New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Employee Incentive and Bonus Payments

Erie County Medical Center Corporation

Report 2016-S-29

January 2017

Executive Summary

Purpose

To determine if incentive and bonus payments made by the Erie County Medical Center Corporation (ECMCC) were warranted, supported, and distributed appropriately based on program intent and/or established criteria. The audit covers the period January 1, 2013 through December 31, 2015.

Background

ECMCC is a public benefit corporation created under Public Authorities Law §3626 to manage the Erie County Medical Center health network. Between January 1, 2013 and December 31, 2015, ECMCC reported 4,720 employees on its payroll, including 209 Management Confidential (MC) employees. During the three-year audit period, ECMCC offered two incentive programs to certain MC physicians — the Performance Incentive Program and the Productivity Incentive Program — and paid 16 of its physicians a total of $1,655,359 in these incentives. Also during this period, ECMCC offered a bonus program for all MC employees and paid 80 employees a total of $503,022 in bonuses.

Key Findings

- ECMCC did not properly administer and monitor its incentive and bonus programs, resulting in $76,254 in incentive payments that should be recovered because they were: not justified under the terms of the relevant incentive plan; distributed in error (as duplicate payments); or simply miscalculated.
- ECMCC did not maintain documentation to support the validity of another $86,261 paid to four physicians. According to ECMCC officials, the required written support was lacking because the doctors' compliance with their contractual performance requirements had been conveyed verbally many times.
- Nine other physicians were paid a total of $510,062 in incentives based upon their performance as a group, despite the terms of their employment agreements that specified that such payments would be based on individual performance. Formal assessments and documentation of physicians' individual job performances were not prepared, and consequently, we could not confirm the propriety of these incentive payments.
- ECMCC's productivity incentive payments included $401,096 paid to three physicians in settlement of a threatened employment dispute. Included therein was $50,011 for purported administrative services that were unrelated to productivity (upon which incentives were to be otherwise based). The remaining $351,085 resulted from a retroactive increase in the incentive rates applied for each doctor. However, because the amounts in question were negotiated, we could not determine whether they were fully warranted or accurate and, therefore, reasonable.

Key Recommendations

- Recover the $76,254 in unwarranted performance and productivity incentives.
- Further assess the $86,261 of unsupported incentive payments to determine if additional disallowances and recoveries are warranted.
- For all incentive and bonus programs and payments: improve monitoring, maintain appropriate supporting records, and ensure that payments are in full compliance with contractual stipulations

and commensurate with actual achievements.

Other Related Audits/Reports of Interest

Westchester County Health Care Corporation: Supplemental Payments to Executive Employees (2015-S-77)

Rochester-Genesee Regional Transportation Authority: Performance Incentive Program (2014-S-2)

State of New York
Office of the State Comptroller

Division of State Government Accountability

January 13, 2017

Ms. Sharon L. Hanson
Chair
Erie County Medical Center Corporation
462 Grider Street
Buffalo, NY 14215

Dear Ms. Hanson:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage government resources efficiently and effectively and, by so doing, providing accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit of Erie County Medical Center Corporation's *Employee Incentive and Bonus Payments*. This audit was performed according to the State Comptroller's authority under Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

Office of the State Comptroller
Division of State Government Accountability

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Background

The Erie County Medical Center Corporation (ECMCC) is a public benefit corporation that was created to manage, own, and operate (under Sections 3626 and 3629 of the Public Authorities Law) the Erie County Medical Center health network. The Erie County Medical Center is the only major public hospital in western New York and provides sophisticated and specialized patient care services to New Yorkers in eight counties. ECMCC is governed by a Board of Directors and managed by a Chief Executive Officer (CEO). Between January 1, 2013 and December 31, 2015, ECMCC reported 4,720 employees on its payroll, including 209 Management Confidential (MC) employees.

During the three-year audit period, ECMCC offered two incentive programs to certain MC physicians:

- Performance Incentive Program: Physicians can receive a quarterly award, up to a capped annual amount, for meeting certain performance criteria, as specified in the ECMCC employment agreement. The incentive is intended to foster ongoing continued improvements, and encourage performance improvements beyond the minimum required by law, medical/dental staff privileges, or common practice.
- Productivity Incentive Program: This incentive rewards physicians for productivity in patient care. Productivity is quantified based on the time and intensity associated with providing a given patient care service, measured in relative value units (RVUs). The amount of compensation is calculated using an agreed-upon dollar value per RVU, as specified in the ECMCC employment agreement. The incentive is intended to foster ongoing growth and development of the physician's medical practice at ECMCC.

Despite the language in ECMCC's employment agreements identifying both performance and productivity awards as incentive payments, ECMCC does not consider performance incentives to be additional compensation, but rather a portion of the physician's agreed-upon fair market value (FMV) annual compensation that is withheld (at risk) until specific criteria are met. According to ECMCC officials, ECMCC is in compliance with the laws and regulations with respect to establishing physician compensation arrangements and payments of compensation at FMV. For the purposes of this report, we refer to both performance and productivity awards as incentive payments.

In addition to these incentive programs, ECMCC also offered a bonus program, wherein MC employees were eligible for an annual award tied to individual merit. Bonuses were contingent on the employees achieving a personalized set of goals and objectives that they had established for the year, as documented during year-end performance evaluations. Bonus amounts varied based on position: for senior-level employees, bonuses were paid either according to contract terms or as a percentage of their annual salary; for lower-level employees, amounts were discretionary or exception based.

Under the Public Authorities Law, ECMCC is required to report various salary and other compensation data. ECMCC reports this data using the Public Authorities Reporting Information System (PARIS), an online data entry and collection system maintained by the Office of the State Comptroller and managed jointly with the State Authorities Budget Office.

Audit Findings and Recommendations

ECMCC did not properly administer certain incentive and bonus payments made to its employees. For the audit period, we identified $76,254 in incentive payments that should be recovered from employees because they either were not justified under the terms of the relevant incentive plan, were distributed in error, or were miscalculated. In addition, we identified another $806,124 in incentive ($596,323) and bonus ($209,800) payments that either had insufficient documentation or were otherwise not amenable to definitive analysis to determine whether they were entirely appropriate.

We also found that an ECMCC dispute settlement with three physicians, involving $401,096 in productivity incentive payments, included $50,011 for services unrelated to productivity (the basis on which incentive payments were to be made). The remaining $351,085 of this settlement was calculated based on a higher RVU count than was applied to compensate for alleged prior underpayments. However, there is no evidence that ECMCC performed any independent verification of the validity of the increase. Furthermore, we were unable to obtain sufficient detailed analysis to determine whether the RVU adjustment was warranted or accurate and, accordingly, whether the amount paid was reasonable. We note that ECCMC eliminated the Productivity Incentive Program as a result of the dispute.

In response to our draft report, ECMCC officials informed us that several individuals responsible for administering performance and productivity incentive payments during the audit period are no longer employed by ECMCC. Further, officials stated that senior ECMCC management has recognized the need to improve the administration of the Performance Incentive Program, and they are taking steps to correct Program processes.

Incentive Payments

Between January 1, 2013 and December 31, 2015, ECMCC paid 16 of its MC physicians a total of $1,655,359 in performance and productivity incentives. To assess the appropriateness of these incentives, we examined payments to 13 physicians whose performance and productivity incentives were among the highest, totaling $1,604,378 for the three-year period.

Accuracy of Payment Calculations

We found ECMCC improperly paid out a total of $76,254 in unjustified or miscalculated incentives, including:

- $36,246 in performance incentives to four physicians who did not meet the performance criteria stipulated in their contracts;
- $31,933 in duplicate payments made to two physicians for their 2014 first-quarter performance incentive ($5,710) and productivity incentive ($26,223);
- $6,620 in duplicate payments to three physicians: for two, the 2013 second-quarter performance incentive and for one, the 2013 first-quarter performance incentive. These

duplicate payments were included as part of a dispute settlement, but had in fact been already paid prior to that settlement; and

- $1,455 paid to three physicians for a total of five quarters based on incorrect RVU counts.

Furthermore, in reviewing the documentation supporting these performance incentives, we were unable to definitively verify whether $596,323 in payments were appropriate. This represents more than one-third of the incentive amounts paid to these 13 physicians.

- For four of the physicians (accounting for $86,261 in incentives), ECMCC did not maintain complete documentation to support physicians' achievement of all contractual performance requirements. Where there was no written documentation, ECMCC officials told us that physicians' compliance was instead conveyed verbally by the head of the respective departments to the person determining the incentive payment amount.
- For the remaining nine physicians (accounting for $510,062 in incentives), officials indicated the physicians' performance was not tracked individually; rather, performance was evaluated in total as a specialty group. However, the criteria included in each physician's employment agreement were clearly intended to measure individual (not group) performance. According to ECMCC officials, the group-based evaluation provided ECMCC with the desired behaviors. Nevertheless, physicians' incentive payments should be earned as stipulated in their employment agreements.

ECMCC officials informed us that several individuals responsible for administering performance and productivity incentive payments during the audit period are no longer employed by ECMCC. Further, officials stated that leadership has recognized the need for improvement in administering the Performance Incentive Program, and is taking deliberate steps to insert corrective measures in their processes. We appreciate ECMCC's actions to address deficiencies, and encourage ECMCC to routinely conduct risk assessments of new processes to ensure their effectiveness.

Employee Dispute Settlement Included as Incentive Payments

We found ECMCC paid a total of $401,096 in additional productivity incentives to three physicians as part of the settlement of an employment dispute. According to the complaint, the physicians alleged they did not originally receive all the productivity incentives they were entitled to because ECMCC had undervalued the RVUs associated with certain care services they performed and had failed to capture all of the physicians' actual work. ECMCC officials stated that this matter was subject to litigation, and the payments were the result of "an arm's-length negotiation" to accurately estimate the discrepancy and settle this matter to avoid litigation.

Based on our review of dispute documents, as well as ECMCC's response to our preliminary findings, we identified several problems with these payments.

- Our analysis showed ECMCC paid productivity incentives totaling $50,011 to compensate a physician for 65 hours of administrative work that he had purportedly performed to support his claim of underpayment (by $37,161) and in anticipation of additional hours of similar work that would be required during the remainder of the physician's contract

($12,850). As stated in the employee agreement, productivity incentive payments were intended to reward productivity in patient care and to foster ongoing growth and development of the physician's medical practice at ECMCC. Administrative work, however, was unrelated to the purpose of the incentive program, and there were no provisions for incentive payments for administrative work. As such, the incentive payments for administrative work were inappropriate.

- This impropriety notwithstanding, we found ECMCC's payments lacked sufficient justification:

    - First, we take issue with the amount ECMCC paid for the physician's 65 hours of work. The physician estimated the value of this work to be only $16,375; yet ECMCC paid $37,161, thereby overcompensating the physician by more than $20,000.
    - Second, we question the propriety of ECMCC's $12,850 payment to the physician in anticipation of additional administrative work. By virtue of both parties reaching a formal settlement, no additional administrative work by the physician would evidently be necessary.

The remaining $351,085 of the settlement payments were based on a higher RVU count designed to compensate the three physicians for their claimed underpayment of productivity incentives. We requested and reviewed the available support for the increase that ECMCC applied to the RVU-based productivity incentives. However, ECMCC did not have sufficient detailed analysis to support the underlying data for each side of the dispute, and therefore, we could not determine whether ECMCC had accurately estimated such an increase. Consequently, we were unable to determine whether the $351,085 paid as a result of the increase was reasonable. Further, as a result of the disputed productivity incentives, ECMCC subsequently amended the contract, eliminating this form of payment, and is no longer offering productivity incentives.

Incentive Reporting

For each year of the audit period, we found ECMCC's PARIS reporting improperly classified the compensation paid for all 16 physicians. Of the $1,655,359 in performance and productivity incentives paid, ECMCC reported $900,887 as regular salary. Accounting for these payments as "salary" instead of as incentives misrepresented the nature of these public employees' compensation. For accountability and transparency purposes, this information should be reported accurately.

In response to our finding, ECMCC agreed that the productivity incentives were reported incorrectly, but contended that the performance incentives were reported in keeping with their belief that such payments are part of physicians' agreed-upon FMV compensation and thus not considered additional compensation. According to ECMCC officials, this element of physicians' compensation is withheld (at risk) until specific criteria are met. However, we note that this element is part of a Performance Incentive Program as described in each physician's employment agreement, with payment contingent on the fulfillment of specific performance goals. We also consulted with the Authorities Budget Office, which agreed with our determination.

Bonus Payments

Between January 1, 2013 and December 31, 2015, ECMCC paid 80 of the 209 MC employees a total of $503,022 in bonuses. We selected a judgmental sample of 10 employees, who received 27 bonus payments totaling $214,800 over the audit period, and reviewed their evaluations to determine if they had established personalized goals and objectives and whether there was evidence to support that they had met these goals and objectives, as ECMCC required for bonus eligibility. Of the 27 payments, we found one (for $5,000) was not a merit bonus, but rather a sign-on bonus and, as ECMCC officials explained to us, a payment made in lieu of relocation expenses.

For each of the remaining nine senior-level employees (accounting for 26 bonus payments totaling $209,800), their total bonus amounts awarded each year did not exceed the maximum amount they were eligible to earn. However, we determined that:

- Five of the nine employees received bonuses (accounting for 12 payments totaling $74,800), although these employees did not establish formal personalized goals and objectives, as otherwise required by ECMCC's bonus program policy; and
- Six employees received bonuses (accounting for 14 payments totaling $135,000), although they did not meet all of their established personalized goals and objectives.

Thus, we questioned the propriety of all 26 bonus payments totaling $209,800. In one particular example, an employee received a bonus payment of $20,000 despite having met only 9 of 32 goals (28 percent). According to ECMCC officials, the full $20,000 payment was warranted because the number of goals established (32) was excessive. However, ECMCC officials and the employee agreed to the goals in the first instance. Further, ECMCC had no formal criteria that allowed for the weighting or prioritizing of the goals in determining the value of the bonus payment. Also, in the following year, the same employee received a bonus of $24,000; however, there was no evidence that she had attained any of the 34 goals established in her performance plan.

ECMCC officials informed us that they discontinued the bonus program effective in 2015, shortly after the appointment of the current CEO. During the three-year period covered by our audit, ECMCC had three CEOs in place, which may have contributed to a lack of consistent focus on bonus awards and payments. ECMCC officials told us that the current CEO's employment contract runs through 2019, and they do not anticipate a renewal of the bonus program in the near future.

Recommendations

1. Recover the $76,254 in unwarranted performance and productivity incentives.

2. Further assess the $86,261 of unsupported incentive payments made to the four physicians, as cited in the report, and determine if additional disallowances and recoveries are warranted.

3. Ensure that incentive payments are properly classified for annual PARIS reporting purposes.

4. For all incentive and bonus programs and payments: improve monitoring, maintain appropriate supporting records, and ensure that payments are in full compliance with contractual stipulations and commensurate with actual achievements.

Audit Objective, Scope, and Methodology

The objective of our audit was to determine if ECMCC's incentive and bonus payments were warranted, supported, and distributed appropriately based on program intent and/or established criteria. The audit covers the period January 1, 2013 through December 31, 2015.

To accomplish our objective, we reviewed payroll records to identify payroll codes related to either an incentive or a bonus program, and then selected two codes with the highest dollar values to focus audit work. One code was related to physician incentives and the other to MC employee bonuses. Further, we reviewed the supporting documentation for ECMCC's internal control assessment, including an internal policy relating to bonus payments and employment agreements between the physicians and ECMCC. We also judgmentally sampled 13 of the 16 physicians who received an incentive payment during our scope period. We did not review payments to the remaining three physicians because of their relatively low amounts.

For each selected case, we reviewed the support provided to us relating to performance achievement and payment of physician incentives. We also interviewed individuals who were at the time, or currently, responsible for collecting support data and measuring employees' actual achievement against established criteria. Further, we also judgmentally sampled payments to 10 MC employees based on their amount. We reviewed annual performance evaluations to determine if personal goals and objectives were established and achieved. We also reviewed PARIS reporting requirements, which we used to evaluate the accuracy of ECMCC's compensation reporting.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating threats to organizational independence under generally accepted government auditing standards. Therefore, in our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

This audit was performed pursuant to the State Comptroller's authority under Article X, Section 5 of the State Constitution and Section 2803 of the Public Authorities Law.

Reporting Requirements

We provided a draft copy of this report to ECMCC officials for their review and formal comment. We considered ECMCC's comments in preparing this report and attached them in their entirety to the report. In their response, ECMCC officials agreed with some of our findings and recommendations and, in certain instances, have recouped overpayments identified in the report. In other instances, ECMCC officials disagreed with our findings and provided documentation which they believed supported particular incentive payments. Where appropriate, we revised the report to reflect the additional information provided. Also, our rejoinders to certain ECMCC comments are included in the report's State Comptroller's Comments.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Chair of the Erie County Medical Center Corporation shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

Contributors to This Report

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Vision

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To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Agency Comments

ERIE COUNTY MEDICAL CENTER CORPORATION
BUFFALO, NEW YORK

The difference between healthcare and true care™

ECMC CORPORATION

RESPONSE TO THE OCTOBER 2016 DRAFT REPORT OF THE OFFICE OF THE NEW YORK STATE COMPTROLLER, DIVISION OF STATE GOVERNMENT ACCOUNTABILITY, PERTAINING TO EMPLOYEE INCENTIVE AND BONUS PAYMENTS.

NOVEMBER 2016

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November 16, 2016

Office of the N.Y.S. Comptroller
Division of State Government Accountability
110 State Street
Albany, New York 12236

Re: Draft Report 2016-S-29 (October 2016)

Dear Sir or Madam:

On behalf of Erie County Medical Center Corporation ("ECMCC"), I am transmitting the "Response to the October 2016 Draft Report of the Office of the New York State Comptroller, Division of State Government Accountability, Pertaining to Employee Incentive and Bonus Payments" ("ECMCC Response"). In reviewing the attached document, you will note that ECMCC has organized its response to correspond with the Draft Report you transmitted in October 2016.

ECMCC appreciates both the role of the Division of State Government Accountability and the commitment made by the audit team while conducting its work on this important topic. ECMCC has – both before and after the audit work – changed practices and identified areas where improvements in process will result in better record-keeping and better administration of physician compensation. As well, ECMCC has provided further information and observations where appropriate.

We realize that the ECMCC Response may give rise to further inquiry and interaction between the audit team and ECMCC personnel and we welcome the opportunity to continue to work together for the citizens of New York State.

Sincerely,

Stephen M. Gary, Sr.
Chief Financial Officer

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EXECUTIVE SUMMARY

By correspondence dated April 12, 2016, the Office of the New York State Comptroller ("OSC") advised Erie County Medical Center Corporation ("ECMCC") that it intended to conduct an audit of employee bonus payment and other compensation issues for the period from January 1, 2013 through December 31, 2015. The OSC Audit Team was on-site for 11 weeks from April through July 2016 and received over 26,000 pages of documents during and after that time. The OSC Audit Team submitted and received responses to several dozen written questions and conducted 16 in-person and telephonic interviews of ECMCC personnel.

ECMCC is a regional health system and a comparatively large public authority that had nearly 4,800 employees during the three-year audit period. The combined payroll during the audit period was over $550 million. The focus of the OSC Audit Team was on a group of 209 employees, and particularly, on less than two dozen employed physician contracts and the record-keeping relating to those contracts.

ECMCC appreciates the cooperation of the OSC Audit Team and the collaborative dialogue during the audit process. The OSC Audit Team provided ECMCC with two preliminary audit findings dated July 22, 2016 and a third preliminary audit finding dated July 27, 2016 to which ECMCC provided written responses dated July 27, 2016 and August 3, 2016, respectively. In addition the OSC Audit Team conferred with ECMCC in a conference call regarding the foregoing correspondence. At the request of ECMCC, the OSC Audit Team also provided documentation supporting their findings, allowing ECMCC to determine the accuracy of the findings and to provide further clarification concerning the matters evaluated.

As a result, ECMCC has thoroughly researched the findings described in the OSC Draft Audit Report and has searched for additional audit evidence in support of payments. The response that follows includes more current information than may have been available to the OSC Audit Team at the time of their field work.

It also should be noted that prior to the OSC audit, ECMCC already implemented changes to the practices in question or record keeping in relation to employee compensation and incentives. Most notably, no incentives and bonus payments are paid to ECMCC employees, other than employed physicians.

RESPONSE TO KEY FINDINGS DESCRIBED IN DRAFT AUDIT REPORT

The OSC Draft Audit Report contained four (4) "Key Findings" described in its Executive Summary section (see 10/2016 OSC Draft Audit Report at 1). These findings are reprinted below for the reader's benefit and are followed by a summary of the response from ECMCC.

Finding 1: *ECMCC did not properly administer and monitor its incentive and bonus programs, resulting in $76,476 in incentive payments that should be recovered because they were: not justified under the terms of the relevant incentive plan; distributed in error (as duplicate payments); or simply miscalculated.*

ECMCC Response: The affected employees are all physicians who have written employment contracts complying with both federal and state law, and who did not engage in any wrongdoing in preforming their duties under those agreements. Based on the detailed information provided by the OSC Audit Team, ECMCC was able to identify alternative audit evidence supporting the propriety of the payment for nearly half of the items underlying this finding, as explained in detail below. While some portion of the amount described by the OSC Audit Team has been recovered by ECMCC, there is no basis for recovering the portion that is supported by the alternative evidence or calculation errors. In any event, the amount in question was less than one-half of one percent of the compensation paid to employed physicians during the audit period. We thank the OSC for identifying past record keeping errors. It should be noted that the processes and personnel involved were changed in late 2015.

* Comment 1

Finding 2: *ECMCC did not maintain documentation to support the validity of another $86,261 paid to four physicians. According to ECMCC officials, the required written support was lacking because the doctors' compliance with their contractual performance requirements had been conveyed verbally many times.*

ECMCC Response: The written employment agreements of the four physicians provided clearly defined performance incentive requirements. Actual performance is confirmed in several ways throughout a contract year. Some of the performance measures relate to annual meetings and planning that, at the time of payment, was confirmed with relevant supervisory personnel. The $86,261 amount described by the OSC Audit Team was not paid in error, and thus, there is no basis for recovery (and the OSC Draft Report did not seek such recovery). ECMCC has agreed, however, that additional paperwork would assist any future auditor in confirming that required performance is being properly memorialized.

* Comment 2

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*See State Comptroller's Comments, page 28.

Finding 3: *Nine other physicians were paid a total of $510,062 in incentives based upon their performance as a group, despite the terms of their employment agreements that specified that such payments would be based on individual performance. Formal assessments and documentation of physicians' individual job performances were not prepared, and consequently, we could not confirm the propriety of these incentive payments.*

ECMCC Response: ECMCC is the only Adult Level 1 Trauma Center serving the Western New York region. As a result of its responsibility for this critical life-saving service, certain physicians (including the single specialty of the nine physicians referenced in this finding) are required to be on-site 24/7/365 to serve the emergent needs of trauma patients, among others. In order to meet those needs, these nine physicians are required to function as an integrated unit, not individually, and the performance measures contained in each of their contracts is intended to measure that level of unified service. The contracts with these nine physicians, however, contained a mutual mistake and each contract has been amended to correctly reflect the agreement that was reached between the physicians and ECMCC. No further action is required because the contracts now conform to the parties' understandings and are consistent with how incentive payments were and are measured. We thank the OSC for pointing out this inconsistency between the contracts and practice.

Finding 4: *ECMCC's productivity incentive payments included $401,096 paid to three physicians in settlement of a threatened employment dispute. Included therein was $50,011 for purported administrative services that were unrelated to productivity (upon which incentives were to be otherwise based). The remaining $351,085 resulted from a retroactive increase in the incentive rates applied for each doctor. However, because the amounts in question were negotiated, we could not determine whether they were fully warranted or accurate and, therefore, reasonable.*

ECMCC Response: This finding involves the settlement of three breach of contract claims, each of which relates to the underpayment of an employed physician. Those employees properly claimed that ECMCC did not pay them what they were owed under their written contracts. The written contracts and all pre-claim compensation records were made available to the OSC Audit Team in order to demonstrate the merit of each claim. It does not appear that the OSC Audit Team disputes that a breach of contract took place in each of these three instances.

The total claim made by the physicians was for $573,000, plus interest. ECMCC and the physicians engaged in mediation, and ultimately, settled these three disputes for

$401,096. Settling in this amount avoided over $171,000 of the claim, avoided several years of interest charges on the whole amount claimed, avoided a claim for unjust enrichment, and avoided the legal fees that ECMCC would have incurred in defending three lawsuits that clearly had merit.

ECMCC exercised sound business judgment in its management of these claims as noted above and any criticism of such settlement is misplaced. ECMCC provided the OSC Audit Team with ECMCC's own independent, internal calculations confirming the magnitude of the error, the calculations completed by the three physicians concerning the ECMCC error, and guidance from the federal government and independent sources concerning why the settlement was both reasonable under these circumstances and in compliance with applicable laws and regulations.

The OSC Audit Team has taken exception to and criticized $50,011 for what they have called "purported" administrative services. The services recognized as a part of the settlement related to work over nearly three years in developing a new service line at ECMCC, now a hallmark service in our community drawing patients from across the country. The services also included meeting with and training ECMCC personnel regarding the unique administrative characteristics of that service line, and in working to correct the compensation error that ultimately led to this settlement.

* Comment 3

RESPONSE TO AUDIT FINDINGS AND RECOMMENDATIONS

We appreciate that the OSC Audit Team has acknowledged the cooperation of all ECMCC personnel as it completed its extensive review of documents and conducted regular staff interviews over the several months of its work. Indeed, over the time of the OSC Audit Team engagement, 16 interviews of ECMCC personnel were completed, 26,326 pages of electronic ECMCC records (including customized compensation reports based on OSC specifications by pay period for every ECMCC employee for over three years) and 45 hardcopy personnel files were made available for review. ECMCC also provided the OSC Audit Team with ECMCC governance documents, other business records, and educational information regarding the federal law governing how physicians should be compensated. [1]

The OSC Draft Report predominantly pertains to employed physician contracts. Over the three-year audit period, ECMCC paid employed physicians a total of $25,116,973 (2013: $5,646,553; 2014: $9,060,973; and 2015: $10,409,447). The observations made by the OSC Audit Team pertaining to the recovery of uncorrected, overpaid compensation of $76,476 constitutes 0.304 percent (0.304%) of the amount paid to employed physicians during the audit period. The corrected and now recovered amount of $50,168.23 is actually only 0.20 percent (0.20%) of the total compensation paid over the same period. While ECMCC understands its role as a responsible steward of every public dollar, we note that 99.8 percent (99.8%) of what the OSC Audit Team extensively examined was handled properly.

The following four (4) sections discuss in detail the Audit Findings and Recommendations described by the OSC Audit Team (see 10/2016 OSC Draft Audit Report at 6-10).

Incentive Payments

The OSC Draft Report concludes that $76,476 should be recovered because the physicians receiving these numerous payments either did not achieve performance measures or received duplicate payments. The calculation underlying this amount is not accurate, however, in the following respects:

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[1] Despite the amount of information reviewed, the October 2016 OSC Draft Audit Report did contain several factual errors. Among other things, the report stated that the Erie County Medical Center is "[o]wned and operated by Erie County." See 10/2016 OSC Draft Report at 5. The medical center is owned and operated by ECMCC, however. The draft report stated that "all MC employees were eligible for an annual award tied to individual merit," and later that "for senior-level employees, bonuses were paid either according to contract terms or as a percentage of their annual salary; . . .." See10/2016 OSC Draft Report at 5. ECMCC explained during the audit opening conference, however, that *none* of the senior-most MC executives were eligible for or received incentive or bonus payments at any time during the audit period. ECMCC also explained that *all* of the remaining MC incentive and bonus programs were discontinued in 2015, before this audit was commenced.

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Comment
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- 23 out of a total of 47 findings by the OSC Audit Team were not consistent with physician contract language and/or ECMCC policies. For example, a physician can appear on a particular report or list for several different reasons, not all of which relate to the achievement of contractual performance measures. It appears that the OSC Audit Team relied solely on the delinquency list as a measure of actual contract performance measure achievement. Some of the findings, in addition, relate to physical visits to the medical records area every other week. It appears that the OSC Audit Team assumed that any gap between appearances that was more than 14 days violated this measure, even though this measure was not described by a period of days. In one instance, finally, we were able to find evidence that the conclusion reached by the OSC Audit Team (that a physician did not sign an appropriate log within a specified time) was not accurate. There is no reasonable basis for ECMCC to claim recovery for the dollar amounts associated with these 23 findings. Regarding the remaining findings, ECMCC notes that the overpayments were caused by ECMCC record-keeping, not by any conduct by the physicians involved. ECMCC has met with the affected employees and each has agreed to repayment of his or her respective amount of overpayment.

* Comment 5

* Comments 6 and 4

* Comment 4

- The OSC Audit Team recommended that $31,933 should be recovered from two physicians because the OSC Audit Team concluded that these two physicians were each paid twice for work that occurred during the first calendar quarter of 2014. First, it is important to note that neither of these physicians played any role in the errors identified by the OSC Audit Team. Previous administrative personnel oversaw physician performance and calculated the amounts to be paid pursuant to specific contract language. ECMCC has met with the affected employees and each has agreed to repayment of his or her respective amount of overpayment.

- The OSC Audit Team reviewed work papers created before a contract settlement and concluded that $6,620 was paid twice. ECMCC has met with the affected employees and each has agreed to repayment of his or her respective amount of overpayment.

- The OSC Audit Team determined that $1,455 was paid to three physicians over five calendar quarters based on incorrect RVU counts. ECMCC has met with the affected employees and each has agreed to repayment of his or her respective amount of overpayment.

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Based on the foregoing information, of the total of $76,476 identified by the OSC Audit Team, ECMCC has identified additional audit evidence and support totaling $26,307 (34.4%) of the payments and has arranged for the recovery of the balance of these funds from the affected individuals. Again, we thank the OSC Audit Team for identifying these past record keeping errors. It should be noted that this area has been restructured with both a change in personnel and practice.

It also should be noted that ECMCC and several of these physicians agreed, before the OSC audit began, that their employment agreements would be modified because of the complexity encountered in administering the methodology in certain multi-disciplinary medical specialty areas. In other words, the incentive methodology is no longer used for these physicians.

In addition, many of the delinquencies that generated audit findings involved the timely completion of paper-based medical records. ECMCC has completed conversion to a fully-electronic medical record that should preclude any future untimely medical records activity.

The OSC Audit Team also commented on the documentation relating to certain other incentive payments totaling $596,323 and involving 13 physicians. ECMCC notes the following regarding each of these matters.

- The OSC Audit Team found that $86,261 in incentive payments to four physicians lacked proper documentation. These payments were for marking the surgical site, and conducting annual performance improvement and quality assurance meetings. Marking of a surgical site by a physician is described in ECMCC policy ADM-005, entitled "Time Out Universal Protocol" which was provided to the OSC Audit Team during their visit to ECMCC. The policy requires completion of a Surgical Pre-Operation Checklist that becomes a part of a patient's medical record. The OSC Audit Team did not request access to any patient records to substantiate the payment. Annual performance improvement and quality assurance meetings typically are conducted in-person with the ECMCC Chief Medical Officer and are confirmed by the Chief Medical Officer before an incentive is paid. These meetings generally result in plans that are presented by the employee or a designee to the Quality Improvement Committee of the ECMCC Board of Directors. Records of such presentations do exist and support these incentive payments.
  * Comment 7

- The OSC Audit Team determined that $510,062 in performance incentives were paid to nine physicians in a manner not consistent with the language of their respective contracts. The OSC Audit Team is correct that the contract

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> language was not consistent with how performance was measured and, as a result, ECMCC and the affected physicians have amended the nine contracts to conform to the proper manner of measuring performance. The services provided by the physicians is unique and cannot be measured individually, given the nature of their work in a Level 1 Trauma Center that responds to the emergent needs of trauma patients and others on a 24/7/365 basis. The language examined by the OSC Audit Team was mistakenly placed in the contracts and has since been removed.

As noted by the OSC Audit Team, the individuals directly involved in the evaluation of physician performance and incentive payment processing during the audit period are no longer employed by ECMCC, having terminated their relationships in 2015 (before the OSC audit began). Leadership has recognized the need for improving the Performance Incentive Program and several steps have been taken toward that goal, as noted above.

Employee Dispute Settlement Involving Incentive Payments

In early 2013, ECMCC was made aware of a claim by three physicians relating to compensation based on Relative Value Units (or RVUs), a methodology approved by the Center for Medicare and Medicaid Services designed to align physician performance with healthcare organizational goals. Essentially, these physicians learned that the manner in which they were being paid for the work they actually performed in this complex, multi-disciplinary specialty, was not consistent with the language of their respective employment agreements, in several respects. The three physicians made a total claim of $573,000, plus interest. The OSC Audit Team was supplied with documents that were created by these physicians illustrating the underpayment they were disputing.

Following presentation of these three claims, ECMCC engaged (through legal counsel) in its own independent investigation of these allegations. As a result of that investigation, ECMCC concluded that the three physicians were correct – ECMCC had underpaid each of these physicians in a manner that was not consistent with the employment contracts then in place. During the investigation, moreover, ECMCC did not pay some of the incentive payments that were due. In addition, ECMCC determined that it had failed to account for administrative time expended by one of the three physicians over a nearly three year period. In other words, without conceding the merit of the claims, ECMCC independently concluded that these three disputes could result in a contractual liability of $573,000 plus statutory interest of nine percent (9%) per year, plus interim incentive payments, plus a related claim for unjust enrichment for administrative services that had gone uncompensated, plus attorneys' fees and litigation expenses if these matters proceeded to litigation. These

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conclusions were described to the OSC Audit Team on repeated occasions and documents from late 2013 attesting to the outcome of ECMCC's independent investigation also were made available to the OSC Audit Team.

As a result of this independent investigation, ECMCC determined it was prudent to attempt to settle this dispute and avoid litigation. All of the foregoing claims were settled in the total amount of $401,096 plus outstanding unpaid incentives. Settling in this amount avoided over $171,000 in claimed underpayments, avoided the annual nine percent (9%) statutory interest on any award, avoided the unjust enrichment claim for unpaid administrative services, and avoided the legal fees and expenses that would have been incurred by ECMCC if these three claims became three lawsuits. ECMCC believes the decision to settle these three claims before they proceeded to litigation was prudent under these circumstances. ECMCC also believes that it provided a substantial document record and information from counsel to the OSC Audit Team so that the OSC Audit Team could determine that the settlement amount was reasonable. See Codification of Statements on Auditing Standards AU-C Section 500.06.A1 – 500.06.A5 (evidence is cumulative; reasonable assurance is obtained when auditor obtains sufficient appropriate evidence) and Section 330 (auditor should base conclusion on all relevant audit evidence).

The settlement payment to each physician was processed through the ECMCC payroll system after these matters were compromised, but should have been characterized as the settlement of contract disputes rather than as measures of performance. As well, the disputes centered on the underpayment for RVU-based work, but not all of the settlement payments involved productivity-based work. The administrative services at issue, for example, occurred over a nearly three year period of time and involved administrative duties. It is improper and inaccurate for ECMCC to characterize this portion of the settlement as productivity based, and improper and inaccurate for the OSC Audit Team to allege that the work being compensated involved only 65 hours of time.

* Comment 3

During the audit, ECMCC also explained to the OSC Audit Team that the three physicians involved in the underpayment dispute were in a specialty area of medical practice that has been and is very important to both ECMCC and the Western New York community. ECMCC described how it views its physicians, especially those directly employed by ECMCC, as partners in bringing high quality clinical outcomes to seriously ill patients and how these three physicians play leading roles in that partnership. Maintaining adversarial proceedings – like three lawsuits – against one's employees is simply not a good way to assure that employer and employee are working productively together. So, in addition to the liabilities, attorneys fees and expenses that were avoided, settling before litigation assured that a productive employment relationship continued with three professional care givers.

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Incentive Reporting

ECMCC agrees that compensation should be categorized accurately when information is input to the Public Authorities Reporting Information System ("PARIS"). Putting the correct amount of compensation into the wrong category, however, does not alter the fundamental fact that the compensation itself was disclosed and the amount disclosed was accurate. Before the OSC audit began, the ECMCC Finance Department completed its own assessment of PARIS reporting and created organizational materials intended to avoid miss-categorizing compensation in the future. Those materials were shared with the OSC Audit Team during their visit.

Bonus Payments

ECMCC discontinued the payment of bonuses to all MC employees in 2015, before the OSC audit began. Before 2015, certain non-executive and mid-level MC employees only were eligible for bonuses of up to 25 percent (25%) and 10 percent (10%) of base salary, respectively, and performance was measured against written evaluations. [2]

ECMCC has a written policy pertaining to the eligibility for and measurement of bonus opportunities for those employees to whom that policy applied. The laws and regulations pertaining to public employee compensation do not require that every component of a potential bonus be awarded based on some objective measure and neither did the ECMCC policy.

ECMCC also has an extensive annual written MC employee assessment form that is completed for all MC employees. The written assessment must annually be completed both by the MC employee and his or her supervisor. On the basis of a written annual assessment some, but not all, eligible MC employees received bonuses during the audit period. Those bonuses, as noted in the OSC Draft Audit Report, did not exceed the maximum amount awardable.

The OSC Audit Team noted correctly that nine employees over the three-year audit period received $74,800 in bonus payments even though personalized goals and objectives had not been formally established. Nevertheless, the bonus payments were only paid after an annual employee assessment was completed by both the employee and his or her supervisor. The failure to have personalized goals and

* Comment 4

[2] As explained to the OSC Audit Team during the opening conference in April 2016, the senior-most executives of ECMCC were never eligible for and never received any form of bonus compensation at any time during the audit period.

objectives in the future will not be a problem because the MC bonus program was discontinued in 2015.

The OSC Audit Team noted correctly that six employees over the three-year audit period received $135,000 even though they did not meet all of their established personalized goals and objectives. Neither ECMCC policy, nor the goals and objectives themselves, required that any employee achieve all of the goals and objectives in order to qualify for a particular bonus. ECMCC and the affected employees set personalized goals and objectives prospectively and measure progress retrospectively. Individual supervisors are relied upon to exercise judgment in awarding bonuses that recognize performance beyond expectations. In any event, measuring performance in the awarding of bonus compensation in the future will not be a problem because the MC bonus program was discontinued in 2015.

The OSC Audit Team described one instance where a particular ECMCC employee received successive bonuses of $20,000 and $24,000 over a two-year period. The OSC Audit Team noted that the first payment of $20,000 was awarded even though only 9 of 32 goals were achieved. Absent from that analysis was any evaluation about whether either the employee involved or his or her supervisor were questioned about this bonus award in an effort to understand the reasons underlying it. The $24,000 bonus awarded in the subsequent year, likewise, was criticized by the OSC Audit Team because there was no evidence that any of the 34 goals established were met by that employee. The OSC Audit Team was presented, however, with a letter signed by the now-former employee attesting to the fact that formal evidence was created at the time the second bonus was awarded.

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Finally, the OSC Audit Team observed near the end of the OSC Draft Audit Report that ECMCC's "CEO changed three times, which may have contributed to the weak oversight of bonus awards and payments." See 10/2016 OSC Draft Audit Report at 9. To clarify, the person in the CEO position at ECMCC changed twice during the three-year audit period (once in April 2014 and then, again, in November 2015). Second, there is no evidence whatsoever that changes in the person occupying the CEO position had any connection to the above matters. It should be noted, however, that past and current leadership made changes before the arrival of the OSC Audit Team that address all of the observations made in this report. As noted, all of the observations made by the OSC Audit Team concerning these subjects pertain to ministerial, recordkeeping matters, not failures in policy or compliance. ECMCC thanks the OSC Audit Team for noting that the entire non-physician employee incentive and bonus program was discontinued in 2015 by the current CEO of ECMCC. Therefore, ECMCC respectfully asks that the above-quoted language regarding "weak oversight of bonus awards and payments" by previous CEOs be removed from the final report.

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REPORTING REQUIREMENTS

ECMCC acknowledges its obligation, pursuant to section 170 of the New York Executive Law, to report to the Governor, the Comptroller, and the leaders of the Legislature and fiscal committees within ninety (90) days concerning the steps taken to implement the recommendations contained in the final report, and where steps have not been taken, the reasons underlying those decisions.

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State Comptroller's Comments

1. As detailed later in ECMCC's response, ECMCC reviewed the incentive payments totaling $76,476 that we identified in the draft report as unjustified or miscalculated. ECMCC determined that payments totaling $50,168 were improper and subsequently recovered this amount. We requested evidence that supported ECMCC's approval of the remaining payments totaling $26,308 ($76,476 - $50,168). Our review of this evidence showed that only $222 of the remaining $26,308 was appropriately paid. Consequently, we revised our report as appropriate to reflect the adjustment of $222. Nonetheless, the additional evidence that ECMCC provided failed to show that the physicians met the performance criteria stipulated in their contracts for most all of the remaining incentive payments totaling $26,086 ($26,308 - $222).

2. ECMCC's response skirts the core issue. In this case, weak monitoring controls enabled ECMCC to distribute $86,261 in performance incentives without proper supporting documentation. As stated in the report, ECMCC did not maintain complete documentation to support that the four physicians met all contractual performance requirements necessary to receive the $86,261 in incentive awards. Where documentation was not available, ECMCC accepted department heads' verbal confirmations of the physicians' performance as sufficient proof. Although ECMCC officials assert that the $86,261 "was not paid in error," without sufficient supporting documentation, there is inadequate assurance that the payments were appropriate and justified. Also, we are encouraged that ECMCC officials acknowledge the importance of supporting documentation in assessing employee performance and justifying incentive payments.

3. ECMCC's support for the compensation in question included a document that referenced the administrative time (or "Unproductive Time") the physician claimed to support his arguments and suggested that ECMCC increase the rate at which ECMCC paid the productivity incentive. The rate increase, which was not formally amended in the physician's employment agreement, resulted in an additional $50,011 in productivity incentive awards, despite evidence that corresponded with only $16,375 (the estimated value of the physician's 65 hours of administrative work that the physician himself reported) in awards. ECMCC provided no adequate evidence to support the remaining $33,636 in productivity incentives paid to the physician for administration work. Further, in response to our draft report, ECMCC asserts that $12,850 (of the $33,636) was compensation "in anticipation of additional similar responsibilities that were required to assure that the matter was completely resolved." However, as stated on page 8 of the report, by virtue of the formal settlement, no additional administrative work was apparently needed.

   Moreover, as we note on page 8 of the report, according to the employment agreement, incentive payments were intended to reward increased productivity in patient care and to foster ongoing growth and development of the physician's ECMCC medical practice. Administrative work was unrelated to the purpose of the incentive program. As such, we maintain that the entire $50,011 in incentive payments for administrative work was inappropriate.

4. Based on ECMCC's comments, we revised the final report as appropriate to improve the technical accuracy of the details in question.

5. We relied on delinquency lists provided by ECMCC only to evaluate this one component of incentive eligibility, and not to evaluate all aspects of contract compliance and achievement. Further, at no point during our audit fieldwork did ECMCC officials indicate that there was any other basis for determining eligibility under this aspect of incentive payments beyond the delinquency lists that they provided to us.

6. The physicians' contracts actually state that the physician shall report to the Medical Records Department no less than one visit every two weeks. We construed two weeks to mean 14 days, and believe our interpretation of the provision to be reasonable. In fact, we noted that in at least one instance, 42 days elapsed between visits to the Medical Records Department by a particular physician.

7. The payments in question were not only for marking surgical sites and conducting annual performance improvement and quality assurance meetings. In fact, there were seven other performance criteria, which accounted for $62,885 of the $86,261 in payments that lacked supporting documentation. We provided these details to ECMCC officials during the audit and requested them to provide us with all documentation supporting how each employee met each of the other seven criteria. If such documents existed and were used in ECMCC's incentive payment determination, ECMCC should have provided them to us. In addition, ECMCC officials told us that physicians' achievement of certain requirements was, in most instances, conveyed only verbally. Thus, we stand by our conclusions, as presented in the report.

8. Regardless of ECMCC's reasons for awarding a $20,000 bonus to an employee for achieving only 9 (28 percent) of 32 prescribed goals, the point is that ECMCC had not established any formal criteria that allowed for the weighting or prioritizing of goals in determining the value of the bonus payment. Not only would this help ensure that bonus payments were commensurate with actual performance, but it would also help: avoid the appearance of ECMCC awarding bonuses arbitrarily; and ensure that all eligible employees were given equal consideration.

9. The letter, written by the former employee to attest on her own behalf, was created solely for the purposes of our audit and was not contemporaneous with the awards in question. Moreover, there was no evidence accompanying the letter indicating that the employee met any of the 34 prescribed goals. As such, the letter had very limited evidentiary value.

10. We disagree. Our observations of weak organizational controls encompass both policy and compliance. For instance, as previously noted, ECMCC did not: have formal criteria that allowed for the weighting of goals in determining the value of bonus payments; or properly monitor its incentive and bonus programs to ensure employees were sufficiently compliant with program requirements for the awards they received. Thus, the control weaknesses went well beyond "ministerial" and "record keeping" matters.