



U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

December 7, 2000

The President  
The White House  
Washington, D.C. 20500

Re: OSC File No. DI-98-1473

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report from the Honorable Jerry MacArthur Hultin, former Acting Secretary of the Navy, sent to me pursuant to 5 U.S.C. §§ 1213(c) and (d). The report sets forth the findings and conclusions of the Acting Secretary's review of disclosures of information allegedly evidencing violations of law, rule or regulation, and a substantial and specific danger to public health and safety within the Department of the Navy, U.S. Marine Corps, Facilities Maintenance Department (FMD), Camp Pendleton, California.

The whistleblower, Jim J. Kent, is a pipe fitter who consented to the release of his name and provided comments on the agency report to this office pursuant to 5 U.S.C. § 1213(e)(1), which I am also transmitting.

We have carefully examined the original disclosures and reviewed the agency's response and Mr. Kent's comments. Pursuant to 5 U.S.C. § 1213(e)(2), I have determined that the findings in the agency's report appear to be reasonable and contain all of the information required by statute.

Specifically, Mr. Kent alleged that on two occasions his supervisor, Mr. Michael Durem, ordered him to excavate without the shoring required by Occupational Safety and Health Administration (OSHA) guidelines. Mr. Kent alleged that in February 1998, Mr. Durem ordered him, under protest, to dig a tunnel under a road in Area 23 of the air station. Mr. Kent alleged that later on April 30, 1998, Mr. Durem ordered him to dig a hole to repair a ruptured pipe in the middle of the street of Area 17 of Camp Pendleton. Mr. Kent protested because the hole did not have any shoring. Again, Mr. Durem told him to continue digging. Due to the ground saturation from the leak, the southeast wall of the hole collapsed on Mr. Kent. He reported both of these incidents to Mr. Durem's supervisor, Mr. David Pierson. It was Mr. Kent's contention, however, that despite his reports no shoring had been ordered as of October 27, 1999.

The President

Page 2

Mr. Kent also alleged that other violations of OSHA shoring regulations occurred. On August 11, 1999, he observed a hole that was dug to repair a sewage line in Area 31220 of the lift station. The hole was over eight feet deep and had no shoring. According to Mr. Kent, the supervisors for that repair were Mr. Durem and Mr. Lou Stefani, Utilities Supervisor.

Finally, Mr. Kent reported that after more than ten years of using friction saws to cut friable asbestos pipes, he has not been issued a respirator, nor been given equipment to determine the extent of his exposure to friable asbestos. He recognized the friable asbestos because of his professional experience as a journeyman pipe fitter, the age and type of the pipe, and the way the pipe shreds when cut. Mr. Kent alleged that he reported this problem to Mr. Durem and to Mr. Pierson but did not receive the proper equipment. In addition, Mr. Kent alleged that in July 1999, Mr. Durem and Mr. Pierson asked him to sign a form verifying receipt of safety equipment that had never been provided. He refused to sign the form.

The report addressed all the allegations and fully substantiated one allegation, partially substantiated four allegations, and failed to substantiate one allegation. The report confirmed that in February 1998, Mr. Kent dug a hole in Area 23 of the air station without the proper shoring. The report did not substantiate his contention that his supervisor, Mr. Durem, ordered him to dig the hole or that he did so under protest. The report notes Mr. Kent was the senior pipe fitter on that job and directed the digging, while Mr. Durem was frequently absent from the job site. In addition, a co-pipe fitter and Mr. Durem denied that Mr. Kent was ordered into the hole.

The report substantiates the allegation that on April 30, 1998, Mr. Kent was ordered by Mr. Durem to dig a hole in Area 17 to repair a ruptured water pipe affecting officers' housing. Mr. Kent alleged that he protested the assignment because the hole was over five feet deep and lacked shoring, but was told by Mr. Durem to keep digging. Due to the ground saturation, the southeast wall of the hole collapsed on him. While the report states that Mr. Kent was initially responsible for having dug this unsafe hole, it also states that Mr. Durem saw the hole in the afternoon and was on notice that it was unsafe. Therefore, the report concludes, Mr. Durem should not have allowed the work to continue in such an unsafe manner.

As a general matter, the report notes that pipe fitters routinely dig holes over five feet deep without the proper shoring. A number of reasons were given for this practice, the obsolete pre-1999 shoring at Camp Pendleton, the lack of adequate shoring, and the pipe fitters' practice of sloping the holes to compensate for the lack of shoring. The report acknowledges that in the cases where the holes could not be sloped, the pipe fitters often did their work in the unsafe holes anyway. Several factors were identified that contributed to the pipe fitters' actions, including but not limited to,

The President

Page 3

time pressure, peer pressure, job security, lack of training, and the belief that the holes were not dangerous.

Mr. Kent's allegation that shoring equipment had not been ordered, despite his reports to Mr. Pierson, the Facilities Maintenance Service supervisor, was unsubstantiated. The report states that on September 3, 1998 and January 21, 1999, the Facilities Management Director, ordered approximately \$11,000 of new shoring equipment to replace the unusable equipment. An OSHA investigation into violations of excavation laws and regulations was completed in August 1998 and cited in the report as the impetus for the purchase of new equipment.

The report substantiated Mr. Kent's allegation that on August 11, 1999, he observed a hole over eight feet deep, with no shoring, that was dug to repair a sewage line in the 31220 Area of the lift station. However, it did not substantiate the allegation that Mr. Durem supervised that repair. On the contrary, it noted that Mr. Durem was attending a training session on that date and thus could not have overseen the operation. The report stated further that it was unclear from the schedule who had supervised that project.

Mr. Kent's allegation that after ten years of using friction saws to cut friable asbestos he had not been issued a respirator or been given equipment to determine the extent of his exposure to asbestos was partially substantiated. The report confirmed that Mr. Kent was not issued a respirator. However, it also states that Personal Air Monitoring (PAM), the process used to detect an employee's level of exposure to asbestos, is not required or conducted for individuals. Rather, PAM is required for certain asbestos-related tasks. Since the level of exposure to friable asbestos from a friction saw exceeds the OSHA acceptable exposure standards, the report notes that the pipe fitters are required to use respirators.

The report described a four-step process that employees must follow to obtain a respirator. According to the report, Mr. Kent had not completed the steps necessary to be respirator certified. The report also noted that the FMD does not keep a record indicating which pipe fitters are respirator-certified and which have respirators. Nevertheless, the report states that the work was assigned as if all employees were respirator-certified and properly equipped.

The report partially substantiated Mr. Kent's allegation that he did not have a respirator and had notified his first and second-line supervisors he did not have one. As indicated above, it was established that Mr. Kent did not have a respirator. However, he acknowledged during the investigation that he had not spoken with his supervisors about a respirator. According to the report, his supervisors became aware of the problem from other individuals.

The President

Page 4

Finally, the report did not substantiate Mr. Kent's allegation that in July 1999, his supervisors asked him to sign a form verifying that he had received safety equipment. He refused to sign the form since no safety equipment was issued to him. The report pointed out that other pipe fitters interviewed did not recognize the form Mr. Kent proffered as the one he was instructed to sign. In addition, both supervisors stated they had never seen the form and denied asking Mr. Kent to sign it or any other equipment form. A survey of pipe fitters' personal equipment, taken at an earlier date, did not include questions about respirators. Finally, the report states that the form did not have a signature block and, further, it is unclear how signing it could have prejudiced Mr. Kent.

The Navy set forth its response to this investigation as well as the safety issues identified. The Commanding General of the Marine Corps Base at Camp Pendleton directed the immediate implementation of the following steps to improve compliance with OSHA guidelines and address health and safety concerns at the base: (1) present regulations requiring written records/descriptions of all excavations are to be enforced; (2) FMD is to maintain a list of all employees to whom respirators have been issued; (3) employees are to be directed to obtain a respirator and use it when cutting asbestos-cement (AC) pipe and, if necessary, are to receive assistance in obtaining a respirator. Employees without respirators must be restricted from assignments that involve cutting AC pipe until the respirators are issued; (4) any supervisor sending employees who do not have a fit test and a respirator to assignments that involve cutting AC pipe will be disciplined; and (5) FMD is to immediately inspect, and repair, if necessary, the "snap cutters" for the pipe fitters.

Disciplinary action in this matter is being considered. U.S. Marine Corps officials will determine whether or not disciplinary action is appropriate upon receipt of a report concerning separate allegations identified in the investigation.

Mr. Kent provided his comments on the report and expressed his continuing concerns about excavation-related safety violations at Camp Pendleton. He contends that the information contained in the report was incomplete and believes that the all allegations should be fully substantiated. He takes issues with the report's contention that the new shoring equipment was ordered in response to OSHA citations and not his complaint. He also states that on August 11, 1999, Mr. Durem was in training near the job site so he could still be held responsible for supervising the work. He noted that he still has not yet received his respirator. In addition, he clarified that the section of dirt that fell on him was ten feet long and suggested that the Navy may be trying to minimize the incident. Mr. Kent also contends that he was singled out to sign the form as some kind of retaliation.

The President  
Page 5

Based on the representations made in the report and as stated above, I have determined, pursuant to section 1213(e)(2), that the findings in the agency's report appear to be reasonable and contain all of the information required by statute.

As required by section 1213(e)(3), I have sent a copy of the report and Mr. Kent's comments to the Chairmen of the Senate and House Committees on Armed Services. We have also filed copies of the report and Mr. Kent's comments in our public file and closed the matter.

Respectfully,

A handwritten signature in black ink, appearing to read 'EK', with a long horizontal flourish extending to the right.

Elaine Kaplan

Enclosures