. Metzler and other Army officials, *EXSUM* (Apr. 28, 2008, 10:08 a.m.).

<sup>29</sup> E-mail from Ms. Gray to ██████████ *FW: EXSUM Additional Info* (Apr. 28, 2008, 12:34 p.m.).

<sup>30</sup> E-mail from ██████████ to Mr. Metzler, ██████████ and other U.S. Army officials, *EXSUM additional info* (Apr. 28, 2008, 11:42 a.m.).



I think her [Ms. Gray's] lack of following his [REDACTED] instructions and/or [REDACTED] instructions. Again, she's [Ms. Gray] only on board two weeks and she's just too new here to understand what's going on here and we probably needed to explain to her in more detail or we needed to explain to her again the sensitivity of the funerals.<sup>36</sup>

On May 20, 2008, Ms. Gray sent an e-mail to [REDACTED] whereby she detailed ANC personnel regarding Memorial Day public affair assignments and provided her opinion of PA practices. Specifically, Ms. Gray wrote,

If you feel that you want ANC non-public affairs people involved beyond running the visitors center then I would strongly object... GOOD public affairs is what you don't see, and PAO's are trained to compartmentalize information and react quickly. An admin officer in a press box is not a PAO – it's an admin officer in a press pit. MDW has offered their trained personnel and institutional knowledge, and that is something we can't afford to lose on the one day of the year that we get the most coverage... In the end, we all work for the Army, and my decision making process is based on one thing: 'Is it good for the Army?'... I would be remiss in my duties as a PAO if I didn't advise that we use PA trained folks for a PA mission and we have more than enough.

The following morning, May 21, 2008, [REDACTED] responded to Ms. Gray and informed her that she forwarded "your info to [REDACTED]"<sup>37</sup>

On May 21, 2008, [REDACTED] sent an e-mail to [REDACTED] whereby in referencing the May 20, 2008, e-mail from Ms. Gray to [REDACTED], *above*, asked [REDACTED] to "Please review to see if this is insubordination."<sup>38</sup> [REDACTED] testified that his office told [REDACTED] the e-mail "was not insubordination."<sup>39</sup>

On May 22, 2008, [REDACTED] sent an e-mail to [REDACTED] and Mr. Metzler, whereby in referencing the May 20, 2008, e-mail from Ms. Gray to [REDACTED] wrote,

Her [Ms. Gray's] e-mail to [REDACTED] is characterized in several ways; disrespectful for a supervisor; insubordination and probably other charges... We can't let this go without formal action my suggestions are; 1. If she is probationary, remove her now, 2... disciplinary taken and advise her she is probationary, 3. Pull the PAO responsibility from her and give it to [REDACTED] for Memorial

<sup>36</sup> OIG DoD Interview of Mr. Metzler (Apr. 17, 2009) at 34-35 and 37-38.

<sup>37</sup> E-mail from Ms. Gray to [REDACTED] and Mr. Metzler, *Memorial Day PAO Assignments* (May 20, 2008, 6:44 p.m.) and E-mail from [REDACTED] to Ms. Gray, *RE: Memorial Day PAO Assignments* (May 21, 2008, 7:48 a.m.).

<sup>38</sup> E-mail from [REDACTED] to [REDACTED] *FW: Memorial Day PAO Assignments* (May 21, 2008, 1:39 p.m.).

<sup>39</sup> OIG DoD Interview of [REDACTED] (Apr. 16, 2009) at 36.

Day to show her we can and have done this without her and removal or disciplinary action... We need to let her go now; I'd hate to see what kind of attitude she will have after doing one of these ceremonies. We can't let this go.<sup>40</sup>

On May 27, 2008, [REDACTED] sent an e-mail to [REDACTED] whereby she wrote, [REDACTED] I have more information in reference to the removal for Gina Gray."<sup>41</sup>

On June 2, 2008, [REDACTED] sent an e-mail to [REDACTED] requesting "the status of the removal letter?" Later that day, [REDACTED] replied, "If you want to terminate Gina (Ms. Gray) now, I'll send the letter for [REDACTED] to review."<sup>42</sup>

On June 3, 2008, [REDACTED] provided Ms. Gray with her civilian evaluation report form (DA Form 7222-1). This form should be provided to an employee by a supervisor within 30 days of reporting for duty in order to outline and clarify their significant duties, responsibilities, expectations, and performance objectives for the upcoming year.<sup>43</sup>

On June 3, 2008, Ms. Gray sent an e-mail to [REDACTED] where she questioned the "increasingly hostile and contentious" work environment and [REDACTED] refusal to address her "face-to-face" since "outlining my suggestions for Memorial Day." Ms. Gray also wrote, "What I am asking for is an environment of professionalism... where I don't feel like I am being punished for knowing the standards of my job as prescribed by the Army and the DoD."<sup>44</sup>

On June 6, 2008, Ms. Gray sent a letter to Senator John W. Warner communicating her belief that "there is a serious public relations problem at ANC adversely affecting our mission and reflecting poorly upon the care we give our men and women in uniform." Ms. Gray further wrote,

Shortly after arriving, problems began to occur with cemetery administration officials after I questioned the existence and legitimacy of public affairs policies that didn't seem to exist... the blatant disregard of established regulations is disappointing... I refused to tell reporters who were calling about our media policies that it is regulations that prevent them from getting a good shot. There were no such regulations in place and I would not lie.<sup>45</sup>

<sup>40</sup> E-mail from [REDACTED] to [REDACTED] and Mr. Metzler, *Gina Gray* (May 22, 2008, 8:21 a.m.).

<sup>41</sup> E-mail from [REDACTED] to [REDACTED] *Gina Gray* (May 27, 2008, 8:13 a.m.).

<sup>42</sup> E-mail from [REDACTED] to [REDACTED] *Status* (June 2, 2008, 11:03 a.m.) and E-mail from [REDACTED] to [REDACTED] *RE: Status* (June 2, 2008, 11:17 a.m.).

<sup>43</sup> AR 690-400 (Oct. 16, 1998) Chapter 4302, Total Army Performance Evaluation System, Section 1-5(a).

<sup>44</sup> E-mail from Ms. Gray to [REDACTED] *RE: PAO* (June 3, 2008, 10:44 a.m.).

<sup>45</sup> Letter from Ms. Gray to Senator Warner (June 6, 2008). We determined the last line is in reference to Ms. Gray stating that there were no regulations allowing ANC to restrict the media from getting a 'good shot.' *See also* OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 31 whereby Ms. Gray testified that she was directed by [REDACTED] to lie to the media.

On June 17, 2008, [REDACTED], a reporter for Voice of America News, sent an e-mail to [REDACTED] and Ms. Gray asking if there were “any updates on coverage procedures for funerals at Arlington?”<sup>46</sup>

On June 24, 2008, Senator Warner sent a letter to Mr. Geoff Morrell, Press Secretary, U.S. Department of Defense, to request “a summary of the guidelines that shape ANC’s media coverage policy, along with the regulations and procedures for their implementation.”<sup>47</sup>

On June 24, 2008, [REDACTED] sent an e-mail to [REDACTED]. The e-mail contained an attachment with a one-page chronology of events from June 17-23, 2008, entitled “Removal Information for Gina Gray.” Specifically, [REDACTED] wrote,

Ms. Gray was not in on June 17, 2008, so I stayed to escort the media. Not knowing Ms. Gray’s illness, I called to ask her who I was to meet at the gate... Ms. Gray provided me no detail information (regarding her illness)... On June 19<sup>th</sup>... media from the Discovery Channel was at the gate (ANC gate)... it was scheduled with Gina... I had no knowledge of such media request... On June 23<sup>rd</sup> I was notified... that Gina approved media for the 3:00 service... I was not able to accommodate the media... since I had no knowledge of the request... Ms. Gray withholds detailed information from me. I only receive a portion of what is going on.<sup>48</sup>

On June 25, 2008, Ms. Gray met with Major General (MG) Richard J. Rowe, Commander, MDW. She gave MG Rowe a binder of information and reported “major problems” at ANC to include allegations of failure to follow Army regulations, contract fraud, and budget mismanagement.<sup>49</sup>

On June 27, 2008, [REDACTED] sent an e-mail to [REDACTED]. The e-mail contained an attachment with a chronology of events used to provide “supporting documentation for termination of Ms. Gray.” In addition to the details provided to [REDACTED] in the June 24 chronology of events, *above*, this chronology also included events beginning on April 30, 2008, as follows:

On April 30, 2008... there was a round table meeting held at the Pentagon... she [Ms. Gray]... left the office with a Navy Officer and did not return... she [did not] tell us she was leaving. Ms. Gray showed inappropriate and disrespectful behavior... Ms. Gray’s e-mail (May 20, 2008, e-mail, *above*) to me was

<sup>46</sup> E-mail from Mr. Pessin to [REDACTED] and Ms. Gray, *RE: Reminder – Access Follow-up* (June 19, 2008, 11:33 a.m.).

<sup>47</sup> Letter from Senator Warner to Mr. Morrell (June 24, 2008).

<sup>48</sup> E-mail from [REDACTED] to [REDACTED] *Removal Information for Gina Gray* (June 24, 2008, 1:41 p.m.).

<sup>49</sup> OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 114-117 and Memorandum for Record from Ms. Gray to OIG DoD (Apr. 3, 2009).

disrespectful and inappropriate as her supervisor. She failed to follow instructions, by setting up the meeting with the ANC staff to make assignments... Ms. Gray notified several people of her situation [in regards to Ms. Gray being ill], but when I e-mailed her to ask about work and followed up with a phone call she said I was causing her stress... recommend immediate removal.<sup>50</sup>

On June 27, 2008, [REDACTED] issued Ms. Gray a letter of termination during probationary period effective immediately. [REDACTED] cited as grounds for probationary termination failure “to follow my instructions... to effectively communicate with me and Deputy Superintendent... to provide me with complete details for your work assignments, been disrespectful to me as your supervisor and failed to act in an in appropriate manner.”<sup>51</sup>

On July 9, 2008, Mr. Metzler sent a letter to Senator Warner in response to his June 24, 2008, letter, *above*. Mr. Metzler wrote,

I assure you that there is not a deliberate effort to exclude the media from the funerals... Based on the terrain or military formations required, we make every reasonable effort to accommodate the press without infringing on ceremonial protocol or the families’ right to grieve... It is difficult to apply one set of standards and rules when handling something as sensitive as the death of a loved one. While one family may allow a reporter to stand next to them, another family may not want to see the media at all... I am sure that you appreciate... our responsibility to accommodate the families’ wishes.<sup>52</sup>

On October 10, 2008, Ms. Gray filed a whistleblower reprisal complaint with the Defense Hotline.

## FINDINGS AND ANALYSIS

### **1. Did Ms. Gray 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 protected 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).

<sup>50</sup> E-mail from [REDACTED] to [REDACTED] *Termination Info – Gray* (June 27, 2008, 11:18 a.m.).

<sup>51</sup> Memorandum from [REDACTED] to Ms. Gray, *Termination During Probationary Period* (June 27, 2008).

<sup>52</sup> Letter from Mr. Metzler to Senator Warner (July 9, 2008).

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 protected disclosure. Section 2302 defines a protected communication as any disclosure of information which the employee reasonably believes evidences:<sup>53</sup>

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.

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.

We identified five communications made by Ms. Gray, from April 23 to June 6, 2008, for analysis to determine whether they are protected disclosures under 5 U.S.C. Section 2302 and *Huffman*:

1. On April 23, 2008, during the Hall funeral, Ms. Gray asked if the media “could get closer” to the funeral site.<sup>54</sup> ██████ asked ██████ if he would “speak with the media because they (the media) were complaining about the distance that they were from the gravesite” and that “they could not see [the funeral site].”<sup>55</sup> ██████ did so, and according to Ms. Gray, her supervisors “exchanged words” with media representatives.<sup>56</sup> ██████ recalled telling Ms. Gray that the family was approaching and that “it was just too late to do anything.”<sup>57</sup>

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<sup>53</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. See *Rusin v. Dep’t of the Treasury*, 92 M.S.P.R. 298, 318 (2002). See also *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. See *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999); accord *Russin, id.*

<sup>54</sup> OIG DoD Interview of ██████ (Apr. 28, 2009) at 39.

<sup>55</sup> *Id.* at 26 and 28.

<sup>56</sup> OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 11.

<sup>57</sup> OIG DoD Interview of ██████ (Apr. 28, 2009) at 26.

On April 24, 2008, the *Washington Post* reported on the Hall funeral, noting,

Nor does the blocking of funeral coverage seem to be the work of overzealous bureaucrats. Gina Gray, Arlington's new public affairs director, pushed vigorously to allow the journalists more access to the service yesterday but she was apparently shot down by other cemetery officials.<sup>58</sup>

According to Ms. Gray, the *Washington Post* article generated numerous media inquiries regarding policy concerning media involvement in ANC channels. As a result, Ms. Gray sought guidance in her response to those media inquiries.

Approximately one day after the Hall funeral, on April 24, 2008, Ms. Gray asked ██████████ "Who says where the media goes?"<sup>59</sup> In response to media inquiries following the *Washington Post* article, Ms. Gray also asked ██████████ what standard to cite for media placement.<sup>60</sup> ██████████ testified that Ms. Gray's "biggest complaint was that the media could not see and were not close enough"<sup>61</sup> and that "she [Ms. Gray] just thought that the policy was not right and what we were doing was not right (in reference to the Hall funeral). That was her opinion."<sup>62</sup>

Within approximately two weeks of the *Washington Post* article being published, ██████████ reported that Ms. Gray cited the Jackman Memo as a possible governing regulation on media access during funerals. Specifically, ██████████ reported that, "... since April 2008, Ms. Gray did decide to use the MDW rules (the Jackman Memo). She [Ms. Gray] did state that she would use the rules she had since the CFR [32001] rules were not published. That was her decision, not mine. I did not try to sway her one way or the other."<sup>63</sup>

2. On April 24, 2008, Ms. Gray sent an e-mail to ██████████ ██████████ and ██████████ regarding media access restriction during the Hall funeral. Specifically, Ms. Gray wrote,

I have just found some documentation that started on 2 December 2003 with a memorandum... regarding a legal review for media guidelines for ANC. There is some very strong language in favor of allowing media coverage (within reason) and directly contradicts what I have been verbally directed to do... Memorandum published on 18 Mar. 2004 and distributed by MG Jackman clearly establishes ground rules. Memorandum further states that 'media will be allowed

<sup>58</sup> Dana Milbank, *What the Family Would Let You See, the Pentagon Obstructs*, *Washington Post* (Apr. 24, 2008) at A3.

<sup>59</sup> OIG DoD Interview of ██████████ (Apr. 28, 2009) at 39.

<sup>60</sup> OIG DoD Interview of Ms. Gray (Jan. 15, 2009) 27-28.

<sup>61</sup> OIG DoD Interview of ██████████ (Apr. 28, 2009) at 40.

<sup>62</sup> *Id.* at 36.

<sup>63</sup> E-mail from ██████████ to OIG DoD, *FW: ANC Documents* (Dec. 17, 2009, 3:57 p.m.). See also e-mail from ██████████ to OIG DoD, *Follow-up Information* (Dec. 18, 2009, 9:33 a.m.).

in an area designated by the U.S. Army MDW and placed by the Superintendent of ANC. The distance will be between 75 to 100 feet from the ceremony or gravesite. The U.S. Army MDW PAO may allow slight media movement to the left and right to ensure the media have an unobstructed view of the service.’<sup>64</sup>

3. Ms. Gray orally communicated her concerns approximately April 24 or April 25, 2008, to ██████████ regarding media access during the funeral. Specifically, ██████████ testified that “she [Ms. Gray] was extremely concerned because she communicated that (the events surrounding the Hall funeral) back with our office. I know that she talked with me and she was concerned because she felt that the media were being blocked.” ██████████ continued,

She communicated that placement of the media was a continuing concern for her. As far as I know, that particular ceremony was the one that caused the largest stress for her because the movement of the media line was done in front of the media. Although she tried to talk to the official there about why they needed to see, it apparently fell on deaf ears. She was very upset about that... Gina (Ms. Gray) expressed to me and a couple of people that they were really not happy with her because she basically stood up and said we need to move folks (the media attending the Hall funeral).<sup>65</sup>

Ms. Gray reported that she told ██████████ the events surround the Hall funeral and she “believed what ██████████ and ██████████ did (with respect to media access during the Hall funeral) was wrong, unethical, and mean-spirited.”<sup>66</sup>

4. On June 6, 2008, Ms. Gray sent a letter to Senator John W. Warner communicating her belief that

there is a serious public relations problem at ANC adversely affecting our mission and reflecting poorly upon the care we give our men and women in uniform... Shortly after arriving, problems began to occur with cemetery administration officials after I questioned the existence and legitimacy of public affairs policies that didn’t seem to exist... the blatant disregard of established regulations is disappointing... I refused to tell reporters who were calling about our media policies that it is regulations that prevent them from getting a good shot. There were no such regulations in place (restricting the media from getting a ‘good shot’) and I would not lie.<sup>67</sup>

<sup>64</sup> E-mail from Ms. Gray to ██████████ and ██████████ *More Documentation* (Apr. 24, 2008, 9:10 p.m.).

<sup>65</sup> OIG DoD Interview of ██████████ (Apr. 15, 2009) at 10 and 12-13.

<sup>66</sup> Memorandum for Record from Ms. Gray to OIG DoD (Jan. 22, 2010).

<sup>67</sup> Memorandum from Ms. Gray to Senator Warner (June 6, 2008) and e-mail string back and forth confirming receipt of letter and inquiring into the “status of my [Ms. Gray’s] complaint” from Ms. Gray to ██████████

5. On June 25, 2008, Ms. Gray orally communicated to MG Rowe during his open office hours, “major problems” at ANC to include allegations of failures to follow Army regulations, contract fraud, and budget mismanagement.

With respect to Ms. Gray’s first communication above, the evidence established that her activity at the April 23, 2008, funeral failed to qualify as a protected disclosure both under 5 U.S.C. Section 2302 and the rule in *Huffman* and its progeny. Specifically, the evidence established that during the Hall funeral, Ms. Gray’s only communication of interest consisted of asking supervisors whether the press could be moved closer to the grave site. This was prompted by media complaints that they were too far away and couldn’t hear the funeral procession. In short, Ms. Gray simply conveyed a media complaint to her supervisors. She did not communicate any potential violation of law, rule, or regulation at the time. Additionally, this communication was part of her normal duties and addressed through normal channels. Interacting with the media and raising media concerns to her supervisors fell within her duties as a public affairs specialist, and the normal and logical channel for Ms. Gray to address media concerns was with her supervisors.<sup>68</sup>

Ms. Gray’s own testimony further supports a conclusion that her comments at the funeral were a routine subordinate-supervisor exchange in the course of her duties: “And I honestly didn’t realize that it was going to be that much of an issue until the following day (when the *Washington Post* published their article)...”<sup>69</sup> Ms. Gray’s question to her supervisors was not a disclosure of information that a disinterested observer would reasonably believe evidenced a violation of law, rule, or regulation. Furthermore, to qualify as a protected disclosure under *Huffman*, the allegation of wrongdoing must be made to someone other than the wrongdoer.<sup>70</sup> At the Hall funeral, Ms. Gray’s interaction and communication was with [REDACTED] and [REDACTED] the two people she considered to be the wrongdoers and responsible for media placement that day.<sup>71</sup> Therefore, Ms. Gray’s communication conveying a question from the media to her supervisors does not qualify as a protected disclosure and does not satisfy *Huffman*.

We determined that Ms. Gray’s second communication, her e-mail to [REDACTED] and [REDACTED] qualified as a protected disclosure. Specifically, approximately one day after the Hall funeral, on April 24, 2008, Ms. Gray asked [REDACTED] what law to cite for restricting media access.<sup>72</sup> Ms. Gray acknowledged that [REDACTED] told her, “It’s the law” and that he cited to 32 CFR as guidance.<sup>73</sup> Ms. Gray reported that after she learned of and reviewed potentially applicable guidance, including the Jackman Memo, she reported her concerns about the adequacy of that guidance and ANC’s

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Senator Warner Staffer, *RE: From Senator Warner’s Office* (June 22, 2008, 7:40 p.m.). See also OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 31 whereby Ms. Gray testified that she was told to lie to the media.

<sup>68</sup> Ms. Gray’s position description states the following applicable responsibilities: “Assists media representatives in obtaining information... Serves as... primary contact for local and national media, which requires immediate responsiveness. Responds to media queries.”

<sup>69</sup> OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 19-21.

<sup>70</sup> *Willis v. Dep’t of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998).

<sup>71</sup> OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 19-20.

<sup>72</sup> *Id.* at 27-28.

<sup>73</sup> *Id.* at 8.

handling of media to [REDACTED] and [REDACTED]<sup>74</sup> Ms. Gray reported that she “believed that by reaching out to OCPA officials ([REDACTED] and [REDACTED]), that they would intervene and some resolution could be reached with ANC officials on how to properly handle the media.”<sup>75</sup>

We noted that the Jackman Memo may have been technically inapplicable because of an ANC organizational realignment. However, it retained some standing as a source of guidance. That is, ANC was removed from certain aspects of MDW management on October 29, 2004. The responsibility for ANC public affairs policy was assigned to the Army Chief of Public Affairs.<sup>76</sup> However, no substitution or similar policy was issued regarding media placement, leaving the reasonable assumption the Jackman Memo represented guidance. Indeed, [REDACTED] acknowledged so in his testimony (“I do remember having the [Jackman] memo and saying that this is our policy until Army decides there will be something different.”).<sup>77</sup>

We also determined that Ms. Gray’s second communication fell outside of her chain of command, therefore meeting 5 U.S.C. Section 2302’s application under *Huffman*.

With respect to Ms. Gray’s third communication, her oral conversation with [REDACTED] in order for this communication to be protected, it must be sufficiently specific and not constitute mere vague allegations of wrongdoing regarding broad and imprecise matters.<sup>78</sup> We determined that Ms. Gray’s communication with [REDACTED] constituted a protected disclosure. Ms. Gray’s communication with [REDACTED] relayed concerns similar to those of [REDACTED] and [REDACTED] above, and noted that during the Hall funeral, the “media were being blocked” by an “official.” Ms. Gray communicated that she “stood up and said we (ANC) need[ed] to move folks (the media attending the Hall funeral).” We therefore determined that Ms. Gray clearly expressed her concerns that the media was blocked access to the Hall funeral to someone other than the wrongdoer in seeking remedial action. We also concluded that Ms. Gray’s oral communication with [REDACTED] met the requirements of a bona fide protected disclosure as defined under 5 U.S.C. Section 2302 and *Huffman*. These requirements were met as Ms. Gray’s communication to [REDACTED] fell outside of her chain of command and was not made as part of her normal duties.

With respect to Ms. Gray’s fourth communication, we determined that Ms. Gray’s complaint to Senator Warner was a protected disclosure under 5 U.S.C. Section 2302. Under Section 2302, no personnel action may be taken against an employee who discloses information

<sup>74</sup> E-mail from [REDACTED] to OIG DoD, *FW: ANC Documents* (Dec. 17, 2009, 3:57 p.m.) (“... since April 2008, Ms. Gray did decide to use the MDW rules (the Jackman Memo). She [Ms. Gray] did state that she would use the rules she had since the CFR [32001] rules were not published. That was her decision, not mine. I did not try to sway her one way or the other.”).

<sup>75</sup> Memorandum from Ms. Gray to OIG DoD, *Memorandum for Record; ANC Media Policies* (Apr. 9, 2009) (“This [Jackman] memorandum was a factor in my determination that there had been a violation of an established regulation and prompted me to go to OCPA for guidance.”).

<sup>76</sup> Department of the Army, General Order 13, *Army National Cemeteries* (Oct. 29, 2004).

<sup>77</sup> OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 56.

<sup>78</sup> *Special Counsel v. Costello*, 75 MSPR 562, 580, 585–86 (1997) (disclosures must be “specific and detailed, not vague allegations of wrongdoing regarding broad or imprecise matters.”). See also *Padilla v. Department of Air Force*, 55 MSPR 540, 543–44 (1992).

to the Congress which they reasonably believe 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.<sup>79</sup> This communication also satisfies *Huffman* because it fell outside of Ms. Gray's chain of command and filing a congressional complaint was not part of her normal job duties.

With respect to Ms. Gray's fifth and final communication, we determined that Ms. Gray's complaint to MG Rowe was a protected disclosure. Specifically, the requirements of 5 U.S.C. Section 2302 were met as Ms. Gray reasonably believed that there were "major problems" at ANC to include allegations of failures to follow Army regulations, contract fraud, and budget mismanagement. This belief is evident in that Ms. Gray provided MG Rowe a notebook of information evidencing her claim.<sup>80</sup> We also determined that Ms. Gray's fifth communication fell outside of her chain of command and was not made as part of her normal duties, therefore meeting 5 U.S.C. Section 2302's application under *Huffman*.

Consequently, Ms. Gray made four communications that constitute protected disclosures as defined under 5 U.S.C. Section 2302 and *Huffman*. However, Ms. Gray's disclosures to MG Rowe and to Senator Warner occurred subsequent to [REDACTED] initial action to terminate Ms. Gray, and therefore could not have been contributing factors in [REDACTED] decision to take the personnel action. As such, for the purposes of this investigation, we did not analyze these disclosures any further.

## **2. Was Ms. Gray the subject of a personnel action? Yes.**

Ms. Gray alleged that she suffered a total of 12 personnel actions in reprisal for making protected disclosures. Specifically, Ms. Gray alleged:

1. April 29, 2008, [REDACTED] removed Ms. Gray's job responsibility to respond to media queries;
2. April 30, 2008, [REDACTED] required Ms. Gray to report every time she left her desk;
3. May 1, 2008, [REDACTED] removed Ms. Gray's job responsibility to approve media requests;
4. May 14 and 27, 2008, [REDACTED] refused Ms. Gray's request to be provided copies of timecards;
5. May 22, 2008, [REDACTED] questioned Ms. Gray's work hours;
6. May 27, 2008, [REDACTED] changed Ms. Gray's proposed supervisor of Mr. Metzler to [REDACTED]

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<sup>79</sup> 5 U.S.C. Section 2302.

<sup>80</sup> OIG DoD Interview of Ms. Gray (Jan. 15, 2009) 116-117.

7. May 27, 2008, ██████████ directed Ms. Gray not to work beyond 4:30 p.m. unless given approval by both ██████████ and Mr. Metzler;
8. June 3, 2008, ██████████ refused to backdate Ms. Gray's initial Department of Army (DA) Form 7222-1 or "Evaluation Support Form," which is a refined formal description of job duties and expectations;
9. June 9, 2008, ██████████ changed Ms. Gray's job title from Director of PA to PA Specialist;
10. June 9, 2008, ██████████ terminated Ms. Gray's BlackBerry phone service;
11. June 24, 2008, ██████████ changed Ms. Gray's office voicemail password and refused to provide the new password for several hours; and
12. June 27, 2008, ██████████ issued Ms. Gray a Letter of Probationary Termination.

After completing our review of documentary and testimonial evidence, we determined that 11 of the actions did not qualify as personnel actions. Actions number one,<sup>81</sup> two, four, five, six, seven, eight, nine, ten, and eleven, *above*, did not meet the definition of a prohibited personnel action under 5 U.S.C. Section 2302 (a)(2)(A) because they constituted neither a decision concerning pay, benefits, or award; nor a significant change in duties, responsibilities, or working conditions.

We also determined that action number three did not warrant further investigation as this was never a duty of Ms. Gray's and therefore could not constitute a personnel action. To corroborate the allegation, Ms. Gray provided the OIG DoD with three e-mails. The first one is dated June 3, 2008, more than a month after Ms. Gray alleged that ██████████ orally removed this duty. ANC RMOs also denied that they removed the responsibility. Therefore, we could not determine if and when the duty change happened, but proceeded on with our analysis on the evidence provided.

Ms. Gray's position description lists the responsibility of "approves or denies media requests."<sup>83</sup> The media request duty is also listed in her civilian evaluation report form (DA Form 7222-1) under major performance objectives and standards as "responsible for evaluating, coordinating, and scheduling all media requests."<sup>84</sup> This form is provided to an employee by a supervisor within 30 days of reporting for duty in order to outline and clarify the employee's significant duties, responsibilities, and performance objectives for the upcoming

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<sup>81</sup> Allegation of reprisal number one was not supported by sufficient evidence to conclude that the action occurred. Additionally, ANC RMOs denied they removed the responsibility. See OIG DoD Interview of Mr. Metzler (Apr. 17, 2009) at 18 and OIG DoD Interview of ██████████ (Apr. 29, 2009) at 95-96; and OIG DoD Interview of ██████████ (Apr. 28, 2009) at 104 and 106-108.

<sup>82</sup> *Id.*

<sup>83</sup> U.S. Army PA Specialist (GS-1035-12) Position Description at 2.

<sup>84</sup> DA Form 7222-1 – Senior System Civilian Evaluation Report Support Form (June 3, 2008). ██████████ testified that this meant all media requests were to go to Mr. Metzler for approval. See OIG DoD Interview of ██████████ (Apr. 28, 2009) at 76.

year. This form “takes precedence over the position description.”<sup>85</sup> Because the DA Form 7222-1 supplants the position description, Ms. Gray would not be “approving or denying,” but rather “evaluating, coordinating, and scheduling” media requests.

Ms. Gray indicated her recognition of this clarification in duty when she signed the DA Form 7222-1 on June 3, 2008. On the same day, Ms. Gray sent an e-mail to [REDACTED] clarifying the ‘media request’ duty.<sup>86</sup> Ms. Gray provided two e-mails, both dated June 12, 2008, to corroborate her allegation that this was a removed duty.<sup>87</sup> These e-mails are subsequent to Ms. Gray’s June 3, 2008, clarification of duty. Based on the facts presented: 1) RMOs denied that they removed the responsibility, 2) the absence of evidence that the duty was performed before June 3, 2008, 3) the precedence of the DA Form 7222-1 over the position description, and 4) Ms. Gray’s June 3, 2008, knowledge of the clarification in duty, we concluded by a preponderance of the evidence that her responsibility with media requests was never a duty to remove. Therefore, allegation of reprisal number three did not warrant further investigation because it was not a personnel action.

We therefore determined that Ms. Gray was subject to one personnel action by [REDACTED] June 27, 2008, Letter of Probationary Termination as it met the definition of a prohibited personnel action under 5 U.S.C. Section 2302 (a)(2)(A).

**3. Did the acting official have knowledge, actual or constructive, of the complainant’s protected disclosure and did the personnel action take 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 personnel action? No.**

We determined by a preponderance of the evidence that [REDACTED] did not have knowledge of Ms. Gray’s second and third disclosure, *above*. Specifically, there was no evidence to suggest that Ms. Gray or the recipients of Ms. Gray’s protected disclosures took action to alert [REDACTED] or any other RMO of the protected disclosures made.<sup>88</sup> Because [REDACTED] did not have knowledge of the protected disclosures, Ms. Gray’s whistleblowing could not have been a contributing factor in [REDACTED] termination decision.

While this investigation did not progress to the clear and convincing evidence analysis in the absence of a disclosure showing causation, the Inspector General is not limited by *Huffman*

<sup>85</sup> E-mail from [REDACTED] Fort Meyer to OIG DoD, *RE: DoD IG Investigation* (Apr. 29, 2009, 11:27 a.m.).

<sup>86</sup> E-mail from Ms. Gray to [REDACTED] *RE: PAO* (June 3, 2008, 10:44 a.m.) (“Am I correct in understanding that you want to approve every request that comes in.”).

<sup>87</sup> E-mail from Ms. Gray to [REDACTED] *Monday Morning* (June 12, 2008, 2:36 p.m.) (Whereby Ms. Gray asked [REDACTED] permission for the Virginia Department of Tourism to shoot a “tomb guard... walking the mat on Monday morning at sunrise.”). *See also* E-mail from Ms. Gray to [REDACTED] *German film crew follow-up* (June 12, 2008, 2:12 p.m.).

<sup>88</sup> OIG Memorandum of Record, *Conversations with [REDACTED] and [REDACTED]* (Oct. 27, 2009). *See also* OIG DoD Interview of [REDACTED] (Apr. 15, 2009) at 23 and 36-37, whereby [REDACTED] did not discuss her conversation with Ms. Gray to [REDACTED] and only interacted with [REDACTED] in preparing for Memorial Day 2008.

in reviewing the actions of DoD managers and supervisors.<sup>89</sup> We therefore reviewed the personnel action in the case, namely, the supervision and termination of Ms. Gray.

#### **4. Related Issue: ANC failed to exhibit adequate performance and management in the supervision and termination of Ms. Gray:**

We determined that with respect to the supervision and termination of Ms. Gray, ANC management demonstrated an obvious failure to exercise sound personnel management. That is, based on public affairs policy issues that Ms. Gray raised during her first weeks of employment, ANC management elected to terminate her rather than make a reasonable effort to address those policy issues, provide suitable guidance to Ms. Gray, or document performance deficiencies that ANC management later claimed formed the basis for Ms. Gray's termination.

We recognize the distinction between federal employees serving their probationary period and those who have completed their probation, as well as the distinction in termination requirements between the two groups. An employee in probationary status is afforded a "trial period" that provides them an opportunity to demonstrate suitability for continued employment. Conversely, the Agency has an opportunity to assess the employee's full potential, competencies and capabilities, and has the responsibility to assess whether or not they possess satisfactory qualifications and suitability for regular full-time employment.

In determining whether the Agency adequately and appropriately performed and managed the termination of Ms. Gray, we reviewed U.S. Army Regulation (AR) 600-100, Army Leadership and AR 690-400, Total Army Performance Evaluation System.

AR 600-100 establishes Army leadership policy and sets forth the attitude and responsibilities for all aspects of leadership. Specifically, the regulation identifies several core leader competencies that are applicable in assessing the performance execution of Ms. Gray's termination. We identified several core leader competencies including effectively communicating by expressing ideas and actively listening to others, creating a positive organizational climate and fostering the setting for positive attitudes and effective work behaviors, and developing others by encouraging and supporting the growth of individuals.<sup>90</sup>

AR 690-400 establishes Army policy for civilian personnel performance management programs. In short, it is the direct application of performance management. Applicable to Ms. Gray's termination is section 2.6(a), which states that "although formal PIPs (Performance Improvement Plan) are not required for ratees who are serving probationary appointments, raters normally should provide ratees who are not meeting expectations with enough information to help them understand how they are failing and how they might improve."<sup>91</sup> A reasonable supervisor under the AR 690-400 would provide a probationary employee a formal document

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<sup>89</sup> Inspector General Act of 1978, as amended, sections 7(a) and 8(c)(2). The evidence gathered in this investigation warranted our review and comments.

<sup>90</sup> AR 600-100, Army Leadership (March 8, 2007) at 1-6, (4), (5), and (7). Further, section 1-8. Leader development, sub-section C. states, "All leaders have a responsibility to develop those junior to them to the fullest extent possible. In addition to institutional training and education, leaders can facilitate development through the knowledge and feedback they provide through *counseling*, *coaching*, and *mentoring*."

<sup>91</sup> AR 690-400, Total Army Performance Evaluation System (Oct. 16, 1998) at section 2-6(a).

(e.g., letter of counseling or PIP) that would, at the very least, put the employee on notice that they are not meeting the expectations of performance and/or conduct suitable for regular full-time employment.

With respect to Ms. Gray's termination, as an application of Army leadership competencies established by AR 600-100 and in the practice of performance management as established by AR 690-400, we determined that the Agency, and specifically [REDACTED], failed to meet adequate application or performance of those standards. The following factors contributed to our determination:

- [REDACTED] did not provide Ms. Gray a single counseling document such as a letter of counseling or memorandum for record (MFR). While it may be argued that the Agency was not required to document justification to terminate Ms. Gray, it was prudent to document to provide evidence justifying their action.
- There was a lack of corroborating evidence that [REDACTED] orally counseled Ms. Gray for the reasons cited in her termination letter. [REDACTED] testified that the reasons cited for Ms. Gray's termination were "based on [her] observations."<sup>92</sup> The OIG DoD viewed the testimony of [REDACTED] as particularly important because he was Ms. Gray's second-line supervisor. For this reason, he would have logically been privy to the issues surrounding Ms. Gray's cited performance and conduct deficiencies and any action taken to correct them. However, [REDACTED] denied direct knowledge of Ms. Gray being counseled for conduct and performance deficiencies and attributed his knowledge to only what [REDACTED] told him.<sup>93</sup> [REDACTED] also testified that although he had knowledge of the chronological summary of events that [REDACTED] "turned over to Human Resources," he did not have copies of the documents and never personally reviewed them.<sup>94</sup>

By providing counseling to Ms. Gray, either verbal and or in writing, [REDACTED] would have demonstrated the standards set forth in AR 600-100 and 690-400, namely effectively communicating to Ms. Gray that she was not meeting performance and/or conduct standards. This communication would have provided Ms. Gray the guidance required to develop as a suitable ANC employee. As Ms. Gray's manager, [REDACTED] was responsible for facilitating Ms. Gray's development "through *counseling, coaching, and mentoring*."<sup>95</sup>

- There was a lack of corroboration with the reasons cited in Ms. Gray's termination letter. Specifically, while the general reasons cited by [REDACTED] as grounds for probationary termination were individually questioned (e.g., failure "to follow my instructions... to

<sup>92</sup> OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 103.

<sup>93</sup> OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 29 and 49-50 ("I was getting some indication from [REDACTED] that she wasn't getting feedback from her. I didn't get involved. She would just mention to me she didn't get this, she wasn't getting that..." "She's [Ms. Gray's] not doing this, she's not doing that. But that's still at the first level... I don't get involved at that level."). See also *Id.* at 76.

<sup>94</sup> OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 80-81.

<sup>95</sup> AR 600-100, Army Leadership (March 8, 2007) at section 1-8c.

effectively communicate with me and [REDACTED]... to provide me with complete details for your work assignments, been disrespectful to me as your supervisor and failed to act in an appropriate manner”), [REDACTED] Ms. Gray’s second-line supervisor, testified that he had “no direct knowledge” on all the reasons except the failure to provide complete details of Ms. Gray’s work and being “disrespectful” to [REDACTED] as a supervisor.

With respect to complete details of Ms. Gray’s work, [REDACTED] cited incidents that he had personal knowledge of including “the Kennedy gravesite” and “when [Ms. Gray] was out with her illness.” However, [REDACTED] did not cite “the Kennedy gravesite (whereby allegedly Ms. Gray gave permission to close the grave for a filming)” incident in her two chronological summaries of events. Regarding Ms. Gray being “disrespectful” to [REDACTED] as a supervisor, [REDACTED] stated personal knowledge of Ms. Gray’s May 20, 2008, e-mail in reference to Memorial Day, *above*, out of the cited reasons in [REDACTED] two chronological summaries of events, as well as Ms. Gray “snapping” at [REDACTED] at the Memorial Day walkthrough.<sup>96</sup> Our review and testimony established that the e-mail was not insubordinate.<sup>97</sup>

Notwithstanding Ms. Gray’s probationary status and [REDACTED] failure to put Ms. Gray on notice for “not meeting expectations,” [REDACTED] failed to provide adequate documentation justifying the decision to terminate Ms. Gray. Specifically, we found little contemporaneous documentation leading up to termination. [REDACTED] did not document any concerns regarding Ms. Gray’s conduct or performance until she wrote a MFR on May 26, 2008, recording her concerns regarding ANC’s 2008 Memorial Day event. The MFR, however, was unclear in what conduct or performance deficiencies Ms. Gray displayed during the Memorial Day event.<sup>98</sup> The only documentation provided to the OIG DoD justifying Ms. Gray’s termination were two separate, one and three-page MFR chronological summaries of events described in the above chronology. Each was separately sent via e-mail to [REDACTED] on June 24 and 27, 2008, *above*. In those documents, [REDACTED] described and documented events that were used to support her recommendation for Ms. Gray’s termination. However, these summaries are dated over *six weeks* after [REDACTED] considered terminating Ms. Gray in early May 2008, according to testimony from Mr. Metzler and [REDACTED] [REDACTED] produced this documentation to satisfy [REDACTED] request to provide him with termination documentation.<sup>99</sup>

- The time of Ms. Gray’s termination, roughly two and a half months into probationary employment, is in accordance with AR 690-400. But the termination does not meet the

<sup>96</sup> OIG DoD Interview of [REDACTED] (Apr. 29, 2009) at 69 and 82-85. [REDACTED] also testified that he agreed with the termination.

<sup>97</sup> OIG DoD Interview of [REDACTED] (Apr. 16, 2009) at 36. [REDACTED] testified that his office told [REDACTED] that “It was not insubordination.”

<sup>98</sup> Memorandum for Record from [REDACTED] *Memorial Day* (May 26, 2008).

<sup>99</sup> OIG DoD Interview of [REDACTED] (Apr. 16, 2009) at 35 and 27 (“Because initially they [REDACTED] and [REDACTED] wanted to go ahead with termination right away (early May). Both myself and the attorney said give us some more stuff. Even though you can, it is not the right thing to do. If you want to terminate somebody we want to hear a summary of why you want to terminate them.”... “We tell all of our supervisors to give us documentation.”).

regulation's intent for leaders "to develop those junior to them to the fullest extent possible."<sup>100</sup> The regulation also states that "decisions to remove probationary employees may be made at any time during the probationary period." This alone, however, does not excuse [REDACTED] or the Agency from properly informing Ms. Gray that she was "not meeting expectations." Nor does it justify denying Ms. Gray an opportunity to take corrective action and ameliorate cited deficiencies. Even though [REDACTED] and the Agency may not be aware of the specific language of AR 690-400, a previous probationary termination clearly demonstrates their clear grasp of its intent. In that termination, the employee was administered a mid-point counseling where "your standards were discussed and you were also informed on areas that need improvement." Additionally, the counseling included specific events or examples that prompted termination. [REDACTED] and the Agency provided Ms. Gray with neither. Moreover, the previous employee's termination took place after ten and a half months on the job; enough time for corrective action. Ms. Gray, on the other hand, received her notice of termination within approximately two and a half months of employment, without prior notice, and without the opportunity to take corrective action. [REDACTED] and the Agency may have operated within the letter of AR 690-400, but they failed to meet its intent by terminating Ms. Gray without proper development through counseling and corrective action.

Additionally, we found that ANC management viewed Ms. Gray's activities surrounding the Hall funeral as disruptive because they resulted in high-level and public focus on ANC operations. This contributed to the contentious relationship that developed between Ms. Gray and her supervisors and their decision to terminate her without attempting reconciliation. The following factors contributed to that determination:

- Approximately one week following the Hall funeral, the Assistant Secretary of the Army for Manpower and Reserve Affairs requested ANC provide an executive summary of the events. An executive summary was also requested by the OSD;<sup>101</sup>
- On April 30, 2008, OCPA held a "media roundtable" where Ms. Gray, [REDACTED], [REDACTED] OCPA officials, and selected members of the media attended. The purpose of the meeting was "convened... to discuss the issue" of the "critical column by Dana Milbank of media coverage of military funeral at ANC;"<sup>102</sup>
- Mr. Metzler testified that subsequent to the Hall funeral, ANC had several additional meetings with OCPA to clarify media procedures. Specifically, he testified, "[OCPA] was not engaged very much and the Hall funeral caused that office to start to get engaged;"<sup>103</sup>

<sup>100</sup> AR 600-100, Army Leadership (March 8, 2007) at 1-8.

<sup>101</sup> OIG DoD Interview of [REDACTED] (Apr. 14, 2009) at 13 and OIG DoD Interview of Ms. Gray (Jan. 15, 2009) at 44-45. See also E-mail from [REDACTED] to Mr. Metzler and other U.S. Army officials, *EXSUM* (Apr. 28, 2008, 10:08 a.m.) ("We just got a call from Sec Def office. They want an EXSUM by 12:00.")

<sup>102</sup> Executive Summary from MDW and [REDACTED] (Apr. 30, 2008).

<sup>103</sup> OIG DoD Interview of Mr. Metzler (Apr. 17, 2009) at 42. See also E-mail from [REDACTED] to Ms. Hoehne, Principal Deputy Chief OCPA, [REDACTED] and Ms. Gray, *Media Guidelines Review* (May 12, 2008,

- When asked if [REDACTED] was upset that she had to attend the April 30, 2008, OCPA roundtable, she testified, “Oh yeah, I definitely did not want to do that... just with my experience with the media that it was going to be something else that we would have to do. When all parties get involved you know there is going to be something else that *you are going to have to do*;”<sup>104</sup>
- Subsequent funerals received increased media attention as witnessed on May 1, 2008, when ANC buried [REDACTED] U.S. Army, Operation Iraqi Freedom. The family requested media access and prior to the funeral ceremony, “ANC... received approximately forty phone calls inquiring about the next media authorized funeral;”<sup>105</sup> and
- [REDACTED] consequently acknowledged that Ms. Gray was blamed for the increased media attention at ANC.<sup>106</sup>

### CONCLUSION

We determined that Ms. Gray was a whistleblower. She was not, however, the subject of reprisal as [REDACTED] lacked knowledge of the qualifying protected disclosures. However, with respect to the supervision and termination of Ms. Gray, we determined that [REDACTED] and ANC management failed to exercise sound personnel management.

### RECOMMENDATION

We recommend that the Assistant Secretary of the Army for Civil Works consider corrective action with respect to ANC officials responsible for handling Ms. Gray’s supervision and termination and an appropriate remedy for Ms. Gray.

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1:50 p.m.), whereby [REDACTED] states, “This follows our meeting concerning the media guidelines currently being used at ANC and the suggested changes discussed.”

<sup>104</sup> OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 64-65.

<sup>105</sup> Executive Summary from Mr. Metzler (May 1, 2008).

<sup>106</sup> OIG DoD Interview of [REDACTED] (Apr. 28, 2009) at 57-58 ([OIG Investigator]: “Do you believe Ms. Gray was blamed for the increased media attention at ANC?” [REDACTED] “Yes.”).