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**The Inspector General
of the Air Force**

Report of Investigation (S8080P)

Maj Gen Edward W. Tonini

January 2015

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REPORT OF INVESTIGATION (Case S8080P)

CONCERNING

MAJOR GENERAL EDWARD W. TONINI

PREPARED BY

January 2015

I. INTRODUCTION

This investigation was directed in response to a complaint filed by [REDACTED] [REDACTED] Kentucky National Guard (KYNG), Joint Force Headquarters (JFHQ), Boone Center, Frankfort, KY, to the Department of the Army Inspector General (DAIG) and forwarded to the Secretary of the Air Force Inspector General (SAF/IGS) for action. (Ex 1) The complainant alleged five separate issues of improper conduct on the part of Maj Gen Edward W. Tonini, The Adjutant General (TAG), KYNG, JFHQ, Boone Center, Frankfort, KY: 1) Failed to hold Selective Retention Boards, 2) Failed to hold Active Service Management Boards, 3) Misuse of government resources, 4) Solicitation of unauthorized gifts, and 5) Acceptance of unauthorized gifts. (Ex 1) The complaint analysis dismissed the first two issues and the last three issues were forwarded to investigation. (Ex 2)

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The complainant, six witnesses and the subject were interviewed between 16 Jun 14 and 3 Dec 14. The testimony of all witnesses closely matched each other.

At no time prior to or during the subject interview did the IO suspect that Maj Gen Tonini committed an offense under the UCMJ. Therefore, the IO treated Maj Gen Tonini as a subject, not a suspect, and he was not provided a rights advisement.

II. SCOPE AND AUTHORITY

The Secretary of the Air Force has sole responsibility for the function of The Inspector General of the Air Force.¹ When directed by the Secretary of the Air Force or the Chief of Staff of the Air Force, The Inspector General has the authority to inquire into and report on the discipline, efficiency, and economy of the Air Force and perform any other duties prescribed by the Secretary or the Chief of Staff.² The Inspector General must cooperate fully with The Inspector General of the Department of Defense.³ Pursuant to Air Force Instruction (AFI) 90-301, *Inspector General Complaints Resolution*, 23 Aug 11 (Incorporating Change 1, 6 Jun 12),

¹ Title 10, United States Code, Section 8014

² These authorities are outlined in Title 10, United States Code, Section 8020

³ Title 10, United States Code, Section 8020(d)

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paragraph 1.13.4, The Inspector General has oversight authority over all IG investigations conducted at the level of the Secretary of the Air Force. (Ex 8:2)

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Pursuant to AFI 90-301, paragraph 1.13.3.1, the Director, Senior Official Inquiries Directorate (SAF/IGS), is responsible for performing special investigations directed by the Secretary, the Chief of Staff, or The Inspector General and all investigations of senior officials. AFI 90-301 defines senior official as any active or retired Regular Air Force, Air Force Reserve, or Air National Guard military officer in grades O-7 (brigadier general) select and above, and Air National Guard Colonels with a Certificate of Eligibility (COE). Current or former members of the Senior Executive Service (SES) or equivalent and current and former Air Force civilian Presidential appointees are also considered senior officials. (Ex 8:2)

One of several missions of The Inspector General of the Air Force is to maintain a credible inspector general system by ensuring the existence of responsive complaint investigations characterized by objectivity, integrity, and impartiality. The Inspector General ensures the concerns of all complainants and subjects, along with the best interests of the Air Force, are addressed through objective fact-finding.

On 19 Aug 14, The Inspector General approved a recommendation that SAF/IGS conduct an investigation into an allegation of misconduct by Maj Gen Edward W. Tonini, TAG, KYNG, JFHQ, Boone Center, Frankfurt, KY. The case was assigned to [REDACTED] who holds a SAF/IG appointment letter dated 20 Aug 14. On 22 Sep 14, as a result of information gathered in the investigation phase the allegations were slightly modified to include the timeframe Maj Gen Tonini was TAG, and to capture the scope of the standard. (Ex 3)

III. BACKGROUND

Maj Gen Tonini, a federally recognized US Air Force general officer, serves at the direction of the Governor of Kentucky and was appointed to the cabinet rank position of Department of Military Affairs and TAG in the KYNG on 11 Dec 07; he remains in those positions to present. Maj Gen Tonini is responsible for approximately 8,500 National Guard Soldiers and Airmen throughout the Commonwealth of Kentucky and as the TAG is responsible for federal and state missions of the Kentucky Guard. (Ex 4:1-3)

In Maj Gen Tonini's tenure as TAG, he has had four individuals serve as his [REDACTED] from Dec 2008 to Dec 2010. (Ex

⁴ The witnesses and subject used the terms [REDACTED] interchangeably, however, the official duty title was Executive Officer for The Adjutant General. The [REDACTED] duties as listed on their OERs were "Prepares and organizes schedules, activities, calendar events, trip itineraries, and the day-to-day activities of the Adjutant General. Supervises and orchestrates the day-to-day activities and duties of his office staff. Coordinates and plans activities with the SGS Office. Represents the Adjutant General in interaction with Local,

26:2-3) [REDACTED] from Nov 2010 to the spring of 2012. (Ex 22:2)
[REDACTED] from Feb 2012 to Jan 2014. (Ex 21:2) [REDACTED]
[REDACTED] for Maj Gen Tonini's entire term as TAG. (Ex
24:2) [REDACTED] to Maj
Gen Tonini from 11 Dec 07 through [REDACTED].
(Ex 28:1-2)

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Department of Defense (DOD) 5500.07-R, *The Joint Ethics Regulation (JER)*, is the single source of standards for ethical conduct and ethics guidance within the DOD. (Ex 10:2) The regulation applies to all DOD employees, regardless of civilian or military grade. (Ex 10:3-4) "DOD employee" is defined to include any National Guard (NG) member on active duty under Title 10 (United States Code) orders, any NG member while performing official duties or functions under Title 10 or Title 32, and any NG member while engaged in any activity related to the performance of their Title 10 or Title 32 duties or functions, including any time the member uses NG U.S. "title or position, or any authority derived therefrom." (Ex 10:4) The JER incorporates 5 CFR part 2635, *Standards for Ethical Conduct for Employees of the Executive Branch*, and (with limited exceptions) requires DoD employees to comply with its provisions. (Ex 10:5)

IV. ALLEGATIONS, FINDINGS, STANDARDS, ANALYSIS AND CONCLUSIONS

ALLEGATION 1. That on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard misused his subordinate's official time in violation of 5 CFR 2635.705(b).

FINDINGS OF FACT.

- [REDACTED] KYNG TAG, (26:3) occasionally drove Maj Gen Tonini domicile to duty between Dec 2008 and Dec 2010. (Ex 26:5) [REDACTED] was an AGR in title 32 status when [REDACTED]
- [REDACTED] KYNG TAG, occasionally drove Maj Gen Tonini domicile to duty between Nov 2009 and the spring of 2012. (Ex 22:2) [REDACTED] was an AGR in title 32 status when [REDACTED] (22:3)

State and Federal Government agencies at all levels. Provides all information technology support functions for the General and his staff to include desktop computer support, mobile communications device support, and user account changes. Responsible for processing drill pay, GO man-day management, travel voucher submittal, and travel card payment. Drafts correspondence for routine communications from the Adjutant General." (Ex 32)

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- [REDACTED] KYNG TAG, routinely drove Maj Gen Tonini domicile to duty between Feb 2012 and Jan 2014. (Ex 27:2-5) [REDACTED] first AGR job was as [REDACTED] to Maj Gen Tonini. (21:2)
- [REDACTED] believed that [REDACTED] Maj Gen Tonini to various events or functions was part of their official duties or done at his direction/expectation. (22:4; 26:3; 27:3)
- [REDACTED] picked up Maj Gen Tonini's lunch on an almost daily basis and occasionally made salads for the front office between Dec 2008 and Dec 2010. (Ex 26:6)
- [REDACTED] did not make lunch for Maj Gen Tonini but he did pick up lunch for Maj Gen Tonini "at least a couple times a week" between Nov 2010 and the spring of 2012. (Ex 22:5-6)
- [REDACTED] made lunch or picked up Maj Gen Tonini's lunch on an almost daily basis between Feb 2012 and Jan 2014. (Ex 21:6-7)
- [REDACTED] "fixed"⁵ Maj Gen Tonini's personal desktop computer approximately "a dozen times" both on duty time and on his personal time and assisted [REDACTED] with her personal computer "maybe three or four times, six tops" and her printer. (Ex 22:7-8)
- Between 2013 and 2014, [REDACTED] assisted Maj Gen Tonini with installation of Windows updates, security updates and software on Maj Gen Tonini's personal laptop computer during duty time, and assisted Maj Gen Tonini with his personal laptop during [REDACTED] lunch time. Assisting Maj Gen Tonini with his personal laptop was not part of [REDACTED] official duties as an AGR member in title 32 status. (Ex 34)

STANDARDS.

The portion of the Code of Federal Regulations pertaining to the ethical conduct of Executive Branch employees is applicable. The pertinent parts are below:

5 CFR 2635.705 *Use of official time.*

(b) *Use of a subordinate's time.* An employee shall not encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.

[REDACTED] used the term "fixed" to include providing advice or helping upload new or updated computer programs.

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Example 1: An employee of the Department of Housing and Urban Development may not ask his secretary to type his personal correspondence during duty hours. Further, directing or coercing a subordinate to perform such activities during nonduty hours constitutes an improper use of public office for private gain in violation of 2635.702(a). Where the arrangement is entirely voluntary and appropriate compensation is paid, the secretary may type the correspondence at home on her own time. Where the compensation is not adequate, however, the arrangement would involve a gift to the superior in violation of the standards in subpart C of this part. (Ex 9:9)

5 CFR §2635.302 *General standards*

(b) *Gifts from employees receiving less pay.* Except as provided in this subpart, an employee may not, directly or indirectly, accept a gift from an employee receiving less pay than himself unless:

- (1) The two employees are not in a subordinate-official superior relationship; and
- (2) There is a personal relationship between the two employees that would justify the gift.

(c) *Limitation on use of exceptions.* Notwithstanding any exception provided in this subpart, an official superior shall not coerce the offering of a gift from a subordinate.

5 CFR §2635.304 *Exceptions*

The prohibitions set forth in §2635.302(a) and (b) do not apply to a gift given or accepted under the circumstances described in paragraph (a) or (b) of this section. A contribution or the solicitation of a contribution that would otherwise violate the prohibitions set forth in §2635.302(a) and (b) may only be made in accordance with paragraph (c) of this section.

(a) *General exceptions.* On an occasional basis, including any occasion on which gifts are traditionally given or exchanged, the following may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) Items, other than cash, with an aggregate market value of \$10 or less per occasion;

(2) Items such as food and refreshments to be shared in the office among several employees;

...

(b) *Special, infrequent occasions.* A gift appropriate to the occasion may be given to an official superior or accepted from a subordinate or other employee receiving less pay:

(1) In recognition of infrequently occurring occasions of personal significance such as marriage, illness, or the birth or adoption of a child; or

(2) Upon occasions that terminate a subordinate-official superior relationship, such as retirement, resignation, or transfer.

5 CFR §2635.203 *Definitions*

(b) *Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. It does not include:

(1) Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;

(2) Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation;

(c) *Market value* means the retail cost the employee would incur to purchase the gift. An employee who cannot ascertain the market value of a gift may estimate its market value by reference to the retail cost of similar items of like quality. The market value of a gift of a ticket entitling the holder to food, refreshments, entertainment, or any other benefit shall be the face value of the ticket.

...

Example 2: A prohibited source has offered an employee a ticket to a charitable event consisting of a cocktail reception to be followed by an evening of chamber music. Even though the food, refreshments, and entertainment provided at the event may be worth only \$20, the market value of the ticket is its \$250 face value.

(d) *Official superior* means any other employee, other than the President and the Vice President, including but not limited to an immediate supervisor, whose official responsibilities include directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee. For purposes of this subpart, an employee is considered to be the subordinate of any of his official superiors.

...

(f) A gift which is solicited or accepted indirectly includes a gift:

(1) Given with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative because of that person's relationship to the employee. (Ex 9:3-5)

ANALYSIS.

When a member of the Air National Guard performs duty in a Title 10 or Title 32 status or "uses his DoD position/title or any authority derived therefrom," the member is considered a DOD employee for purposes of the JER. (Ex 10:3-4) While this investigation was ongoing, on 5 Dec 2014, the DoD Standards of Conduct Office (SOCO) issued guidance (SOCO Advisory 14-03) explaining the applicability of the JER to Guard and Reserve personnel. (Ex 31) The Advisory stated that the "JER also applies where a member of the National Guard or Reserve not in title 10 or 32 status takes an affirmative action to use his or her DoD title, position or authority." Illustrative examples included:

- At the request of the National Guard Bureau, The Adjutant General (TAG) of a state travels on title 32 military orders to Washington, DC, to attend a 2-day senior leader conference. ... Following the conference and expiration of those orders, he remains in Washington on travel orders issued by his state, ... to visit with his Congressional Delegation and industry representatives regarding National Guard matters of importance to his state. Where a TAG wears civilian clothes and is the only National Guard member in attendance. During a dinner, a prohibited source pays for TAG's meal, valued at \$50. Under these facts, the JER does not apply to TAG. He is not in either title 10 or title 32 status, and he has not taken an affirmative action to use his DoD title, position or authority.
- A traditional (drilling) member of the Reserves has returned from a deployment and has been demobilized. He has been selected by a non-federal entity to receive an award for work he did in that prior Federal status. He decides to wear his Federal uniform to accept the award (which he is permitted to do) even though he will not be in a title 10 or title 32 status. While at the ceremony he solicits contributions to benefit his unit's informal fund. Under these facts, the JER applies to him. Although he was not in a title 10 or title 32 status, by wearing his Federal uniform while soliciting funds he is taking an affirmative act using the authority of his official position. (Ex 31)

Additionally, DOD/IG has indicated that TAGs are generally considered DOD employees for JER purposes, because they are federally recognized and maintain this underlying federal status, regardless of the status in which they may perform duties on any given day. (Ex 5)

Generally, Federal Government resources, including personnel, shall be used by DOD employees for only official use and authorized purposes. (Ex 10:6-8) JER paragraph 2-100 incorporates the provisions of 5 C.F.R. Part 2635 ("Standards of Ethical Conduct for Employees of the Executive") into the JER. Because National Guard members in title 10 or title 32 status are included in the definition of DoD employees in the JER, the JER applies to National Guard members who are in either title 10 or title 32 duty status or uses their "DoD position/title or any authority derived therefrom." 5 CFR § 2635.705 (b) addresses a federal employee's use their subordinate's official time. Specifically, 5 CFR §2635.705(b) states, "An employee shall not

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encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties or authorized in accordance with law or regulation.” (Ex 9:9) 5 CFR §2635.705(b) lists as one example of the improper use of a subordinate’s time when an employee asks his secretary to type his personal correspondence during duty hours. (Ex 9:9)

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When asked to provide examples of personal errands accomplished by Maj Gen Tonini’s Execs, [REDACTED] testified with regard to [REDACTED]

Oh, it’s uh, whether it’s to pick up laundry, whether it’s to pick up gifts, whether it’s to drop by the house, uh, she didn’t give me all of the details, but it was very well known that she just would run all of his personal errands for him. (Ex 20:7)

With regard to [REDACTED] testified:

He required [REDACTED] who had some computer skills, to work on their personal computers. In fact, he would have, bring in, I think, [REDACTED] iPad or laptop or whatever and they would take it into the J6 Shop or IT Shop, and have them work on them. (Ex 20:8)

With regard to [REDACTED] testified:

[On [REDACTED] weekends he [Maj Gen Tonini] would call him up and say, hey, look I want to go into the office for no purpose whatsoever and just have him drive him into the office and ... [REDACTED] [would] have to wait around for several hours while he would surf the internet and then go home, and have to drive him back home. (Ex 20:8-9) [REDACTED] would, he would complain about the fact that the TAG would get on him about keeping the car gassed up and he’d texted him once while he was TDY saying ‘unacceptable.’ And [REDACTED] was called in and said, ‘Sir, what’s going on?’ He says, ‘There’s bugs on my windshield.’ He said, ‘This is absolutely unacceptable.’ So uh, it was part of the [REDACTED] job is to keep the gas, the car clean, the uh, bugs off the windshield and keep it gassed up and we’re talking about a Field Grade Officer. (Ex 20:11) Gen Tonini is the current President of the Adjutant General’s Association of the United States. Uh, he had [REDACTED] un, write all the letters to these um, to all the other Adjutant Generals in all the other States, when he was trying to run for that office. And of course, he would use, that’s the thing is, he would use his Aide de Camp for all kinds of what was strictly AGA-US business. And so, [REDACTED] was constantly writing papers, he was doing research, uh, he was uh, doing all kinds of work and it was all for the AGA-US, it wasn’t for any official business. (Ex 20:11) But Tonini would have the, the frequent practice of directing his Aide to, to tip whenever, whoever’s handling baggage or a cab or whatever, and he would never reimburse him. He would direct his subordinates, you tip that person, and they would pull money out of their own pockets and, and, and tip, and Gen Tonini would never reimburse him. (Ex 20:14)

When interviewed in the complaint analysis portion of this investigation, [REDACTED] added examples of personal errands performed for TAG to include making lunch or picking up Maj Gen Tonini's lunch on an almost daily basis (Ex 21:6-7), and that [REDACTED] donated for a NGAUS event on behalf of Maj Gen Tonini. (Ex 21:12-13) During the time frame of the allegation, Maj Gen Tonini testified that [REDACTED] were in full-time Active Guard Reserve (AGR), title 32 status. (Ex 29:3) Additionally, [REDACTED] continued in full-time AGR status after leaving [REDACTED] position. (Ex 34)

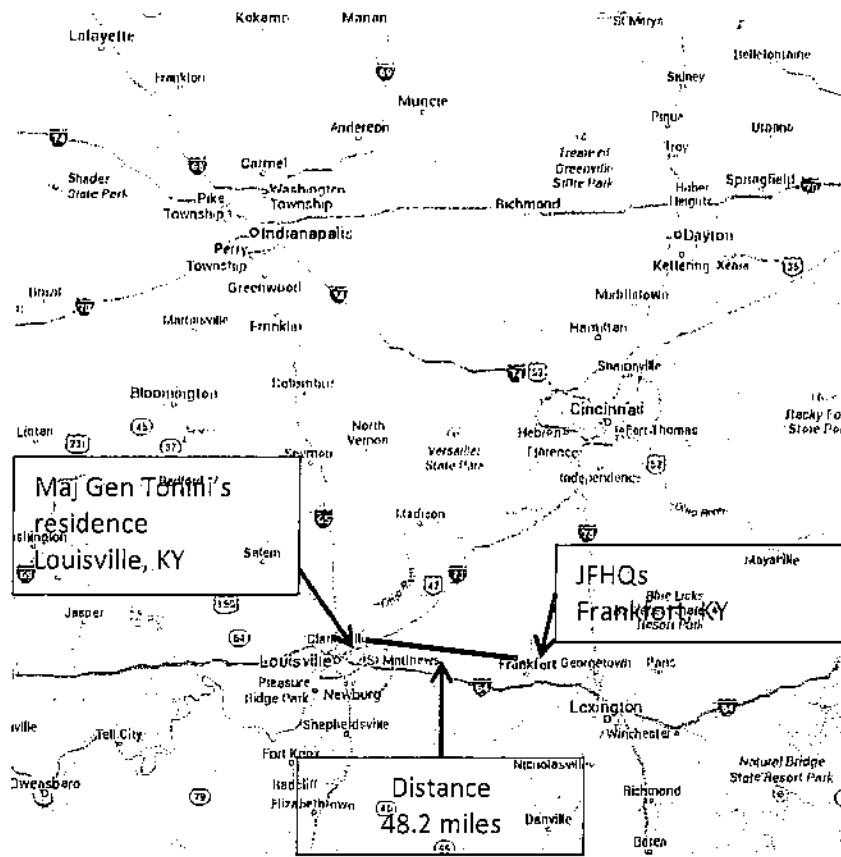
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Collectively the instances of Maj Gen Tonini allegedly having misused his subordinates' official time that will be analyzed below include: 1) Driving Maj Gen Tonini from his residence to his work site; 2) Picking up gifts for Maj Gen Tonini; 3) Making/picking up Maj Gen Tonini's lunch; 4) Repairing Maj Gen Tonini's and his wife's personal computers; 5) Picking up Maj Gen Tonini's laundry; 6) Maintaining Maj Gen Tonini's state vehicle; 7) Drafting non-official correspondence for Maj Gen Tonini; and 8) Tipping support personnel for Maj Gen Tonini.

1) Driving Maj Gen Tonini from his residence to his work site.

Maj Gen Tonini lives in Louisville, KY. (Ex 29:4) His primary duty location is the KYNG Joint Forces Headquarters (JFHQ) located at the Boone Center in Frankfort, KY. (Ex 4:2) Maj Gen Tonini also utilizes facilities at the 123 AW in Louisville, KY, as an alternate work location. As a cabinet-level official, the State of KY assigned Maj Gen Tonini a Chevrolet Sport Utility Vehicle for daily use. Maj Gen Tonini uses it to travel between his Louisville residence and the JFHQ, Frankfort, KY, a distance of approximately 50 miles one way. (Ex 29:3) The IO provides the following Google map as a generic reference of the distance from Maj Gen Tonini's residence in Louisville to his primary work location in Frankfort, KY. The IO determined that, based on testimony by numerous witnesses, to include Maj Gen Tonini, that Maj Gen Tonini used his state-provided vehicle as his primary mode of travel when performing his duties. (Ex 29:6)

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██████████ recalled one time that ██████████ drove Maj Gen Tonini to a college football game, which was most likely not official business for the National Guard because Maj Gen Tonini was not in uniform nor was ██████████ did not attend the event. ██████████ testified:

██████████ Okay. And then, um, but I do recall one time, at least one time, that I drove him to the UK football game and he was in civilian clothes. And so I don't, uh, don't remember what status, um, he wasn't in military status at the time.

IO: Was he performing TAG duties?

██████████ I, I don't, uh, I didn't have an agenda for that. I just had, uh, and I, I can't remember who he was with if, if, you know, if he was with a, a group that, uh, so I, I can't, uh, recall that.

IO: Okay. Do you have any idea when that game might have been?

██████████ No, I do not. Um, I can't remember if it was the first year or the second. Um. Okay.

IO: And were you in uniform?

██████████ No, no. What I did is I dropped him off at the game and then I went to, um, a local Starbucks or something and worked and then, uh, picked him up. (Ex 26:5)

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As noted earlier, ██████████ was Maj Gen Tonini's ██████████

Maj Gen Tonini testified that he did, on occasion, attend a University of Kentucky football game not in his uniform when he had no official role to perform there. However, Maj Gen Tonini denied that he was ever driven to any non-official football games by ██████████ (Ex 29:7)

██████████ testified that ██████████ occasionally drive Maj Gen Tonini from Maj Gen Tonini's home to work:

I live in Georgetown, Kentucky which is about an hour from Louisville ... there was no expectation for me to go to his house on a daily basis to pick him up.... So if we had an event or a meeting in Louisville or somewhere close to Louisville, typically I would drive into Louisville, park my vehicle at his house and we would leave in his vehicle from there to go to the meeting. That would be a typical time when I would drive him from his home to a place of work. Either that being the Air Guard Base in Louisville or maybe in downtown Louisville for a meeting with somebody.... There were probably times when it was once or twice weekly and then there was other times where maybe it was two or three times a month tops, a couple times a month. (Ex 22:4)

██████████ testified that if ██████████ questioned the official status of events that he was supposed to drive Maj Gen Tonini to, he would ask Maj Gen Tonini for guidance:

But there was, you know, multiple times, um, on a weekly basis when I'd see something on his calendar and go, you know, I'd just, hey, sir. Is this something that you're planning on me taking you to? Because at first glance I wouldn't know if it was military thing or a personal thing or a, um, you know, just something like that. Uh, like, I guess it was a **Christmas dinner at UK or at U of L or, um, and the president invited him.** Um, you know, the, just things like that I'd be, uh, hey, sir. Is this something that you're planning on me taking you to? Um, cuz I'm not clear. Or a function at BLAK, **the Brain Injury Alliance of Kentucky**, um, would give him a table at their **annual Brain Ball.** And I would just ask him, hey, sir. Is this something that, that you plan on me taking you to or, um, **because I don't think you're speaking at it and you don't really have an official role there.** But they did donate you a table. Um, but, you know, every, you know, **every one of those times I would end up taking him.** (Ex 27:5) (emphasis added)

[REDACTED] testified that on occasion he drove Maj Gen Tonini to events at the Governor's mansion. (Ex 27:3) On a few occasions [REDACTED] drove both Maj Gen Tonini and his wife to events that [REDACTED] questioned if they were of an official nature:

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Uh, yeah there was a lot of, um, but, you know, since he's also a state employee because again, it's just hard to differentiate, you know, if he's having, um, if he's going to dinner with the president of UK, of the University of Kentucky or the president of UK is having a Christmas Social, um, you know, I would take him to that every year. Uh, I would take him and [REDACTED] both years I was there I did that. (Ex 21:7)

Maj Gen Tonini testified that he has been driven to official events at the Governor's mansion and sometimes [REDACTED] could attend the function/event and sometimes they were not allowed to do so, depending on the level/type of event. (Ex 29:9) Maj Gen Tonini referenced a policy governing the TAG's attendance at events where alcohol was served:

Again, that's, it's all situational. However, what we have, from the very get go and it's been that this has been the case for as long as I know of in terms of TAG's, there has been established criteria that **if there is consumption of alcohol at these social events, that the TAG and if in fact the spouse is included, that the TAG will not drive after having consumed alcohol; and the aide or the Exec is more often than not, although not always, the person that filled that position.** (Ex 29:10) (emphasis added)

When asked for a reference as to where the IO could find this policy Maj Gen Tonini responded:

I guess policy, because policy has to be written and it may not be. Or it might, maybe. I'm not even certain whether it's in writing or not, but from day one when I came in, it was explained to me that that was the standard and we have not deviated from that. (Ex 29:10)

When confronted with the option that Maj Gen Tonini could have elected to not consume any alcohol at specific events, thereby not requiring [REDACTED] to drive him to non-official events just to abide with what Maj Gen Tonini considered as policy, Maj Gen Tonini responded:

[Y]ou need to understand that you're talking about the Commonwealth of Kentucky, where our signature product is bourbon and ... consumption of alcohol amongst peers is something that is pretty standard practice. And ... I have absolutely partaken of that on a regular basis and I've never, I never drink in excess, but even if I've had one, that rules applies. (Ex 29:11)

[REDACTED] testified that she has never driven Maj Gen Tonini anywhere. (Ex 24:6)

██████████ testified ██████████ only drove Maj Gen Tonini from his residence to work on one occasion and it was convenient because Maj Gen Tonini lived on the route ██████████ took to get to work:

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Sir, I picked him up one time, I remember I picked him up in my vehicle um, I, I guess the car, I guess the car that they have for the Adjutant Generals that he drives back and forth wasn't working, it was in repair, it needed repair or something but I picked him up in my vehicle and brought him to work. That's the only instance. One time.... I actually live further away and then **I drive right by where they live to get to work so it, it was really not out of my way at all.** (Ex 28:3) (emphasis added)

Maj Gen Tonini testified that he believes it is economical and common sense for him and ██████████ to drive together from his house:

When we have official functions that require the use of the vehicle during the day, it's more efficient to carpool to the events that we both will be attending; so typically if we're using it to go to somewhere in Kentucky or wherever during the day, it's the standard for the ██████████ to come to my house in the morning, pick me up and then to go back at the end of the day, so that they won't have to drive that same fifty, sixty miles. And it's a more efficient use of everyone's time.... And again, you have to look at the reasonableness of this. My current ██████████ for instance, lives about two miles from me and if we are using the car during the course of the day, it makes much more sense for him to drive two miles and then use the State vehicle to go to whatever our official business is than to come back and to drive two miles home for him. And in many cases, we don't go to the office, we originate from here and go the other place. So it's just a much more, it's much more, it's much better use of time and it's certainly the right thing to do in terms of conserving fuel and everything else. (Ex 29:4)

However, ██████████ testified that having ██████████ drive Maj Gen Tonini to events was Maj Gen Tonini's expectation, and that picking up Maj Gen Tonini from his house was not more convenient because ██████████ lived approximately 30 minutes away from Maj Gen Tonini's residence. (21:3)

The IO found guidance from the Office of Government Ethics (OGE) helpful in determining whether AGR personnel could be used to drive Maj Gen Tonini from his home to his place of work.⁶ In an informal advisory letter dated 12 July 1985, the US Office of Government Ethics (OGE) issued guidance on misuse of government property, including government vehicles: "When Congress provided that appropriated funds may be expended for motor vehicles used only for an official purpose, it stated that **an official purpose**, except for

⁶ The IO did not find any standard or law violated as to Maj Gen Tonini using the state-provided vehicle for domicile to duty transportation. The issue the IO focused on is whether Maj Gen Tonini could use federally-funded AGR personnel (federally-provided resources) to drive him from domicile to duty.

persons holding very specific positions, **did not include transporting employees between their domiciles and places of work.**” (emphasis added) Therefore, absent those exceptions, no appropriated funds can be used for such transportation. (Ex 11)

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31 U.S.C. Section 1344 states, “funds available to a Federal agency, by appropriation or otherwise may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes. Notwithstanding any other provision of law, **transporting any individual other than the individuals listed** in subsections (b) and (c) of this section **between such individual's residence and such individual's place of employment is not transportation for an official purpose.** (Ex 18, emphasis added) AFI 24-301, *Vehicle Operations*, paragraph 3.44 states the SECAF must approve all domicile-to-duty authorizations. (Ex 16:3-4) TAGs are not listed as being authorized federally-funded domicile-to-duty transportation nor did SECAF authorize Maj Gen Tonini federally-funded domicile-to-duty transportation. (Ex 18; 29:6) Therefore, Execs in AGR title 32 status being used as drivers to provide domicile-to-duty transportation for Maj Gen Tonini would not be considered an official purpose or official duty.

Aside from the issue of “domicile-to-duty” transportation, OGE in its letter gave further guidance on the meaning of “official purposes” for government transportation (and therefore, corresponding use of personnel for transportation to such events). Referencing certain events in the Washington area, OGE stated **some popular kinds of events should not be considered official for the purpose of using any Government-supplied personnel, equipment or facilities.** These events include:

- (1) **Events that are purely social** and the invitation is extended on that basis, regardless of whether the invitation was sent to an employee's home or office, or whether or not his or her official title was used on the address, and **regardless of whether the individual voluntarily talked “business” with another guest at the event;**
- (2) Purely political events, including political fundraisers or party meetings;
- (3) Events to which people are invited because of such things as their ethnic, home state, religious or educational background and not to carry out a function of their agency; and
- (4) **A private or non-profit fundraiser of any kind.** (Ex 11)

While the vehicle used for this domicile-to-duty transportation was not a federal asset, all [REDACTED] were in a full-time AGR federally-funded position. Maj Gen Tonini was not specifically approved by SECAF for federally-funded, domicile-to-duty transport IAW AFI 24-301. (Ex 16:5; Ex 29:6) However, the IO found Maj Gen Tonini directed [REDACTED] drive him from domicile-to-duty as well as to a UK football game (where Maj Gen Tonini was not in uniform, and then [REDACTED] drove him to the event that [REDACTED] did not attend but waited at

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Starbucks for a call from Maj Gen Tonini requesting to be picked up), social events at the Governor's mansion, and the annual Brain Injury Alliance of Kentucky "Brain" Ball (charitable event/fundraiser).

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The IO determined these events were not official events because they were either social events or private or non-profit fundraisers, which are not considered official for purposes of using any Government-supplied personnel.⁷ (Ex 11) The IO determined Maj Gen Tonini, acting in his official position as TAG, took affirmative actions by expecting/directing [REDACTED] to drive him from his home to his place of duty as well as to unofficial events. Therefore, the IO found the JER and in turn 5 CFR 2635 applied.

The IO concluded that [REDACTED] time used to drive Maj Gen Tonini from his home to his place of duty was official time as it was considered by Maj Gen Tonini and [REDACTED] to be part of [REDACTED] official duties; Maj Gen Tonini was not entitled to federally-government provided domicile-to-duty transportation; [REDACTED] positions were title 32 (federally-funded); driving from domicile-to-duty was a personal service not within their assigned duties nor authorized by law or regulations; therefore, Maj Gen Tonini directing [REDACTED] to drive him from his home to his place of duty was considered a misuse of [REDACTED] official time. Accordingly, Maj Gen Tonini's directions/expectation that [REDACTED] drive him domicile-to-duty would be a violation of 5 CFR 2635.705(b).

However, the IO determined [REDACTED] one-time pick up of Maj Gen Tonini from Maj Gen Tonini's house was not a violation of the JER. [REDACTED] did not go out of his way to pick up Maj Gen Tonini and did not object to providing Maj Gen Tonini a ride to work. Under these circumstances, the IO found the value of allowing Maj Gen Tonini to ride to work with [REDACTED] would have been *de minimis*; and therefore was not a violation of 5 CFR 2635.302.

2) Picking up gifts for Maj Gen Tonini.

[REDACTED] testified that [REDACTED] never picked up any gifts for Maj Gen Tonini. (Ex 26:6, Ex 22:5, Ex 24:5) However, [REDACTED] testified [REDACTED] did pick up gifts of alcohol for NGAUS events for Maj Gen Tonini during the duty day on at least two occasions:

Uh, multiple cases of bourbon, beer, um, we had a function and, uh, we were gonna have a, like, State of the Union address in DC at, um, at the National Guard, uh, at the, uh, at NGAUS, at the NGAUS Building. And, uh, Gen Tonini organized this thing to where all of the, the soldiers and airmen that are working in DC came that night. And he just kinda rallied everybody from Kentucky that was in DC working. ... And, uh, so he got [REDACTED]

⁷ See OGE informal advisory dated 12 Jul 85.

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[REDACTED] to donate a, a bunch of Kentucky-specific bourbon, alcohol and beer, um, that we took with us on the trip to DC. (Ex 27:5-6) ... I know, uh, at least one other time I went to [REDACTED] and picked up alcohol for, I think it was for a hospitality room we were having at that National Guard Association of Kentucky, our annual conference. And they donated alcohol for that and I went and picked it up. (Ex 27:11)

Maj Gen Tonini testified with regard to this instance of [REDACTED] having picked up a gift of alcohol:

I'm also aware of a singular instance where a quantity of products, in fact, it was alcohol, bourbon and beer that were products of a company by the name of [REDACTED], were picked up and although I did not, I presumed became the donation was made to the National Guard Association for a, for a charity function. I know that the aide found, again, I think it was, I believe that was [REDACTED] did that because he thought it was the best and most expeditious way to do it. I would have expected [REDACTED] of the Kentucky National Guard Association to pick that up. I don't know why he didn't, but that's what I would have expected, but I was told later on after the fact even though I didn't ask the individual to do it if they had picked up that supply of alcoholic beverage. (Ex 29:11-12)

Based on the evidence, the IO concluded that [REDACTED] did pick up alcohol donated by [REDACTED] for two NGAUS events on duty time. The IO also concluded that Maj Gen Tonini did not direct or expect [REDACTED] to pick up the alcohol, and that Maj Gen Tonini was not aware that [REDACTED] had done so until after the fact. Therefore, Maj Gen Tonini did not misuse his subordinate's official time and, therefore, Maj Gen Tonini did not violate 5 CFR 2635.705(b). Maj Gen Tonini's actions of accepting this gift of alcohol will be further reviewed in Allegation #2.

3) Making/picking up Maj Gen Tonini's lunch.

[REDACTED] testified that [REDACTED] picked up lunch for Maj Gen Tonini between [REDACTED] to [REDACTED] while [REDACTED]. Specifically, [REDACTED] testified [REDACTED] would "take care of the boss" on an almost daily basis by picking up lunch for Maj Gen Tonini. (Ex 26:6) [REDACTED] testified [REDACTED] did pick up lunch for Maj Gen Tonini, [REDACTED] (Ex 22:6) [REDACTED] testified that [REDACTED] or someone else [REDACTED] picked up lunch for Maj Gen Tonini almost every day. (Ex 21:6) However, [REDACTED] testified that [REDACTED] has never picked up lunch for Maj Gen Tonini. (Ex 24:5)

[REDACTED] testified about a "slush" fund or "kitty" maintained by Maj Gen Tonini. (Ex 26:6; 22:5; 21:7) This pot of money was used to reimburse small expenses paid by the [REDACTED] personnel on Maj Gen Tonini's behalf, including tips paid while TDY, candy purchased

for the front office and lunches picked up for Maj Gen Tonini. (Ex 27:8; 26:6) When the slush fund got low, [REDACTED] were expected to remind Maj Gen Tonini and he would place more money into this account. (Ex 21:7)

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Maj Gen Tonini described this "kitty" when he testified: "You know, in our office we have a kitty. A kitty is basically General Tonini's money and I pay for all the coffee and similar expenses in the, within the office." (Ex 29:12)

Maj Gen Tonini described the daily situation in his front office concerning the lunch routine:

Staff members frequently go out to fast food places and pick up lunch and they know that the nature of the way I've worked my entire career is that I never look up from whatever I'm doing. And if somebody doesn't pick something up for me, I simply won't have lunch. So what they do is whoever's going out, they know that I'll eat anything and they pick up whether they're going, they'll pick up a bag of, you know, a cheese sandwich or turkey sandwich or a hamburger or whatever, and it's all done in order to help one another. And it's no specific individual. But I never asked anybody anything. If people out of the goodness of their heart will sometimes pick me up stuff along with other, the same thing that they do for other people. My [REDACTED] God bless her soul, is kind of a watcher-out for my waistline and she frequently will make something at the same time she's making something for herself, that I pay for out of my kitty, and will say, 'sir you need to eat a salad' and she'll make me a salad. But once again, if nobody brings something into my office, then typically I don't, I just work through it and I never eat. So it's, I never, ever, ever force or even, I'll bet you there's not five times in seven years when I've actually asked somebody to go get something. (Ex 29:12-13)

Although Maj Gen Tonini provided means for the front office staff to pay for his lunches, Maj Gen Tonini testified he did not compensate his subordinates for performing this personal service of picking up his lunch on a regular basis. (Ex 29:14) As noted earlier, [REDACTED] were all in title 32 status at the time, Maj Gen Tonini was in his office in uniform performing his duties as the TAG, [REDACTED] were expected to pick up or make his lunch, and his [REDACTED] believed picking up/making lunch was one of their "implied" duties. (Ex 22:9) The IO concluded that Maj Gen Tonini's expectation and acceptance of [REDACTED] picking up or making his lunch for him on a regular basis was an affirmative action and Maj Gen Tonini was acting in his official position as TAG when he accepted [REDACTED] personal services. Accordingly, the IO determined that the JER, and in turn 5 CFR §2635, applied in this instance.

Based on a preponderance of the evidence, the IO found that [REDACTED] either made lunch or picked up lunch for Maj Gen Tonini during [REDACTED] personal lunchtime and did it as a convenience for Maj Gen Tonini. The IO determined picking up or making lunch was a personal task done on behalf of Maj Gen Tonini on an almost daily basis and was not within [REDACTED]

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██████████ officially assigned duties nor authorized by law or regulation. Example 1 of 5 CFR 2635.705 indicates where an arrangement between an employer and his subordinate "is entirely voluntary and appropriate compensation is paid, the [task may be done] ... on her own time. Where the compensation is not adequate, however, the arrangement would involve a gift to the superior in violation of the standards in subpart C of this part." Maj Gen Tonini did not compensate ██████████ for their personal time used to pick up or make his lunches. Therefore, Maj Gen Tonini allowing ██████████ to pick up or make his lunch was an uncompensated misuse of their personal time. Since Maj Gen Tonini did not compensate ██████████ for ██████████ time for picking up or making his lunch (a personal service) during non-duty hours ██████████ personal time; i.e., ██████████ own lunchtime), the acceptance of ██████████ personal time to regularly perform a personal service, is an improper acceptance of personal time/service from his subordinates.⁸ Therefore, the IO concluded, by a preponderance of the evidence, that in this instance Maj Gen Tonini did not misuse his subordinate's official time and did not violate 5 CFR 2635.202 (a). However, the IO found that Maj Gen Tonini did not compensate ██████████ for their personal time used for picking up or making his lunches, and therefore, found Maj Gen Tonini violated 5 CFR 2635.302(b).

4) Repairing Maj Gen Tonini's and his wife's personal computer.

██████████ testified ██████████ never worked on either Maj Gen or Mrs. Tonini's personal computers. (Ex 26:7) ██████████ also testified ██████████ never worked on either Maj Gen or ██████████ personal computers. (Ex 28:4)

██████████ testified that ██████████ did repair Maj Gen Tonini's personal computer "less than a dozen times" in the two and a half years ██████████ (Ex 22:7) ██████████ described that on occasion this occurred during the duty day (Ex 22:7) and ██████████ specified:

No, I guess it wouldn't fall under official duties but it's something that I've done for multiple people throughout my career in both technician status and AGR status. Um, somebody comes in with a computer problem, I've got the expertise to help them out, take a few minutes to see if I can get an initial diagnosis on it and if it's a quick fix, I'll knock it out there and if it's not something I can fix immediately, I either refer them to a service to get it fixed or in some cases, I would offer to take it home for a few days and see if I can bang my head against it long enough to get it fixed. (Ex 22:6)

██████████ summarized ██████████ efforts to help Maj Gen Tonini with his personal desktop computer when he testified:

⁸ Under the JER, the uncompensated personal time ██████████ used to perform personal services for Maj Gen Tonini is considered a "gift" from his subordinates.

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If we were in Louisville for the day, um, there might be a time during lunch where I'd go to his house and take a look at things to see how it [Maj Gen Tonini's personal desktop computer] was running. I recommended a couple fixes for him. It just kind of really depended on the ebb and flow of the day and I mean, sometimes where there was you know, down time I could look at it. Other times we were so busy that there was just no way I could have time to do anything like that. (Ex 22:7)

██████████ also testified about the times he helped ██████████ with her personal IMAC computer, at her residence:

I would help her on occasion as well, absolutely. Um, she'd either ask me in passing when we were at events or when I was over picking up the boss if he wasn't quite ready yet and she had a question for me, it was nothing for me to go and kind of give her some quick one-on-one training. But in say ever fixing her computer, I think I may have trouble shot a flaky printer one time and that was as far as I went as far as "fixing her computer." (Ex 22:7)

██████████ stated that over the past two years on approximately three to five occasions he has helped Maj Gen Tonini with his personal laptop. This assistance consisted of both providing advice and helping with the installation of Windows updates, security updates and software installation. He has provided personal computer advice to Maj Gen Tonini over the phone as well as in scheduled meetings in Maj Gen Tonini's office at the Joint Forces Headquarters. The two-three meetings in Maj Gen Tonini's office, specifically scheduled to work on Maj Gen Tonini's laptop, occurred both over ██████████ lunch hour (personal time) and during ██████████ duty day (official duty time). ██████████ was in title 32 AGR status at the time, and assisting Maj Gen Tonini with his personal laptop was not part of ██████████ official duties. (Ex 22:1)

Maj Gen Tonini testified concerning this issue of getting help with his personal computer when he said:

██████████ is a very, very talented IT person. He's, we would have conversations where I would describe a problem that I was having and he would volunteer to take a look at it and see if he could fix it. And I stressed with him that it should never, ever be perceived as an obligation or anything else, but he insisted. He said, look General, I do this for anybody and I often do it for soldiers that are near me, because I know more than they do. And he said, I know your problem, and I can fix it in an instant. And he probably over the course of the two years that he was with me, probably worked on my computers twice maybe, and my wife's maybe once or twice. But he did that and he reiterated the fact, because I stressed with him that this could not be done in his capacity as an obligation at all and he said, it's ridiculous, sir. He says, I know what I'm doing, it won't take me any time and I happen to be here anyway. (Ex 29:14)

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The IO determined that [REDACTED] was in a full-time Active Guard Reserve (AGR) federally-funded position when he worked on Maj Gen Tonini's personal computer and personal laptop or assisted with technical questions both for Maj Gen Tonini's and his wife's personal computers and printer. Maj Gen Tonini was the TAG at the time and was [REDACTED] supervisor when he accepted [REDACTED] assistance. The IO found that Maj Gen Tonini, while the TAG, accepted [REDACTED] (his subordinate) assistance with his and his wife's personal computers to be an affirmative action by Maj Gen Tonini. Therefore, the IO found the JER and in turn 5 CFR §2635 applied.

Based on a preponderance of the evidence, the IO found that [REDACTED] used both duty hours and his personal time to assist with Maj Gen Tonini's and [REDACTED] personal computers, laptop, and printer. [REDACTED] testified that he advised on and repaired Maj Gen Tonini's personal computer no more than a dozen times and some of those times were during duty hours but the tasks were not a part of his official duties. Between 2013-2014, [REDACTED] has worked on Maj Gen Tonini's personal laptop during duty hours; this task was not part of [REDACTED] official duties. (Ex 34) Therefore, the IO found that [REDACTED] assistance was a personal task/service not authorized by law or regulation. Accordingly, for the times when [REDACTED] assisted Maj Gen Tonini with his personal computer on duty time, the IO found Maj Gen Tonini misused [REDACTED] official time. Accordingly, Maj Gen Tonini allowing [REDACTED] to work on Maj Gen Tonini's personal computer during duty hours is a violation of 5 CFR 2635.705(b).

The IO also found that [REDACTED] worked on Maj Gen Tonini's and [REDACTED] personal computers, personal laptop, and printer at Maj Gen Tonini's home during non-duty hours and these tasks were not part of [REDACTED] official duties. IAW with 5 CFR 2635.303(f) (1), the IO found that [REDACTED] assistance to [REDACTED] could not be accepted because it is considered an indirect gift of [REDACTED] personal time to Maj Gen Tonini because the assistance was provided to [REDACTED] with Maj Gen Tonini's "knowledge and acquiescence" and because of Maj Gen Tonini's relationship to [REDACTED]. If [REDACTED] had not been Maj Gen Tonini's [REDACTED] the IO found it unlikely that [REDACTED] would have received [REDACTED] assistance with her personal computer and printer.

Therefore, Maj Gen Tonini would be responsible for compensating [REDACTED] for his personal time used to assist the Tonini's with their personal computers, personal laptop, and printer. Since the Tonini's did not compensate [REDACTED] for his personal time to repair or assist with technical issues with the Tonini's personal computers and printer, the acceptance of [REDACTED] uncompensated personal time would be an improper acceptance of a subordinate's personal time⁹; and therefore, a violation of 5 CFR 2635.302.

⁹ Under the JER, the uncompensated personal time [REDACTED] used to perform personal services for Maj Gen Tonini is considered a "gift" from his subordinates.

5) Picking up Maj Gen Tonini's laundry.

Contrary to the complainant's allegation, [REDACTED] testified [REDACTED] never picked up Maj Gen Tonini's laundry. (Ex 26:8) [REDACTED] testified [REDACTED] never picked up Maj Gen Tonini's laundry. (Ex 22:8) [REDACTED] also testified [REDACTED] never picked up Maj Gen Tonini's laundry. (Ex 28:4) Maj Gen Tonini also testified that he never had an aide pick up his laundry for him. (Ex 29:16) The IO found no evidence to indicate a standard was violated. Therefore, the IO will not further analyze this alleged behavior.

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6) Maintaining Maj Gen Tonini's state vehicle.

[REDACTED] who mentioned that maintaining Maj Gen Tonini's state vehicle was an expectation of the job. [REDACTED] testified that [REDACTED] responsibilities included keeping the state vehicle gassed and cleaned. (Ex 27:6) [REDACTED] testified [REDACTED] was made aware of this expectation by [REDACTED] when [REDACTED] replaced [REDACTED] (Ex 27:7) [REDACTED] testified that on occasion Maj Gen Tonini would let [REDACTED] know if the state vehicle was not in good condition to include the fuel level or the presence of bugs on the windshield:

It didn't happen frequently because if it happened once, then we made sure it didn't happen again. Uh, it probably happened two or three times over the course of my time there. Or, you know, somebody wouldn't fill the car up during the day. And I would get an email that night when he got home that the car hadn't been filled up and, uh, for me to correct it and make sure it didn't happen again.... I knew that he wants it gassed up every day and he wants the windows cleaned every day and, you know, if we didn't do it then I would correct it and make sure we got it the next time. (Ex 27:7)

When questioned about his having [REDACTED] maintain his state vehicle, Maj Gen Tonini replied:

If maintaining the vehicle is occasionally filling it up with gas because it's empty, then the answer is yes. Otherwise, categorically no. I have full time State employees that do that in a regular course. I have someone every morning that gets the keys, goes over to the State compound and fills up with gas. And if the windows need washing, they wash the windows. On occasion that I need an oil change, then I have State workers that do that. We've got State vehicle maintenance compounds that take care of the fleet; so absolutely no. (Ex 29:17)

The IO found maintaining the state vehicle in operational condition, to include fuel levels and cleanliness, is an acceptable task to be performed in support of a TAG's official duties. This vehicle, while provided by the state, was nonetheless provided to aid TAG in performing his duties as TAG. As such, tasking [REDACTED] to ensure that TAG's assigned vehicle is maintained in operational condition by state employees not an improper use of [REDACTED] official time. The IO determined, by a preponderance of the evidence, that using a federal asset (Maj Gen Tonini's

██████ to ensure that Maj Gen Tonini's official vehicle was properly maintained is not a violation of 5 CFR 2635.705(b).

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7) Drafting non-official correspondence for Maj Gen Tonini.

██████ mentioned that as part of ██████ job he drafted correspondence and assisted Public Affairs with drafting speeches for Maj Gen Tonini. ██████ testified that this correspondence included researching and writing papers to prepare Maj Gen Tonini for events (Ex 27:12) and writing invitations for the Adjutants General Association of the United States (AGAUS) when Maj Gen Tonini was first elected President. (Ex 27:11-12) ██████ testified that ██████ was unsure of whether the papers or speeches were for AGAUS business or not. (Ex 27:12) ██████ specified:

I would write invitations. Um, so, uh, yes, some, uh, when he first was elected.... Um, I mean, when he first got elected a lot, you know, it was, it would, wouldn't be writing letters. It would be, hey, you know, I need to have a conference call with all 54 TAGs. I need you to set that up and have it ready, um, you know, by 1700 tonight, um, because we've gotta go over this, this, this, this, before the GSLC [Guard Senior Leader Conference]. Um, so and that, that kinda stuff was, when he first got elected was, you know, every day. (Ex 27:11-12)

Maj Gen Tonini testified that he does on occasion ask ██████ to draft "attaboy" notes for him. However, Maj Gen Tonini denied ever having ██████ work on correspondence concerning NGAUS or AGAUS events. (Ex 29:18)

10 U.S.C. §2558 authorizes services secretaries to provide, among other things, administrative support in connection with an annual conference or convention of a national military association. (Ex 19) DODI 5410.19, *Public Affairs Community Relations Policy Implementation*, 13 Nov 01, Enclosure 10, Attachment 1 defines "national military associations" to include The Adjutant General Association of the United States and The National Guard Association of the United States. Paragraph E10.3.6.4 of the Instruction further clarifies authorized "administrative support" as typing, filing, photocopying, distribution processing, telephone answering, and accounting duties. All support must be related directly to official conference events and should be of a reasonable duration, generally no more than 2 weeks before and 1 week after the officially announced dates of the conference or convention. (Ex 13:2)

As ██████ was in a full-time Active Guard Reserve (AGR) federally-funded position. The IO concluded that ██████ researching and drafting papers in support of Maj Gen Tonini's duties was one of ██████ official duties as noted in his OER. The IO found the instance of ██████ having arranged the conference call for the 54 TAGs for Maj Gen Tonini was in direct support of AGAUS before a Guard Senior Leader Conference was scheduled. Per DoDI 5410.18, some administrative support may be used for

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AGAUS, a recognized national military association, prior to conference events. With ██████ being unsure of what correspondence and speeches ██████ worked and Maj Gen Tonini testifying that he did not have ██████ work on NGAUS or AGAUS correspondence, the IO found by a preponderance of the evidence, that Maj Gen Tonini did not have ██████ draft NGAUS or AGAUS correspondence for Maj Gen Tonini. The IO found no evidence that ██████ drafted correspondence and speeches for Maj Gen Tonini for non-official purposes. Therefore, IO did not find it inappropriate for Maj Gen Tonini to request that ██████ draft speeches and other official correspondence. Therefore, Maj Gen Tonini's direction that ██████ to arrange the conference calls and draft official correspondence and speeches for Maj Gen Tonini is not a violation of 5 CFR 2635.705(b).

8) Tipping support personnel for Maj Gen Tonini.

MAJ McKinney testified he routinely paid the tips on behalf of Maj Gen Tonini:

Uh, yes, well, he would, you know, he would ask me to take care of 'em. Um, not all the time but sometimes. And I would either, you know, write it off on my DTS that I tipped or I would, uh, I always had a personal, like a petty cash account, and I would take it out of that. (Ex 27:8)

All of ██████ testified about a "slush" fund "kitty" maintained by Maj Gen Tonini. (Ex 26:6; 22:5; 21:7) This pot of money was used to reimburse small expenses by the front office personnel including tips paid while TDY, candy purchased for the front office, and lunches picked up for Maj Gen Tonini. (Ex 27:8; 26:6) When the "slush" fund got low, the aides were expected to remind Maj Gen Tonini and he would place more money into this account. (Ex 21:7)

Concerning the "kitty" maintained by the front office personnel and how it is maintained, Maj Gen Tonini testified:

They come to me and they say sir, the kitty's getting low and I hand them a hundred dollar bill. Until the next time that they say, sir the kitty's getting low.... You know, it's, there's a little metal box that it sits in and I have faith in my people that they take care of it and they're not stealing from me or anything and I just have implicit faith that it lasts as long as it lasts. (Ex 29:13)

Concerning the act of occasionally sharing tips, Maj Gen Tonini testified:

You know, I frequently travel with ██████ and one of us typically tips the cab driver or baggage handler or things like that. Those tips, in the course of official travel obviously is something you claim on your travel voucher and if I do it, I claim it and if they do it, they claim it. So could it happen? Absolutely it could happen. Are they doing it in my behalf? Well, I may do it on their behalf. It all just depends on what the circumstances are and might that have happened where a tip was provided for four bags, two of which

were mine and then the individual asked for reimbursement? That's very possible. (Ex 29:18)

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The IO found that Maj Gen Tonini's [REDACTED] tipped cab drivers or baggage handlers on Maj Gen Tonini's behalf when [REDACTED] traveled with him. The IO also determined that [REDACTED] were either reimbursed these funds through their travel voucher or through Maj Gen Tonini's funds in the "kitty." Accordingly, the IO discovered no evidence supporting an ethical violation concerning the tipping.

CONCLUSION.

As discussed above, the IO found that the JER, and in turn the CFR, applied to Maj Gen Tonini's conduct. Maj Gen Tonini has misused his subordinates' (his full-time AGR [REDACTED] official and personal time throughout his tenure as TAG. The IO determined, by a preponderance of the evidence, that Maj Gen Tonini improperly used his subordinates' official time to drive him from duty-to-domicile and back and to some non-official events and to work on his personal laptop in violation of 5 CFR 2635.705(b).¹⁰

By a preponderance of evidence, based upon the findings of fact and sworn testimony, the allegation that on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard misused his subordinate's official time in violation of 5 CFR 2635.705(b), was **SUBSTANTIATED**.

ALLEGATION 2. That on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard accepted gifts from prohibited sources or given because of his official position, in violation of 5 CFR 2635.202 (a).

FINDINGS OF FACT.

- Maj Gen Tonini accepted a framed racing "pit crew" suit as a gift from an individual who maintained a contract with the NGB. (Ex 29:23-25)
- Maj Gen Tonini wrote that he "personally solicited and accepted" almost \$1.5 million towards the construction of the Kentucky National Guard Memorial. (Ex 6)

STANDARDS.

The Code of Federal Regulation was applicable. The pertinent parts are below:

¹⁰ Maj Gen Tonini accepting his subordinates' personal time to pick up or make lunch for him and to work on his and his wife's personal computers and printer without appropriately compensating them violated 5 CFR 2635.302.

5 CFR 2635.202 General Standards

(a) General prohibitions. Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or **accept a gift**: (1) **From a prohibited source**; or (2) **Given because of the employee's official position**. (b) Relationship to illegal gratuities statute. Unless accepted in violation of paragraph (c)(1) of this section, a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B). (c) Limitations on use of exceptions. Notwithstanding any exception provided in this subpart, other than § 2635.204(j), **an employee shall not**: (1) Accept a gift in return for being influenced in the performance of an official act; (2) Solicit or coerce the offering of a gift; (3) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain; Example 1: A purchasing agent for a Veterans Administration hospital routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of his crowded calendar, the purchasing agent has offered to meet with manufacturer representatives during his lunch hours Tuesdays through Thursdays and the representatives routinely arrive at the employee's office bringing a sandwich and a soft drink for the employee. Even though the market value of each of the lunches is less than \$6 and the aggregate value from any one manufacturer does not exceed the \$50 aggregate limitation in § 2635.204(a) on de minimis gifts of \$20 or less, the practice of accepting even these modest gifts on a recurring basis is improper. (4) Accept a gift in violation of any statute. Relevant statutes applicable to all employees include: (i) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes regular and special Government employees as well as all other Government officials; (Ex 9:3) (*Emphasis added*) (Ex 9:3)

5 C.F.R. 2635.203 (b) defines "gift" broadly:

Gift includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or **other item having monetary value**. It includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred. It does not include: ...

(2) Greeting cards and items **with little intrinsic value, such as plaques, certificates, and trophies**, which are intended solely for presentation; (*emphasis added*)

(d) *Prohibited source* means any person who:

(1) Is seeking official action by the employee's agency;

(2) **Does business** or seeks to do business **with the employee's agency**; ... (*emphasis added*)

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(e) A gift is solicited or accepted because of the employee's official position if it is from a person other than an employee and would not have been solicited, offered, or given had the employee not held the status, authority or duties associated with his Federal position. (Ex 9:3)

5 CFR 2635.204 *Exceptions.*

...(b) *Gifts based on a personal relationship.* An employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift. (Ex 9:5)

ANALYSIS.

When asked to provide examples of gifts received by Maj Gen Tonini, [REDACTED] testified:

Well, um, alcohol was frequently given to him.... General Tonini received [REDACTED], he was very, very close with them. Uh, I know he has a full, what's it called, Nomex racing suit? Or whatever, they gave him. Those fire proof suits, I know that they're hundreds and hundreds of dollars. He got one. (Ex 20:12)

When asked to describe gifts that Maj Gen Tonini has received, [REDACTED] testified about basketball posters from the University of Kentucky (UK) and die cast model racing cars in his office. (Ex 21:11, 13)

Collectively, the gifts Maj Gen Tonini allegedly improperly accepted that will be analyzed below include: 1) Alcohol; 2) Nomex racing suit; 3) UK basketball posters; 4) Die cast model racing cars; and 5) Funds for the KYNG Memorial Fund.

1) Alcohol.

[REDACTED] is a local Kentucky company that specializes as an agricultural business. They also make bourbon and ale. (Ex 21:12) [REDACTED] is not listed as a DoD contractor with awards of \$25,000 or more in FY 2013.¹¹ Therefore, the IO did not conclude that [REDACTED] is a prohibited source.

¹¹ See http://www.dod.mil/dodgc/defense_ethics/resource_library/contractor_list.pdf.

██████████ testified that ██████████ routinely donated bourbon to the KYNG:

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I know that, um, like when we're having an event, they will donate a bunch of stuff to it, like if we're having a social or if we're having a, uh, you know, anything like that then they'll donate alcohol for it. (Ex 21:12)

██████████ testified this routine donation of bourbon was intended for the KYNG, not specifically meant for Maj Gen Tonini. (Ex 21:12) Maj Gen Tonini additionally specified that ██████████ has on occasion, donated alcohol to the Kentucky National Guard Association to support official events. (Ex 29:21) The Kentucky National Guard Association is a non-federal entity.

Maj Gen Tonini described the events supported by the two alcohol donations, and the amounts frequently donated when he testified:

A legislative, a couple of legislative receptions; one in Washington with the key members of staffers from the House and the Senate as well as other key people in the Washington area. And others would be the same kind of instance in Kentucky at the Association headquarters that we did from time to time... that particular thing that I'm speaking of would be in support of the National Guard Association of Kentucky. (Ex 29:12) The, you know, gosh, I don't remember, it was enough to accommodate a crowd, on one occasion of probably a hundred people. They are purveyors of bourbon; they have a bourbon called Town Branch and probably we got, I'd have to guess, it's probably a case or two of Town Branch. They've got another product called Pierce Reserve which is a kind of like an Irish whiskey that we probably got half a case of. And they also manufacture several kinds of Kentucky-based beer, Kentucky Bourbon Ale, Kentucky Ale, etc., etc., and we probably had, I don't know how many, I'm going to guess here, but I would guess it was probably six to ten cases. (Ex 29:21)

Maj Gen Tonini also testified that he has a personal relationship with the ██████████ and that he considers the ██████████ a close personal friend and they have a longstanding friendship. (Ex 29:21-22) The IO found no evidence to the contrary and did not find by a preponderance of the evidence that the request of the donation was made in his official capacity or using federal resources. Accordingly, the IO concluded that this donation of alcohol was not a personal gift to Maj Gen Tonini nor was it given because of his official position, but that this alcohol was a gift to the Kentucky National Guard Association, which is a non-federal entity that Maj Gen Tonini was a member of. Since the IO found no evidence of a violation of standards, the IO will not further analyze this alleged behavior against the standards.

2) Nomex racing suit. Based on the evidence detailed below, the IO found this item to be a pit crew suit instead of a Nomex racing suit presented in a large display case.

██████████ testified he remembered an occasion involving a racing company attempting to give Maj Gen Tonini a racing jacket. However, he recalled the acceptance of this gift contingent on getting a legal opinion about it:

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Nomex suit. I do remember a racing suit, now that I do remember. Um, there was a racing suit, we were at the Air National Guard and I can't think of the man's name who owns one of the racing companies, I don't remember getting a suit, it was some type of jacket uh, and I do remember him trying to give that to Gen Tonini but I, I'm pretty sure that and you, I mean, I don't know ██████████ at the time but that was something that had to be ran through the legal folks but I do remember a, a jacket uh, it's one of those fire proof jackets that the racers wear. (Ex 28:6)

Maj Gen Tonini testified that he had received such a gift and he described it as:

This, this particular instance was not a racing suit per se, it was actually a suit that was used by the pit crew which has the same kind of, you know, it's a coverall, you know, step in type of coverall with all the advertising on it that's so obnoxious that you see everybody that's in any type of auto racing. It happened to be last year's series, last year's contacts, so the primary advertising on the suit said ██████████ ██████████ was a company that had subsequently gone bankrupt. These were suits that were used the prior year all year long, they were used and they were old and they were outdated. And the gentleman that provided it to me indicated to me that it had no value, that in fact they were being discarded because they had no value and they couldn't even be reused because they no longer, they had National Guard on them and they had ██████████ and he had a bankrupt company with National Guard along with a multitude of other advertisements on it and they were being discarded and had absolutely no value. (Ex 29:23)

Maj Gen Tonini subsequently testified that this suit was presented to him in a large framed display case that he keeps at his house:

Tonini: And that was back in the days of ██████████ my first, my first, in fact it was her and my ██████████ that had to figure out a way of how to get this back to my house because it was a little unwieldy in terms of size because of the way it was displayed. But, but...

IO2: So it was already in the display case, sir?

Tonini: Yes, that's correct. (Ex 29: 25)

According to Maj Gen Tonini, he and ██████████ initially met over 20 years ago when Maj Gen Tonini produced Indy Car races for ESPN in his civilian capacity. ██████████ ██████████ ██████████, an Indy Car racing team, who had a

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sponsorship contract with the National Guard from FY 08 through FY 13. (Ex 36) After having limited contact with [REDACTED] for a few years, Maj Gen Tonini "rekindled" his relationship with [REDACTED] after Maj Gen Tonini became TAG in Dec 2007. Maj Gen Tonini stated the relationship "really blossomed" and they became "close personal friends" after he became TAG. (Ex 33)

The IO also spoke with [REDACTED] to assess his recollection of the characterization of the relationship [REDACTED] shared with Maj Gen Tonini. [REDACTED] provided a very similar characterization of the nature of their personal friendship over the last several decades. (Ex 36)

The IO determined the relationship was not a close personal relationship before Maj Gen Tonini became TAG but the relationship became very close due to Maj Gen Tonini's status as TAG.

The IO found that the JER, and in turn, 5 CFR §2625 applied to this situation because [REDACTED] and Maj Gen Tonini's relationship truly developed after Maj Gen Tonini became TAG. The IO determined that but for Maj Gen Tonini being appointed TAG, the re-establishment and "re-blossoming" of the relationship would not have occurred. For the relationship to continue, the IO determined that Maj Gen Tonini, in his official position as both TAG and a National Guard of the US member, would have had to take "affirmative actions" to cultivate and maintain his acquaintance with [REDACTED]

The IO determined, by a preponderance of the evidence, that [REDACTED] was doing business with Maj Gen Tonini's agency (the National Guard) because his company [REDACTED] has the sponsorship contract with the National Guard when the pit crew suit was given to Maj Gen Tonini sometime in 2009. Therefore, the IO concluded that [REDACTED] was a prohibited source.

The framed pit crew suit was presented in a very large display case/frame; described by Maj Gen Tonini as "unwieldy," which required both [REDACTED] and [REDACTED] assistance to get home. The IO determined the market value of the used racing suit is at least \$99.¹² Given that [REDACTED] encased the suit in a very large frame/display case, the IO determined, by the preponderance of the evidence, the gift exceeded the \$20 limit per occasion exception that would have permitted Maj Gen Tonini to accept the gift within JER guidelines. Further, although the racing suit was framed for

¹² http://www.ebay.com/sch/?_nkw=panther+racing+pit+crew+suit&_from=R40&_trksid=m38.11313

presentation, the suit does not meet the gift rule exclusion as a "gift intended solely for presentation" because the item *is* of value, similar to crystal and works of art.¹³ Since no gift exception applies, the IO found by a preponderance of the evidence, Maj Gen Tonini accepted a gift from a prohibited source in violation of the JER. Therefore, Maj Gen Tonini's action of accepting the framed racing "pit crew" suit from [REDACTED] is a violation of 5 CFR 2635.202 (a) (4).

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3) UK basketball posters.

[REDACTED] testified [REDACTED] has no knowledge of Maj Gen Tonini receiving any UK basketball posters as a gift during her tenure as [REDACTED] (Ex 26:10). [REDACTED] testified [REDACTED] does not recall any gifts of UK basketball posters made to Maj Gen Tonini during his time as the [REDACTED] (Ex 22:11). [REDACTED] testified that [REDACTED] would donate signed UK basketball posters to the KYNG. He clarified:

Gen Tonini will, uh, he donates them to things like the, uh, if they are doing a silent auction for, um, the officer/soldier of the year banquet, uh, he'll donate for any, you know, any kind of silent auction like that, uh, if there's any kind of fundraisers going on that people are taking donations for, he'll donate to that. Um, he will take a bunch of posters to, when we go, uh, pick up deployed soldiers, he took posters with him and gave them UK posters. (Ex 21:13)

Maj Gen Tonini described the environment in which [REDACTED] donated signed posters to be distributed to the KYNG members:

But typically at the end of this conversation, [REDACTED] would take whatever the poster that was current at the time, and if you remember [REDACTED], of course again if you're a basketball fan, you know [REDACTED] is now maybe the best player in the NBA for the New Orleans team. But he had a poster where his arms were stretched out wide and there were nine basketballs between his fingertips across it, and that was something that was given away at a UK home basketball game. But, and they ended up showing up the next day on eBay. But [REDACTED] had a whole bunch of them and he said, during the, during the conversation with the troops that were in Iraq and Afghanistan, different places, he said, hey, I'm going to make sure you guys get a bunch of these posters and I'm even going to do one better, I'll have [REDACTED] sign them, who was there too. And he signed fifty and I actually took those fifty posters and took them, I can't remember if it was Iraq or

¹³ In 2003, the Department of Defense Standards of Conduct Office (DoD SOCO) issued an Information Paper entitled, "Gifts Intended Solely for Presentation (5 C.F.R. 2635.203(b)(2))" (available at http://www.dod.mil/dodgc/defense_ethics/resource_library/presentation_gifts.pdf). According to DoD SOCO, items of value, such as crystal, glassware, works of art, and the like do not qualify for this exclusion, even if they are otherwise adorned with an individual's name. DoD SOCO noted that the Office of Government Ethics "specifically rejected agency attempts to add 'mementos' to the list of approved items."

Afghanistan and I provided those to soldiers that were a part of that VTC. So that's one instance. After Kentucky won the national championship in 2012, [REDACTED] gave me a bunch of posters that I ended up taking to Djibouti, Africa. The same kind of thing. [REDACTED] at that time gave me enough to take to the soldiers in Djibouti. (Ex 29:26)

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The IO found no evidence that this donation of UK basketball posters was a personal gift to Maj Gen Tonini or given because of his official position but found that [REDACTED] on his own accord, gifted the posters to the Airmen and Soldiers of the KYNG. The IO found no violation of the standards; therefore, the IO will not further analyze this alleged behavior against the standards.

4) Die cast model racing cars.

[REDACTED] testified [REDACTED] was unaware of any die cast model racing cars Maj Gen Tonini received as a gift. (Ex 26:10) [REDACTED] testified [REDACTED] and Maj Gen Tonini have received model National Guard cars. (Ex 22:11) [REDACTED] testified several members of the KYNG, including Maj Gen Tonini, have received die cast model racing cars. He specified:

Yes, that was military recruiters that uh, uh, had those given them out to it was some program years ago that they were giving them out to their recruits and I think they had them we actually had them for about a week, sitting on the desk, that's the only die cars, die cast cars that I even know of.... Oh, no that was a lot of members in the Kentucky National Guard because it was a recruiting effort, it was to uh, help uh, bolster recruiting and to let people see uh, and then they were taken all back up by the recruiters and, and uh, given to new recruits, things like that. So, it was all part of a recruiting effort. (Ex 28:6)

Maj Gen Tonini confirmed that he did have several die cast model racing cars that were given to him as sample incentives used by the KYGN Recruiting Command. (Ex 29:26-27)

The IO found no evidence that the die cast model racing cars were a personal gift to Maj Gen Tonini or given because of his official position, but that these model cars were National Guard recruiting incentive samples. Therefore, since there is no evidence of a standard being violated, the IO will not further analyze this alleged behavior against the standards.

5) Funds for the KYNG Memorial Fund

After the IO made contact with Maj Gen Tonini regarding this current investigation, he forwarded evidence of his involvement, as the TAG in his uniform, of soliciting and accepting money in support of the KYNG Memorial. (Ex 6) Maj Gen Tonini was very forthcoming with the fact that he did solicit and accept support of many different events throughout Kentucky. Maj Gen Tonini sent the IO an email on 2 Sep 14 where he provided four pictures of himself in a

federal uniform standing with different donors holding large prop checks to signify the amount of various donations made to the KYNG Memorial fund. (Ex 7) In this email he also testified:

This particular effort has raised over \$1.5 million for the Kentucky National Guard Memorial Fund, which will begin construction this week. I personally have solicited and accepted most of that \$1.5 Million. (Ex 6)

On 30 Nov 14, Maj Gen Tonini also sent an email to The Inspector General, stating "I thought I would provide some additional perspective of my approach to the job as Adjutant General of Kentucky" and in that email claimed responsibility for personally soliciting and accepting contributions for the KYNG Memorial Fund. (Ex 30)

Maj Gen Tonini testified about his wear of his uniform:

Tonini: You, in the case of any type of solicitation or acceptance of gifts, you can write it down that I was always categorically always on State status.

IO2: So you were in civilian clothes and calling yourself Mr. Tonini?

Tonini: No ma'am. The Adjutant General of Kentucky is a State position. That, I do that in State capacity. I wear a uniform every single day and I'm in most, ninety percent of those days, I'm in State capacity. I wear a uniform, because that's the way the Guard does things. (Ex 29:22)

Maj Gen Tonini further testified, "I do all this stuff in uniform, but I wear a uniform in my State capacity as the Adjutant General." (Ex 29:29) Maj Gen Tonini implied that he considers fundraising to be part of his job as the Adjutant General.

The IO found [REDACTED] and [REDACTED], both DoD contractors, among the donors listed on the memorial's website.¹⁴ Given Maj Gen Tonini's relationship with [REDACTED] and given that Maj Gen Tonini detailed his involvement with [REDACTED] [REDACTED],¹⁵ the preponderance of the evidence indicates Maj Gen Tonini did personally solicit, and accept, gifts from those contractors.

The IO found that Maj Gen Tonini solicited funds for the KYNG Memorial using his official DoD position and federally funded resources (phone and email). By using his DoD position and federal resources to solicit these funds, he took an affirmative act using the authority of his official position; therefore, the IO found that the JER and in turn 5 CFR 2635 applied. The evidence indicates that he used his official position to accept the gifts and the IO found it

¹⁴ Humana has been a DoD TRICARE contractor since 1995. See <https://www.humana-government.com/about-us/company-profile>.

¹⁵ ROI, Ex 30:2

unlikely that he would have been able to raise over \$1.5 million for the KYNG Memorial Fund without using his position and federal uniform.¹⁶ Additionally, the IO found that Maj Gen Tonini solicited and accepted funds for the KYNG Memorial from DoD contractors. Therefore, the IO concluded, by a preponderance of the evidence, that Maj Gen Tonini violated 5 CFR 2635.202 by using his official position to accept funds and accepting funds from prohibited sources for the KYNG Memorial Fund.

The IO found that Maj Gen Tonini soliciting/accepting funds for the KYNG Memorial Fund in his federal uniform as the TAG and using federally-funded assets to solicit some of the funds raised, was an affirmative act by Maj Gen Tonini using the authority of his official position; and therefore, the JER and in turn 5 CFR §2635 applied to his conduct. Based on a preponderance of the evidence, the IO found that Maj Gen Tonini improperly accepted money towards the KYNG Memorial and accepted funds from prohibited sources, which is a violation of 5 CFR 2635.202.

CONCLUSION.

Maj Gen Tonini's acceptance of the framed "pit crew" suit and acceptance, in uniform, of funds raised for the KYNG Memorial Fund were violations of 5 CFR 2635.202. Therefore, by a preponderance of evidence, based upon the findings of fact and sworn testimony, the allegation that on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard accepted gifts from prohibited sources or given because of his official position, in violation of 5 CFR 2635.202 (a), was **SUBSTANTIATED**.

ALLEGATION 3. That on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard solicited gifts from prohibited sources or given because of his official position, in violation of 5 CFR 2635.202 (a).

FINDINGS OF FACT.

- Maj Gen Tonini did solicit donations of alcohol from ██████████ to be used at KYNG Association events. (Ex 29:31; 30)
- Maj Gen Tonini wrote that he "personally solicited and accepted" almost \$1.5 million towards the construction of the Kentucky National Guard Memorial. (Ex 6)
- Maj Gen Tonini solicited over \$2 million worth of mattresses for the KYNG Youth ChalleNGe Academy. (Ex 30)

¹⁶ Prior to Maj Gen Tonini's fundraising efforts, less than \$100,000 had been raised for the KYNG Memorial Fund for the first four or five years. Maj Gen Tonini efforts to raise money occurred "primarily [in] the last two years." (Ex 29:30)

STANDARDS.

See 5 C.F.R. 2635.202 standard from Allegation 2 above.

5 CFR 2635.303 *Definitions*

(e) *Solicit* means to request contributions by personal communication or by general announcement.

Kentucky Revised Statute (KRS) §11A.055 provides, in part, that “any provision of KRS Chapter 11A to the contrary notwithstanding, a state agency or a public servant may raise funds, either individually or as a department or agency, for a charitable nonprofit organization granted a tax exemption by the Internal Revenue Service under Section 501c of the Internal Revenue Code without violating the provisions of this chapter. Raising of funds shall include but not be limited to holding events for the benefit of the charitable organization, contacting potential donors, providing prizes, and engaging in other forms of fundraising and providing the funds thus raised to the charitable organization.” KRS§11A.015 further provides that “an agency that is directed by statute to adopt a code of ethics shall be exempt from KRS Chapter 11A upon the effective date of an Act of the General Assembly creating the agency's code of ethics or upon the effective date of an administrative regulation that creates the agency's code of ethics.” (Ex 15:4)

ANALYSIS.

5 CFR § 2635.202(a) states that an employee shall not solicit gifts from prohibited sources or given because of the employee's official position.

██████████ testified that Maj Gen Tonini would “shake down” corporate sponsors like ██████████ for donations of alcohol (Ex 20:11):

██████████ was sent to a place called ██████████ was one of the companies that, that Tonini is buddies with, and he hit them up for a bunch of alcohol for a big reception for the NGAUS. (Ex 20:11)

██████████ testified that he provided legal opinions to Maj Gen Tonini on ethics issues and after “about a year, he [Maj Gen Tonini] stopped asking me [for a] legal opinion on anything that he didn't want an opinion on.” (Ex 20:15)

██████████ also complained about Maj Gen Tonini's involvement in the solicitation of funds to support the KYNG Memorial. (Ex 1:6-8) However, a previous case worked by this office contained a similar allegation of solicitation against Maj Gen Tonini concerning his involvement in fundraising efforts for the KYNG Memorial. This allegation of wrongdoing was dismissed in the complaint analysis stage due to lack of evidence. However, shortly after the IO made contact with Maj Gen Tonini regarding this current investigation, he forwarded evidence of

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his involvement, as the TAG in his uniform, in soliciting and accepting money in support of the KYNG Memorial. (Ex 6)

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When interviewed in the complaint analysis portion of this investigation, [REDACTED] added examples of Maj Gen Tonini soliciting gifts when he mentioned signed UK basketball posters and free hotel rooms from the [REDACTED], a hotel in Louisville. (Ex 21:13)

Maj Gen Tonini was very forthcoming with the fact that he did solicit support of many different events throughout Kentucky. Maj Gen Tonini sent the IO an email on 2 Sep 14 where he provided four pictures of himself in a federal uniform standing with different donors holding large prop checks to signify the amount of various donations made to the KYNG Memorial fund. (Ex 7) In this email he also testified:

This particular effort has raised over \$1.5 million for the Kentucky National Guard Memorial Fund, which will begin construction this week. I personally have solicited and accepted most of that \$1.5 Million. (Ex 6)

Maj Gen Tonini also sent an email to The Inspector General on 30 Nov 14, stating "I thought I would provide some additional perspective of my approach to the job as Adjutant General of Kentucky" and claiming responsibility for personally soliciting contributions of the following: [REDACTED] providing over two million dollars' worth of mattresses for the KYNG Youth Challenge Academy, a grant from the [REDACTED] supporting scholarships for the KYNG Youth Challenge Academy, the [REDACTED] to provide between 500-2500 football and basketball tickets per year over the last five years, [REDACTED] to donate alcohol to two NGAUS Kentucky receptions, jobs for KYNG members working at [REDACTED] to provide tickets to Churchill Downs (over the last five years) for surviving family members valued at over \$300,000. (Ex 30)

While Maj Gen Tonini did not specifically claim, in his 30 Nov 14 email, to have solicited for the following events, he does claim that these donations were raised as a direct result of the friendships he has formed in his tenure as TAG: the University of Kentucky [REDACTED] providing signed posters/scholarships for dependent children to participate in basketball camps/500-3000 football tickets annually over the last seven years/[REDACTED] towards the KYNG Memorial, and [REDACTED] donating gift cards from local fast food businesses. (Ex 30) Maj Gen Tonini described his role in this when he wrote:

As we have discussed my efforts in **developing and nurturing** relationships with political figures on both side[s] of the isle and relationship with corporations and business in my state have resulted in unprecedented levels of support for the Soldiers and Airmen of the Kentucky National Guard and for our National Defense efforts in general.... These are each wonderful examples of the type of efforts that are made on a

regular basis in support of the KYNG members and their families. They are all based on greatly developed relationships within the Commonwealth of Kentucky and are points of great pride my management of the National Guard. (Ex 30) (emphasis added)

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Maj Gen Tonini testified that his personal efforts of solicitation took place while he was wearing the US Air Force federal uniform and occasionally included his use of telephones at his military office and his military email account. (Ex 29:32-33) By his own admission, Maj Gen Tonini has been very active in soliciting donations for the KYNG. (Ex 6; 30) Maj Gen Tonini believes that is a requirement of his position, and he believes the Kentucky statute cited above gives him the authority to conduct solicitation. (Ex 29:35) However, the IO found that since the federal regulations and state law may conflict in this case, that the federal regulations preempt state law given that Maj Gen Tonini is a federally recognized two-star using his federal uniform to solicit and accept a variety of gifts.

Collectively the instances of Maj Gen Tonini having allegedly solicited donations that will be analyzed below include: 1) Alcohol from [REDACTED] 2) Donations for the KYNG memorial; 3) Basketball posters from [REDACTED] 4) Hotel rooms from the [REDACTED] and 5) Donations of mattresses for the KYNG Youth Challenge Academy.

1) Alcohol from [REDACTED]

[REDACTED] testified Maj Gen Tonini would solicit alcohol from [REDACTED] to support KYNG events, "Gen Tonini is the one that's ask, like talking to them about it and asking for it I guess." (Ex 21:12)

Maj Gen Tonini testified that he did solicit these donations of alcohol from [REDACTED] to be used at KYNG Association events. (Ex 29:31; 30) However, the IO could not determine where and how the solicitation occurred. Therefore, the IO did not find that Maj Gen Tonini took an affirmative act using the authority of his official position when he solicited the donation from Alltech. Therefore, the IO found that the JER and in turn 5 CFR 2635 did not apply in these two instances. Accordingly, the IO concluded that Maj Gen Tonini did not violate 5 CFR 2635.202.

2) Donations for the KYNG memorial.

Maj Gen Tonini wrote in an email to the IO on 2 Sep 14:

Here is a link to the story I mentioned that was posted just yesterday. The link has been reposted on many different social media sites including my own Facebook page. This particular effort has raised over \$1.5 million for the Kentucky National Guard Memorial Fund, which will begin construction this week. I personally have solicited and accepted most of that \$1.5 Million. (Ex 6)

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In this same email, Maj Gen Tonini sent four photographs of him posing with donors holding large symbolic checks made out to the KYNG Memorial Fund. In each picture Maj Gen Tonini is wearing his federal uniform as a Maj Gen in the USAF. (Ex 7) Maj Gen Tonini testified he believed there could be no doubt from anyone that his solicitation efforts made on behalf of the KYNG Memorial were performed as part of his role as the KYNG TAG. (Ex 29:32) Furthermore, Maj Gen Tonini testified that he used his military office as well as his office telephone (both federally funded) to solicit some of the funds raised for the Memorial Fund. (Ex 29:29-30)

The IO found [REDACTED] and [REDACTED], both DoD contractors, among the donors listed on the memorial's website.¹⁸ Given Maj Gen Tonini's relationship with [REDACTED] and given that Maj Gen Tonini boasted of his involvement with [REDACTED] [REDACTED]⁸ the preponderance of the evidence indicates Maj Gen Tonini did personally solicit, and receive, gifts from those contractors.

The IO found that Maj Gen Tonini solicited funds for the KYNG Memorial using his official DoD position and federally funded resources (phone and email). By using his DoD position and federal resources to solicit these funds, he took an affirmative act using the authority of his official position; therefore, the IO found that the JER and in turn 5 CFR 2635 applied. The evidence indicates that he used his official position to accept the gifts and the IO found it unlikely that he would have been able to raise over \$1.5 million for the KYNG Memorial Fund without using his position and federal uniform.¹⁹ Additionally, the IO found that Maj Gen Tonini solicited and received funds for the KYNG Memorial from DoD contractors. Therefore, the IO concluded, by a preponderance of the evidence, that Maj Gen Tonini violated 5 CFR 2635.202 by using his official position to solicit funds and soliciting funds from prohibited sources for the KYNG Memorial Fund.

The IO found that Maj Gen Tonini soliciting/accepting funds for the KYNG Memorial Fund in his federal uniform as the TAG and using federally-funded assets to solicit some of the funds raised, was an affirmative act by Maj Gen Tonini using the authority of his official position; and therefore, the JER and in turn 5 CFR §2635 applied to his conduct. Based on a preponderance of the evidence, the IO found that Maj Gen Tonini improperly solicited money towards the KYNG Memorial and solicited funds from prohibited sources, which is a violation of 5 CFR 2635.202.

[REDACTED] has been a DoD TRICARE contractor since 1995. See [REDACTED]
[REDACTED]

¹⁸ ROI, Ex 30:2

¹⁹ Prior to Maj Gen Tonini's fundraising efforts, less than \$100,000 had been raised for the KYNG Memorial Fund for the first four or five years. Maj Gen Tonini efforts to raise money occurred "primarily [in] the last two years." (Ex 29:30)

3) Basketball posters from UK.

According to [REDACTED] Maj Gen Tonini solicited signed basketball posters from the University of Kentucky:

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[REDACTED] UK basketball coach, uh, will donate, you know, signed basketball posters.... Gen Tonini will, uh, he donates them to things like the, uh, if they are doing a silent auction for, um, the officer/soldier of the year banquet, uh, he'll donate for any, you know, any kind of silent auction like that, uh, if there's any kind of fundraisers going on that people are taking donations for, he'll donate to that. Um, he will take a bunch of posters to, when we go, uh, pick up deployed soldiers, he took posters with him and gave them UK posters. (Ex 21:13)

Maj Gen Tonini credibly testified that he did not solicit for basketball posters from the University of Kentucky, but that these posters were a gift from [REDACTED]

No, in that particular case, [REDACTED] is just such a generous, magnanimous guy; it was his idea. And he just said, here I want you to take these to your guys. (Ex 29:33)

The passage of time renders further investigation into this matter difficult. The IO found no evidence to support a violation of 5 CFR 2635.202. Therefore, the IO will not further analyze this alleged behavior against the standards.

4) Hotel rooms from the [REDACTED]

[REDACTED] testified he believed that Maj Gen Tonini solicited for complimentary hotel rooms from the [REDACTED]

Um, we'd get things like, um, not, not specifically anything big, but things are donated like, uh, the [REDACTED] uh, would donate rooms for things like it's, it's a hotel here in Louisville and, um, if we had an event going on in the [REDACTED] then they will donate a room for the Kentucky National Guard or for Gen Tonini, um, and he would stay there or he would have a social there or, um, you know, use the bourbon from [REDACTED] for a bourbon tasting there for the guests, uh, things like that, that, that's I guess that's a donation. (Ex 21:13)

[REDACTED] serves as the [REDACTED] for the KYNG. (Ex 23:2) He was also the individual in charge of the planning efforts for the [REDACTED] [REDACTED] (Ex 23:8, 9, 14) According to [REDACTED] the [REDACTED] provided a certain number of complimentary rooms to the KYNG based on the total number of rooms rented out for this conference. Maj Gen Tonini and many others stayed in these rooms based on their military status during that conference:

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But I can tell you that I do have knowledge that, um, um, the, because we maxed out the hotel, the, the, the organization was given so many comp rooms per, it's like every twenty, every twenty rooms, you get a comp room.... I don't remember, but for every so many rooms, you get a comp, and you get to use that comp how you need it too and we deemed it, the support people that can't get paid reimbursement needs to have those comp rooms because we're asking them to be there. (Ex 23:15)

According to [REDACTED] Maj Gen Tonini could not have solicited for these complimentary rooms from the [REDACTED]. They were simply the result of the contract made by the [REDACTED] based on the total number of rooms rented out through the KYNG for this conference. Maj Gen Tonini testified that he did not solicit hotel rooms from the [REDACTED] (Ex 29:34)

The evidence supports that Maj Gen Tonini did not solicit the complimentary rooms from the [REDACTED] and the complimentary rooms were part of a contract between the [REDACTED] and KYNG. The IO found no evidence to support a violation of 5 CFR 2635.202. Therefore, the IO will not further analyze this alleged behavior against the standards.

5) Donations of mattresses for the KYNG Youth Challenge Academy.

Maj Gen Tonini's email, dated 30 Nov 14, to The Inspector General included a statement about donation of mattresses: "Recent activity at establishing and nurturing relationships has include[d] soliciting and accepting donations of 2,000 of the highest quality mattresses from Lexington, KY based [REDACTED] ... This represents a donation of over \$2.1 million in the past year. (Ex 30:1) Maj Gen Tonini further explained in his testimony how the "solicitation" of these mattresses came about:

Well, let's take an example of the mattresses. The mattresses, **it was brought to my attention that a Kentucky-based company by the name of [REDACTED] was interested in making a donation** and I went physically to [REDACTED] and I talked with them and I dealt with them and frankly, that has turned into something much larger than I ever dreamed it would. But it's obviously been a million dollar plus benefit to the Youth Challenge Academy, not just in Kentucky but all across the country. And I continue, I think that that will continue. They are very, very pleased at the association that they have and it's been a very positive kind of an experience. ... (Ex 29:28) (emphasis added)

The IO found Maj Gen Tonini to be forthcoming and direct in his responses and, therefore, found him credible. Accordingly, the IO found that Maj Gen Tonini did not contact [REDACTED] until he had been made aware of [REDACTED] interest in making a donation. (Ex 29:28) The IO found the JER, and in turn the CFR, applied to Maj Gen Tonini's actions in that he took the affirmative step of going to visit [REDACTED] in his official capacity in uniform to discuss the donation. However, since [REDACTED] expressed an interest in making the

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donation that Maj Gen Tonini follow-up on rather than Maj Gen Tonini initiating the request for the mattress donation, Maj Gen Tonini's conduct did not meet the definition of solicitation ("to request a contribution").

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Based on a preponderance of the evidence, the IO determined that Maj Gen Tonini did not solicit the [REDACTED] mattress donation. Therefore, the IO found that Maj Gen Tonini did not solicit the mattresses from [REDACTED] and his actions did not violate 5 CFR 2635.202 in this instance.

CONCLUSION.

The evidence and testimony supported that Maj Gen Tonini solicited items for the KYNG while in uniform and using his federally-funded office and phone. The IO found his actions to be the affirmative use of his DoD position/title (TAG) to solicit funds for a variety of organizations. Since Maj Gen Tonini affirmatively used his position, the IO found the JER applied, and in turn 5 CFR 2635.202, to Maj Gen Tonini's actions. The IO determined the solicitation of money to support the KYNG Memorial by Maj Gen Tonini was counter to the general prohibitions on employee solicitation found in 5 CFR 2635.202.

By a preponderance of evidence, based upon the findings of fact and sworn testimony, the allegation that on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard solicited gifts from prohibited sources or given because of his official position, in violation of 5 CFR 2635.202 (a), was **SUBSTANTIATED.**

VI. SUMMARY

The complainant also raised a question of whether Maj Gen Tonini's [REDACTED] were given AGR positions after enduring misuse as Maj Gen Tonini's [REDACTED]. The IO asked [REDACTED] about this issue. [REDACTED] testified they did not feel as if Maj Gen Tonini's demands on [REDACTED] were an inducement or coercion of his benefits. (Ex 26:9; 22:8; 27:8) [REDACTED] testified, "And he wasn't like that. Um, he wasn't like the type of person like you're asking me is, was it beneath him." (Ex 26:9) The IO found no evidence that [REDACTED] subsequently received AGR positions because they acquiesced to having their official or personal time be misused by Maj Gen Tonini.

Throughout the duration of this investigation Maj Gen Tonini expressed his ardent opinion that the JER does not apply to his actions, and that the IG system was trying to portray his "good works" as misconduct:

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I, because of some difficult situations with other Adjutants General recently where the IG has been used, in my opinion, as a weapons system, I now take that very much into consideration and use my personal computers for that. (Ex 29:30) I just cannot imagine that anybody in Kentucky, the Governor through any of the individuals that I work with that feel like any of the things that I did were in any way unethical. I just can't imagine that they did, because all of them are things that I can take great pride in and that I can say that there were accomplishments that benefitted the organization as well as the people the organization as well as the people of the Commonwealth. But, I got it; and I'll deal with it however. (Ex 29:38-39)

Maj Gen Tonini stated that he believed KRS §11A.055 allows him, as a state employee, to fundraise and that because he was acting as the Kentucky TAG in his state capacity while he was fundraising (soliciting), he did not violate the law and the JER did not apply to his activities. Maj Gen Tonini also provided an opinion from his state ethics advisor that he, as a state employee, is allowed to solicit funds for 501(c) non-profit organizations, which the IO carefully considered.²⁰ (Ex 35)

However, as Maj Gen Tonini was informed by his JAG, the JER applies to Maj Gen Tonini's conduct. The KRS does not allow state employees to conduct fundraising in uniform, and the JER specifically does not allow DoD employees to fundraise or solicit funds for most NFEs. The IO found that because Maj Gen Tonini took affirmative acts using the authority of his official position, the JER and in turn 5 CFR 2635 applied to his activities. And that if the JER and state law conflict, then in accordance with the Supremacy Clause of the Constitution, federal law preempts state law.

On his own accord, Maj Gen Tonini provided multiple examples of his acceptance of gifts and successful solicitation efforts in his role as TAG. (Ex 6; 30) While every instance concerning the solicitation and acceptance of gifts, provided by Maj Gen Tonini, has not been thoroughly investigated in this report, there is ample evidence of his wrongdoing highlighted therein. This report does not question the benefits Maj Gen Tonini has garnered for the KYNG personnel, but it does serve to highlight the improper methods used by Maj Gen Tonini to achieve those results.

ALLEGATION 1, that on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard misused his subordinate's official time in violation of 5 CFR 2635.705(b), was **SUBSTANTIATED**.

- The preponderance of evidence supported the conclusion that Maj Gen Tonini used [REDACTED] [REDACTED] (both their duty time as well as during their non-duty time) to drive him from duty-

²⁰ Given that Maj Gen Tonini decided to contact his state ethics advisor after the interview with the IO and provided the ethics advisor's opinion to the IO, the IO decided it was unnecessary to contact the state ethics advisor.

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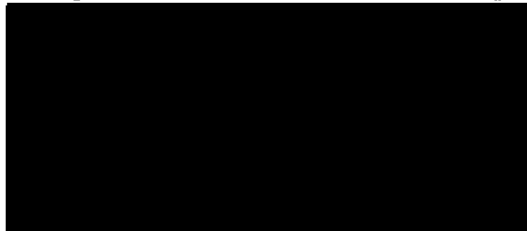
to-domicile and back, pick up or make lunch for him, and work on his and his wife's personal computers and printer in violation of 5 CFR 2635.705(b) (as to [REDACTED] official duty time) and 5 CFR 2635.302 (as to the Execs' personal time).

ALLEGATION 2, that on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard accepted gifts from prohibited sources or given because of his official position, in violation of 5 CFR 2635.202 (a), was **SUBSTANTIATED**.

- The preponderance of evidence supported the conclusion that Maj Gen Tonini did violate the provisions of the JER by accepting monetary donations towards the KYNG Memorial, because Maj Gen Tonini was in a federal uniform and his acceptance of the gifts was an affirmative act using the authority of his official position.

ALLEGATION 3, that on or about December 2008 to September 2014, Major General Edward W. Tonini, The Adjutant General, Kentucky National Guard solicited gifts from prohibited sources or given because of his official position, in violation of 5 CFR 2635.202 (a), was **SUBSTANTIATED**.

- The preponderance of evidence supported the conclusion that Maj Gen Tonini executed the affirmative use of his DoD position/title (TAG) to improperly solicit funds for the KYNG Memorial while in uniform and using his federally-funded office and phone.



Directorate of Senior Official Inquiries

I have reviewed this Report of Investigation and the accompanying legal review and I concur with their findings.

A handwritten signature in black ink, appearing to read "Gregory A. Biscione".

GREGORY A. BISCIONE
Lieutenant General, USAF
The Inspector General