



**Metropolitan Water
Reclamation District
of Greater Chicago**



Office of the Independent Inspector General

“[T]o detect, deter and prevent corruption, fraud, waste, mismanagement, unlawful political discrimination or misconduct in the operation of County government.”

**Metropolitan Water Reclamation District of Greater
Chicago
Quarterly Report
4th Quarter 2020**

January 15, 2021



OFFICE OF THE INDEPENDENT INSPECTOR GENERAL

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January 15, 2021

Transmittal via electronic mail

Honorable Kari K. Steele
and Honorable Members of the Metropolitan
Water Reclamation District of Greater Chicago
Board of Commissioners
100 East Erie Street
Chicago, Illinois 60601

Re: Independent Inspector General Quarterly Report (4th Qtr. 2020)

Dear President Steele and Members of the Board of Commissioners:

As you know, on April 18, 2019 the Board of Commissioners of the Metropolitan Water Reclamation District of Greater Chicago (MWRD) adopted Ordinance O19-003 entitled Office of the Independent Inspector General (MWRD OIIG Ordinance) that has been designed to promote integrity and efficiency in government and provide independent oversight of the MWRD. Additionally, an Intergovernmental Agreement between the County of Cook and MWRD became effective by full execution of the parties on May 17, 2019 (Sec. II. Term of Agreement) thereby authorizing the OIIG to initiate operations relating to the MWRD. This quarterly report is written in accordance with Section 2-287 of the MWRD OIIG Ordinance to apprise you of the activities of this office during the time period beginning October 1, 2020 through December 31, 2020.¹

OIIG Case Activity

In connection with the number of complaints received by the OIIG, please be aware we have received a total of 5 new complaints during this reporting period. This number also includes those matters resulting from the exercise of my own initiative (MWRD OIIG Ordinance Section Two (citing Cook County Code, Sec. 2-284(2))). Four OIIG investigations have been opened and four OIIG case inquiries have been initiated during this reporting period while a total of 12 OIIG

¹ In accordance with the MWRD OIIG Ordinance, this office reports quarterly the number of investigations initiated and concluded during the subject time period along with other relevant data concerning the activities of the office. Quarterly reports also set forth OIIG recommendations for remedial or other action following the completion of an investigation and track whether recommendations were adopted in whole or in part or otherwise not implemented by the MWRD. Finally, quarterly reports also describe miscellaneous activities of the OIIG that may be of interest to MWRD officials, employees, contractors and members of the public.

case inquiries remain pending at the present time.² No matters have been referred to management or other enforcement or prosecutorial agencies for further consideration. The OIIG currently has three matters under investigation and one investigation open beyond 180 days of the issuance of this report.

OIIG Summary Reports

During the 4th Quarter of 2020, the OIIG issued two summary reports on MWRD matters. The following provides a general description of the matters and states whether OIIG recommendations for remediation or discipline have been adopted. Specific identifying information is being withheld in accordance with the OIIG Ordinance where appropriate.³

IIG19-0322. The Office of the Independent Inspector General (OIIG) received a communication expressing concern that the MWRD may not have adequate cybersecurity to protect the MWRD's industrial controls. The OIIG subsequently initiated this case to review the MWRD's cybersecurity over industrial controls. The OIIG set the scope of this review to include those industrial controls installed in the Water Reclamation Plants ("WRP's"), Pumping Stations, and Dams (collectively, "Facilities") used for the wastewater treatment process and flood control operations. The Maintenance and Operations Department ("M&O") is responsible for maintaining and operating those Facilities for the MWRD. The M&O organizational structure consists of four divisions. There are three field divisions with WRP's that provide wastewater treatment services in their respective areas (North, Stickney, Calumet). Additionally, there is a division that provides administrative support and water flow facilities (e.g., dams and tunnels) to all four divisions (General Services Division).

The Council of the Inspectors General on Integrity and Efficiency (the "CIGIE")⁴ tasked the Department of Homeland Security ("DHS") Office of the Inspector General to lead and

² Upon receipt of a complaint, a triage/screening process of each complaint is undertaken. In order to streamline the OIIG process and maximize the number of complaints that will be subject to review, if a complaint is not initially opened as a formal investigation, it may also be reviewed as an "OIIG inquiry." This level of review involves a determination of corroborating evidence before opening a formal investigation. When the initial review reveals information warranting the opening of a formal investigation, the matter is upgraded to an "OIIG Investigation." Conversely, if additional information is developed to warrant the closing of the OIIG inquiry, the matter will be closed without further inquiry.

³ The OIIG issues a Quarterly Report relating to the MWRD separate from the one it issues for other government agencies under its jurisdiction. The Quarterly Reports for MWRD matters can be found at <https://www.cookcountyil.gov/service/metropolitan-water-reclamation-district-greater-chicago>.

⁴ The Council of the Inspectors General on Integrity and Efficiency (CIGIE) was statutorily established as an independent entity within the executive branch by the Inspector General Reform Act of 2008, Public Law 110-409.

coordinate a working group to conduct a cybersecurity review.⁵ We relied on the DHS criteria to evaluate the MWRD's cybersecurity over industrial controls.⁶

The DHS criteria contained five objectives for evaluating an agency's cybersecurity:

- I. Identify whether the agency has designated a department to be primarily responsible for security over the industrial controls;
- II. Determine whether the department has implemented an effective "Cybersecurity Program" to protect its industrial controls from cyber threats and attacks;
- III. Evaluate the Cybersecurity Program's performance metrics and outcome measures for implementing the policies and procedures needed to protect its industrial controls from cyber threats and vulnerabilities;
- IV. Assess whether the Cybersecurity Program is efficiently managing the strategy to protect its industrial controls; and,
- V. Identify and assess the relationships the Cybersecurity Program has with other governmental agencies and private entities to strengthen its cybersecurity.

As an initial step in our cybersecurity review over industrial controls, we issued a document production request to the M&O Director for the following information:

1. Documentation explaining the policies and procedures (internal controls) for ensuring cybersecurity for the industrial controls at the Facilities;
2. Audits, reviews, and risk assessments related to cybersecurity for the industrial controls at the Facilities for the past three years; and
3. Recent updates to cybersecurity and any outstanding recommendations or correspondence to improve cybersecurity in connection with the industrial controls at the Facilities.

The OIIG subsequently interviewed key MWRD personnel familiar with their cybersecurity for industrial controls, including the following:

1. A member of the MWRD Board of Commissioners;

⁵ According to the CIGIE, this is a high-level audit guide that can be used as a baseline for cyber and IT security-related reviews conducted by the Inspectors General community. The guide is based on the subject matter expertise of DHS OIG IT audit managers and specialists, legal research, and a review of applicable websites and audit programs developed within the OIG community. The intent of this guide is to provide a foundation for conducting cybersecurity and IT system security-related audits.

⁶ Department of Homeland Security Management Advisory Report: A Guide for Assessing Cybersecurity within the Office of Inspector General Community, Appendix E, page 100-101, February 2014.

2. Director of the MWRD Information Technology Department;
3. Director of M&O;
4. Assistant Director of M&O;
5. A Waterways Section System Dispatcher;
6. A Powerhouse/Dam Mechanic;
7. A Principal Engineer for Treatment Plant Operations; and
8. A Treatment Plant Operator.

We examined the premises and control rooms for the Facilities that utilize industrial controls to conduct the wastewater treatment processes and flood control operations:

1. The Lockport Powerhouse (Lockport, Illinois);
2. The Stickney WRP;
3. The Lemont WRP; and
4. The Waterways Section Control Room, MWRD Main Office Building.

The OIIG applied certain auditing procedures and investigative techniques to assess the MWRD's cybersecurity over the industrial controls utilized in the Facilities. If the MWRD Board of Commissioners believes a more in-depth analysis is necessary, subject matter experts should be hired to perform more extensive evaluations for specific areas.

The evidence developed during the course of this review supports the conclusion that the MWRD has substantially complied with the Council of the Inspectors General on Integrity and Efficiency for Cybersecurity criteria due to the framework that has been put into place. Nonetheless, our review revealed that the cybersecurity program has certain issues to address in order to both remain in substantial compliance and strengthen its protection of the MWRD's industrial controls against cyber threats and harm. Accordingly, we make the following recommendations:

1. Our review revealed that the M&O failed to complete Annual Reports for approximately five years. Before the February 2020 Annual Report, M&O did not issue an Annual Report since 2014. The M&O should implement a notification procedure for this reporting obligation to prevent future lapse in reporting. Any future lapse would necessarily threaten our finding of substantial compliance.
2. During our site inspections and interviews, we received statements from certain personnel in the control rooms that they were unfamiliar with written standard operating procedures for operating the industrial controls at the Water Reclamation Plants. The M&O should ensure that selected personnel receive the standard operating procedures and training related to them.
3. The M&O Director can authorize audits of the DCS for security vulnerability assessments and compliance pursuant to the Computer Systems Directive. We were told that the M&O has not conducted periodic audits related to its industrial controls that operate the Water

Reclamation Plants, Powerhouse/Dam, Pumping Stations, and waterflow Gates. The M&O should conduct periodic audits for these Facilities.

4. The MWRD's Directive states that the M&O will cooperate with the Information Technology Department when security vulnerability assessments are conducted for the DCS. The M&O has not conducted cybersecurity risks assessments for its DCS that operates the WRPs, Powerhouse/Dam, Pumping Stations, and waterflow Gates. We did learn, however, that one WRP had been scheduled for a cybersecurity assessment before the COVID-19 pandemic caused a delay. We recommended that the MWRD begin the process for scheduling cybersecurity risks assessments for all the Facilities mentioned above as soon possible under the circumstances.

The MWRD accepted all of the OIIG recommendations.

IIIG19-0518. The OIIG received information suggesting that contract participation for the Affirmative Action Program⁷ entities may be substantially below the MWRD's aspirational goals. The OIIG subsequently initiated this review to assess the MWRD's Affirmative Action Program ("AAP").

During our review, we interviewed key MWRD senior officials familiar with the MWRD's procurement process and AAP. These MWRD officials include a member of the MWRD Board of Commissioners, the Director of Procurement, the Director of Maintenance & Operations, and the Diversity Administrator. We also interviewed the Director of the Cook County Contract Compliance Office to obtain insights from a different government unit administering a MWBE Program.

The OIIG received Appendices from the Diversity Administrator that describe the contract participation for the AAP.⁸ We selected specific MWRD contracts to sample for compliance with the Appendices. We assessed the AAP actual contract participation according to the stated contract goals and assessed the process for monitoring AAP contract participation.

The OIIG reviewed MWRD Board meeting information on the legistar website for contracts that the MWRD awarded over a three year period (2016-2019). This timeframe served as the baseline period for our AAP review. We arranged the list according to the highest dollar amount, and our judgmental sample resulted in 20 contracts worth \$193,282,707. The actual level of contract distribution amounted to \$118,192,474.

We compared the aspirational goals stated in the contracts to the aspirational goals in the Appendices. The MWRD does not generate reports that compare disbursements made to the prime

⁷ The "SBE" reference in this report includes both SBE and VBE. VBE and SBE have different criteria, but are combined for SBE participation pursuant to the MWRD's policies. There is no separate tracking and reporting for VBE and SBE.

⁸ The Appendices are found in each contract.

contractor to payments made to the AAP participants. Therefore, the OIIG received payment information made to the prime contractors provided by the Finance and Procurement Departments. We compared the Finance Department's disbursements to prime contractors to the payments AAP participants reported to the AAP. The AAP are required to report their payments to the AAP.⁹ As discussed below, this methodology presented challenges to compare relevant payment information between the prime contractors to the AAP participants during the same baseline period.

The mission of the AAP includes reviewing contracts, setting aspirational goals, and monitoring contract participation. The AAP operates in accordance with the contract Appendices.¹⁰

The Appendices establish the "aspirational goals" for AAP participation in contracts that exceed certain prescribed monetary thresholds.¹¹ These aspirational goals are as follows:

Type of Contract	Minority	Women	SBE
Consulting/Professional/Services	20%	10%	10%
Construction	19.6%	6.9%	0%
Goods	0%	0%	0%

There are two general exclusions in connection with the AAP. For one, the MWRD has no Appendix for AAP participation with contracts for goods. Additionally, construction contracts do not have a provision for SBE participation.

Based upon all of the foregoing, we respectfully offered the followings recommendations:

1. The Engineering Department met the AAP's aspirational goals for 4 MBE's and 6 WBE's in the 10 contracts our Office examined for this review. While there will likely be variations on AAP participation based on different contracts and timing, the data nonetheless provides a snapshot at a moment in time. The OIIG recommended that the MWRD Board requests quarterly reports from senior management that show the aspirational goals and actual outcomes. This could provide the basis for constructive discussions from the AAP, contract managers or resident engineers, and contractors – including the MBE, WBE, VBE, and SBE participants.

⁹ The AAP Director provided the OIIG with payment information as of January 2020. The Director of Finance provided us with disbursements made pursuant to the respective contracts through May 2020. Therefore, there could be some timing differences between payments and reporting.

¹⁰ **Appendix A** covers *MBE, WBE, and SBE* participation in professional services contracts; **Appendix C** covers *MBE and WBE* participation in construction contracts; **Appendix K** covers *MBE and WBE* apprenticeships in contracts; and **Appendix V** covers *VBE and SBE* participation in professional services and construction contracts (collectively "*SBE*").

¹¹ The monetary threshold for AAP participation for service contracts and apprenticeships are the total estimated expenditures exceeding \$100,000. The threshold for AAP participation for construction contracts is contracts that are estimated to exceed \$10,000 (applies to Cook County only).

2. When we reviewed the Engineering Department contracts, 9 of 10 contracts had dual representation where the SBE was also the MBE or WBE. For dual representation, the MWRD does not increase the percentage of proceeds that goes to the MBE/WBE and SBE. The MBE/WBE percentage covers the SBE's percentage. In effect, the general contractor is allowed to retain more of the contract proceeds than if he/she included a different SBE to participate in the contract through this loophole. We recommended increased aspirational goals for dual participation scenarios.
3. The Engineering Department uses dual participation that could be undermining the spirit of the SBE classification. SBE's provide opportunities for business owners within a certain entity size despite their race or gender. We recommended that the MWRD reviews this practice to determine the intent supporting small business participation and adjust this practice – if necessary. Accordingly, the MWRD should establish and track separate goals for SBE's.
4. Our review revealed that the AAP does not include Furnish and Deliver contracts because the MWRD deems this practice commercially useful. Furnish and Deliver contracts are issued for goods and commodities. The three furnish and deliver contracts in our review generated \$28,917,207 (54.9%) in contract activity for our M&O sample. The OIIG recommended that the MWRD Board of Commissioners ensures that that the external consultant hired to conduct a Disparity Study assesses this policy and determines whether AAP should also apply to furnish and deliver contracts.
5. Our investigators had to create reconciliations to assess the level of MWBE participation for our review. This methodology presented challenges to compare relevant payment information amongst the MWRD, the prime contractors and the AAP participants during the same baseline period. The AAP is currently working to implement new tracking software set to go online in early 2021. MWRD senior management should ensure the AAP has the resources and assistance to meet this goal through implementation and thereafter.
6. Our review identified an intergovernmental agreement ("IGA") between the MWRD and a workgroup totaling \$4,718,895. The contract had no aspirational goals because the AAP was not provided the IGA for MBE/WBE/SBE participation. Note that the AAP does not have an opportunity to review Furnish and Deliver contracts. The AAP's inability to directly participate in the MWRD's overall mission and strategic planning endeavors may put the AAP at a disadvantage. The OIIG recommended that the MWRD determine whether diversity and inclusion could be improved if the AAP is elevated to a department and included as part of the Executive Team.
7. We identified circumstances where contracts with no or low aspirational goals failed to include documentation that explained the reasons for modifying the aspirational goals. In our experience, documentation serves as an important internal control and provides an audit trail. Moreover, the practice would provide sources of information to evaluate the

effectiveness and shortcomings of the AAP. The OIIG recommended that the AAP document the reasons for setting tailored goals. We do not believe that this practice would unduly impede upon the Diversity Administrator's professional discretion as suggested.

8. We received statements that MBE/WBE/SBE businesses do not bring concerns to the AAP about the lack of inclusion in their contracts. We recommended the MWRD encourage prime contractors and subcontractors to report issues implicating AAP goals to either AAP or to the Inspector General's Office. This may be achieved by adding a general condition requiring the same.

These recommendations are currently pending.

Outstanding OIIG Recommendations

In addition to the new cases being reported this quarter, the OIIG has followed up on outstanding recommendations for which no response was received at the time of our last quarterly report. Under the OIIG Ordinance, responses from management are required within 45 days of an OIIG recommendation or after a grant of an additional 30-day extension (if applicable) to respond to recommendations. Below is an update on these outstanding recommendations.

From the 3rd Quarter 2020

IIG20-0127. The OIIG opened this case after receiving information that a Commissioner's Aide ("Aide A") was driving an MWRD vehicle assigned to the Commissioner for whom he worked (Commissioner A) late on a Sunday evening when he became involved in an accident. The OIIG opened an inquiry to determine whether the use of the vehicle and the ensuing MWRD response to the crash were consistent with MWRD policies.

The preponderance of the evidence developed by the investigation demonstrates that, following the accident, the MWRD, including Aide A, did follow established protocols for filing a police report, reporting the accident through the chain of command and cooperating with the leasing company as it sought to resolve the matter. Further, Commissioner A terminated Aide A upon recognizing that Aide A's use of the vehicle was unauthorized. Commissioner A and Aide A both advised this office that the Commissioner had directed Aide A not to use the vehicle for personal reasons. Aide A acknowledged to Commissioner A and to OIIG Investigators that his use of the vehicle during the weekend in question was for personal reasons and thus unauthorized.

While the original allegations were not sustained, our investigation revealed four important considerations upon which we made recommendations. First, we believe that the MWRD Administrative Procedure 3.1.0., in its current form, could be construed to permit personal use of a Class One vehicle by a Commissioner's Aide. The Procedure specifies that all Class One vehicles "are authorized for use in all District and personal travel." The Procedure, clearly intended to provide Commissioners with the taxable benefit of a vehicle for which personal use is permitted, does not expressly exclude other drivers from personal use. Thus, in the instant case,

had Commissioner A previously permitted his Aides to use his Class One vehicle for personal reasons, the MWRD could be compromised in the event of an accident taking place during an Aide's personal use of the vehicle.

Second, the circumstances surrounding whether Aide A was duly authorized to use the vehicle each time he used it are unclear. Aide A has asserted he used a particular authorization memo to utilize the vehicle on weekends. The MWRD Administrative Services Section has reported it has no such authorization memos regarding Aide A. The MWRD Police Officers corroborated that such a memo is to be used in these circumstances, but they recalled repeated instances where Aides, including Aide A, collected vehicles without such a memo. Moreover, statements from MWRD Police Officers suggest that MWRD Police were aware and at times concerned that Aide A did not have the required authorization memo but nonetheless permitted him to take the vehicle.

Third, the vehicle use log implemented by Commissioner A appears to be the result not of an MWRD requirement but the Commissioner's desire to track mileage in order to comply with tax law. For the purposes of this investigation, we have not delved into the practices of other Commissioners' offices but are seeking to make a recommendation for all Commissioners' offices to adopt the same practice of logging all use of Class One vehicles.

Fourth, the log used by Commissioner A disclosed use of the vehicle to attend at least one political fundraiser.

Based upon all of the foregoing, we recommended that the MWRD:

1. Consider the risk of liability associated with the circumstances where a Commissioner permits an Aide to operate the Class One vehicle assigned to the Commissioner;
2. Modify Administrative Procedure 3.1.0.I.C.2.a. to require a specific documentary procedure for Commissioners to authorize Aides to operate Class One vehicles and that such authorization exclude independent personal use by Aides;
3. Modify Administrative Procedure 3.1.0.I.C.2.a. to require detailed vehicle use logs for Class One vehicles;
4. Inform Commissioners and their Aides that the MWRD Ethics Ordinance prohibits the use of any MWRD resources, including Class One vehicles, in support of prohibited political purposes as defined by the Ordinance;
5. Maintain the current course of legal action seeking reimbursement from Aide A.

These recommendations were made on September 28, 2020. The MWRD's response is pending.

IIG20-0382. The OIIG initiated this investigation after receiving a complaint alleging that there is an institutional custom at the MWRD Calumet Water Reclamation Plant (“Calumet”) of disregarding mask protocols required as a precaution against the spread of COVID-19. During the investigation, OIIG investigators reviewed communications from Human Resources and an MWRD Executive Director. OIIG Investigators also conducted two separate site checks at Calumet.

The preponderance of the evidence developed during the course of this investigation failed to support the existence of an institutional custom or practice to disregard the wearing of face masks as a precaution against the spread of COVID-19 at the Calumet facility. The visit to the various areas of the plant by OIIG investigators yielded observations that plant staff were largely compliant with the MWRD directives regarding COVID-19. On one site visit, however, the OIIG did observe several persons believed to be employees sitting or sleeping in vehicles in parking areas. Accordingly, the OIIG recommended that the MWRD Executive Director instruct the Calumet Plant Manager to take notice of individuals sleeping in vehicles and ensure that the employees are on an authorized break and that sleeping on site is not otherwise a violation of policy or relevant collective bargaining agreements.

The MWRD adopted the OIIG recommendations.

IIG19-0320. In 2019, the OIIG received a communication expressing concern that the MWRD may not be prepared to properly and efficiently respond to a major disaster or a flu pandemic. The OIIG initiated this matter to review the MWRD’s emergency response program. During our review, we interviewed key MWRD personnel familiar with the emergency response program, including a member of the MWRD Board of Commissioners, the Executive Director, the Risk Manager, Director of Maintenance & Operations, an Assistant Director of Maintenance & Operations, and three Water Reclamation Plant Managers. We also reviewed the MWRD’s Emergency Response Plans, emergency procedures manuals for Water Reclamation Plants, training and practice drills documentation and the *President’s Council on Integrity and Efficiency, IG Guide to Evaluating Agency Emergency Preparedness* (Nov. 2006)(incorporating the *National Response Plan*).

The primary goal for this review was to confirm the existence of emergency plans and assess whether these plans met the standards recommended by the *President’s Council on Integrity and Efficiency, IG Guide to Evaluating Agency Emergency Preparedness* and the National Incident Management System’s (“NIMS”) *National Response Plan*. We also sought to determine whether key MWRD personnel were aware of such plans and whether they have been trained to implement them. Accordingly, the OIIG applied limited auditing procedures and investigative techniques to assess the MWRD emergency response program. Below are specific findings and corresponding recommendations based on our review:

1. We noted that the MWRD’s Emergency Response Plans did not contain all the provisions found in the federal standards established for emergency response plans. The OIIG review revealed that the MWRD met 30 of the 33 recommended standards (90.9%) stated in the

NIMS checklist related to its Emergency Operations Plan. We also noted that the MWRD met 26 of the 29 recommended standards (89.7%) stated in the NIMS checklist established for the MWRD's Business Continuity Plan. The OIIG recommended that the MWRD Executive Director ensures that senior management review these omitted provisions and formally document whether these items should or should not apply to the MWRD's emergency response plans.

2. Our review revealed that 9 of the 16 MWRD Incident Management Team Members (staff) did not fulfill their Federal Emergency Management Agency ("FEMA") training obligations prior to an OIIG confirmation request made in March 2020. The MWRD should create a policy that imposes an obligation upon personnel to complete the FEMA training within a reasonable timeframe after joining the MWRD.
3. OIIG investigators received statements from MWRD senior management that it is a challenge to maintain a current contact list for the Emergency Response Plans. We recommended that the MWRD follow a suggestion from a senior manager and make the contact list "live" as a cloud-based contact directory.
4. The OIIG received and reviewed memoranda from the Executive Director that was addressed to the Board of Commissioners in connection with transmitting updated Emergency Response Plans on an annual basis. Senior management, however, does not appear before the Board to explain the contents or provide updates in person. The OIIG recommended that the Board consider an annual Board Meeting agenda item be added to apprise the Board and ensure the emergency response program is prioritized throughout the MWRD.
5. We recommended a heightened attention to employee training, practice drills and exercises, and the reconciliation of the Emergency Response Plans (District-wide versus facilities).
6. During our review, we learned that the Risk Manager was tasked with an enormous responsibility for creating an emergency response program and the subsequent training for the entire MWRD. Although the Risk Manager obtained input from other MWRD personnel, the Risk Manager was ultimately responsible for the creation, implementation, and continued monitoring of the emergency response plans. We recommended that the MWRD consider the assignment of additional staff to support the Risk Manager in fulfilling these responsibilities. Such additional support could be dedicated to training, monitoring, and unifying the numerous plant specific emergency response plans discussed above.
7. Our review revealed that the MWRD does not conduct formal New Employee Orientation training related to its emergency response program. This training is a provision contained in the MWRD's emergency response plans. We recommended that Human Resources coordinate its efforts with the Risk Manager to formulate materials to address this issue.

8. The MWRD should consider procuring and implementing Emergency Management software. The State of Illinois, City of Chicago and Cook County government currently use emergency management software called the “WebEOC.” We were told that this is relatively inexpensive cloud-based software that enables organizations to streamline the creation and execution of practice drills and exercises, emergency response plans and subsequent updates, and real time communication internally and externally to coordinate emergency responses including requests for supplies and equipment.

On November 10, 2020, the MWRD issued a response adopting recommendations 2,3, and 5-8. Recommendations 1 and 4 remain pending.

IIG20-0074. In this case, an MWRD employee, alleged that during a retirement celebration at the MWRD she was subjected to unwelcome physical contact by another employee. Specifically, the complainant alleged that the subject employee gave her an unsolicited “bear-hug” and a kiss on her cheek at the event. These allegations raise the possibility that the subject employee engaged in sexual harassment.

During the investigation, we found that the witness recollections varied to some degree. The complainant recalled a hug and kiss at the dessert table while another witness recalled a hug and kiss taking place at the elevator. For her part, the subject employee did not recall hugging the complainant, but allows it could have occurred in accordance with her cultural traditions but denies kissing anyone. Therefore, the preponderance of the evidence establishes that the subject employee initiated physical contact that, at a minimum, involved a hug with the complainant and others in connection with a retirement celebration taking place in a conference room of the MWRD.

The preponderance of the evidence developed by the investigation does not, however, support the conclusion that the allegation rises to the level of sexual harassment. The governing policy in this case is the MWRD Administrative Procedures Manual - Human Resources 10.5.0. (Anti-Harassment). The policy defines sexual harassment as any unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Per the policy, the phrase "working environment" is not limited to a physical location where an employee is assigned to perform his or her duties and does not require an employment relationship. The MWRD Harassment policy, 10.5.0, A (1)(e), states that sexual harassment in violation of the policy includes but is not limited to making undesired physical contact of a sexual nature (such as touching, embracing or pinching) or impeding another's movements in a deliberate manner or crowding an employee due to their sex.

Although the preponderance of evidence developed in this matter demonstrated that the conduct complained of was unwelcome, there was insufficient evidence to establish that submission to the conduct was made explicitly or implicitly to a term or condition of employment or that submission to the hug was used as a basis for employment decisions affecting the complainant. Further, the evidence did not establish that the isolated conduct was pervasive with respect to the complainant or had the purpose or effect of unreasonably interfering with complainant's work performance or creating what amounted to an intimidating, hostile, or offensive working environment.

However, the physical contact by the subject employee was unwelcome and is therefore problematic in the workplace. Courts have considered this type of conduct (hugging in the workplace), and the results represent risks for employers. The Ninth Circuit Court of Appeals has recently determined that a reasonable juror could conclude that hugging female employees, while shaking the hand of male employees, constitutes sexual harassment. *Zetwick v. County of Yolo*, No. 14-17341 (9th Cir. Feb. 23, 2017). Likewise, the Eleventh Circuit Court of Appeals has held the repeated workplace hugs by a manager of a grocery store became offensive over time and constituted sexual harassment. *Zetwick v. County of Yolo*, 208 F.3d 1290, 1293 (11th Cir. 2000). While hugging in the workplace is neither sexual nor inappropriate *per se*, it can be perceived as sexual conduct and, when taking place between employees in a hierarchal environment, can lead to employees feeling pressure to accept unwanted hugs. To be sure, the conduct in question was unwelcome. This is precisely how a hostile work environment can develop.

Although the evidence did not support a finding of sexual harassment, we recommended that the subject employee be counseled and admonished to avoid physical contact that has an unwelcome effect and could lead to a violation of the Anti-Harassment Policy. Additionally, we recommended that the subject employee receive additional training in this area.

The MWRD adopted the OIIG recommendations.

IIIG19-0281. The OIIG received a complaint alleging that the MWRD failed to appropriately accept settlement funds from a design consultant after the MWRD discovered defects in the work resulting in total replacement. This allegation raised the possibility of employee negligence.

According to MWRD records, on April 1, 2015, a senior civil engineer from the MWRD sent the contractor an email stating that the "the upper cross hatch replacement at the Upper Des Plaines Control Structures has cracked, spalled and generally deteriorated." The senior civil engineer stated that "the Contractor was required under the contract to inspect their workmanship and perform any corrective actions necessary and/or repair all defects in the work that are found." On April 14, 2015, the contractor responded that they performed the work "in accordance with the contract documents" and that the cracks are "design related and as such not covered under the Contractor's Guarantee." On May 28, 2015, an Assistant Director of Engineering asked the Contractor for a quote to repair the structures and, on June 29, 2015, the Contractor provided an estimate of \$149,400.55 to repair the work. The Director of Engineering advised the Contractor

that she approved the proposal to do the work. On July 23, 2015, the Director of Engineering “Director” sent a letter to the President for the Design Consultant stating that “the upper waterstop placement does not provide concrete coverage in all directions, as required per the manufacturer’s specifications. . . which led to cracked and spalled concrete.” The letter, which had been signed and initialed by the Managing Civil Engineer, further stated that she believed the Design Consultant’s errors and omissions policy would cover this error and that the MWRD was prepared to make a claim, but that the MWRD would accept a settlement to resolve the matter. The Board approved the change order in the amount of \$149,400.55 on August 6, 2015. In the transmittal letter for the agenda item, the Director said that “the design had been revised to prevent further damage” and that “the change order is in compliance with the Illinois Criminal Code since the changes if due to the circumstances not reasonably foreseeable at the time the contract was signed.” On August 27, 2015, the President for the Design Consultant sent a letter to the Director stating that the Consultant believed this was not a design error, but the result of “an unforeseen outcome that [the Consultant], an experienced contractor, and the District had not experienced in the past.” The Design Consultant further stated that notwithstanding their belief and “[b]ecause [they] value the relationship [they] have with the District,” they offered to resolve the matter for \$65,000 and further apprised the District that the total amount to repair the cracking “is below [Consultant’s] deductible for [their] Professional Liability Insurance.” The file did not reveal any additional correspondence following the Design Consultant’s settlement offer.

According to the Managing Civil Engineer, the MWRD Project Manager prepared a draft letter accepting the settlement offer which never was issued. The Managing Civil Engineer could not recall if he spoke to the MWRD Director directly, but later learned that she decided not to pursue the settlement. He recalled the Director stating that MWRD also makes mistakes, the percentage of changes was very low (less than 5%, the industry standard) and, as such, would be considered a good project. The Managing Civil Engineer said that the Legal Department is not typically involved in change orders or reimbursements. His department only consults the Legal Department if litigation seems likely.

According to the Project Manager, no one told him why MWRD was not going to collect the settlement and he was embarrassed that MWRD did not follow through with it. The Design Consultant’s President contacted the Project Manager months later and thanked him for not pursuing the claim as the Design Consultant’s insurance policy deductible had been high enough that the Consultant would have had to pay the settlement out of pocket.

According to the Design Consultant President, the error was “almost like an unforeseen condition and I wasn’t sure we should pay for anything but because the MWRD was such a good client over the years I offered 50%.” The Design Consultant President believed that the Design Consultant had used this particular waterstop technology before and since this particular project. The Design Consultant President also said that no one from the Design Consultant was on site during the waterstop installation to verify whether installation was according to design because the seal was under concrete and not visible. The Design Consultant President further opined that clients sometimes want to pass every bit of risk to the Design Consultant which is unreasonable given that clients benefit from the project for years to come in comparison to the Design

Consultant's small project fee. The Design Consultant President said that he advises clients that mistakes and unforeseen circumstances do happen and that while 3-5% in change orders is an industry standard, the Design Consultant averages far lower - approximately 1%

The evidence developed in the investigation failed to support a finding of employee negligence. Local, State and Federal agencies may provide contract contingencies on design and construction contracts and typically implement rules and a process determining risk allocation. For example, Section 36.608 of the Federal Acquisition Regulation, "Liability for Government costs resulting from design errors or deficiencies" provides:

Architect-engineer contractors shall be responsible for the professional quality, technical accuracy, and coordination of all services required under their contracts. A firm may be liable for Government costs resulting from error and deficiencies in designs furnished under its contract.

The underlying concerns associated with the design in question do not appear to be real when considering the waterstop manufacturer's representations concerning application and installation of the product. However, notwithstanding, this investigation revealed that the MWRD may assume the risk and bear all of the costs for design contracts on the premise that errors are acceptable as long as the overages fall within the 5% industry standard for change orders. This view has developed in apparent disregard of the nature of the design condition itself.

Additionally, the evidence also revealed the determination to seek reimbursement from the Design Consultant was handled entirely by the engineers in the Design Department without input from the Legal Department or the Director of Procurement and Materials Management. This practice does not comport with standard government processes as technical personnel should not be drafting demand letters, assessing legal culpability or engaging in settlement discussions without legal or procurement support. Again, Section 36.608 of the Federal Acquisition Regulation states:

[W]hen a modification to a construction contract is required because of an error or deficiency in the services provided under an architect-engineer contract, the contracting officer (with the advice of technical personnel and legal counsel) shall consider the extent to which the architect-engineer contractor may be reasonably liable.

Although the allegation was not sustained, we make the following recommendations:

1. The MWRD should establish a policy setting forth criteria to be considered when reviewing change orders and that such criteria and justification should be documented and also approved by the Director of Procurement and Materials Management. As referenced above, we do not believe that the suggested criteria adopt a "no fault" baseline of 5% before when considering error or omission;

2. The MWRD should adopt a procedure incorporating Procurement and/or the Law Department when assessing legal culpability, engaging in settlement discussions or preparing demand letters. In accordance with this recommendation, MWRD should create a minimum errors and omissions threshold and process for dispute resolutions. (*See, e.g.,* 8-4 of Bureau of Design and Environment Manual, Illinois Department of Transportation.)

The MWRD rejected the first recommendation and adopted the second recommendation.

Conclusion

Thank you for your time and consideration to these issues. Should you have any questions or wish to discuss this report further, please do not hesitate to contact me.

Very truly yours,



Patrick M. Blanchard
Independent Inspector General

cc: Mr. Brian Perkovich, Executive Director
Ms. Susan T. Morakalis, General Counsel