

[REDACTED]

[REDACTED]

September 25, 2023

Via Email Only

David Tuteur, Esquire
U.S. Office of Special Counsel
1730 M St NW, Suite 218
Washington, DC 20036
[REDACTED]

RE: OSC File No. DI-22-000146

Dear Mr. Tuteur:

On behalf of [REDACTED], included with this correspondence are 1.) Whistleblower's Comments to Department of Army's Response Dated September 11, 2023 Regarding the Office of Special Counsel's Disclosure Unit's Request of August 11, 2023 Seeking Supplemental Information Regarding the Abatement of Asbestos Floor Tile in Building E2354; and 2.) Consent to Public Release of Written Comments On Agency Report signed by [REDACTED].

Should you have any questions or concerns regarding these enclosures, or if more information or documentation is needed, then please communicate with me. Thank you.

Very Truly Yours,

[REDACTED]

Enclosures

OSC File No.: DI-22-000146
Whistleblower's Comments to
Department of Army's Response Dated September 11, 2023
Regarding the Office of Special Counsel's Disclosure Unit's
Request of August 11, 2023 Seeking Supplemental Information
Regarding the Abatement of Asbestos Floor Tile in Building E2354

As some relevant history, on February 7, 2023, Whistleblower was provided the Summary of the Report of Investigation ("ROI") for File No.: DI-22-000146 by the U.S. Office of Special Counsel ("OSC"). On April 5, 2023, Whistleblower provided extensive substantive comments to the ROI ("Comments to ROI") and additional information regarding certain findings about the abatement of asbestos containing material ("ACM") in Building E2354. Based upon this information and documentation from the WB, OSC sought additional information from the Department of the Army ("Agency") and on September 11, 2023, the Agency provided a response (Agency's Response). These comments relate to the Agency's Response to abatement of the ACM floor tile and mastic in Building E2354 sometime before 2019.

The Agency acknowledged that the IO's initial finding that ACM floor tile in Building E2354 was "probably" properly abated was made in error. The Agency then shifted its reliance to the "opinion" that the floor tile was "probably" properly abated based upon circumstantial, not direct, evidence from only one individual.

One of the WB's protected disclosures related to the unknown abatement of ACM floor tile and mastic (hereinafter the floor tile and mastic are referred to collectively as "Floor Tile") in Building E2354. Requests for information and documentation regarding the abatement of the Floor Tile in Building E2354 started in the Spring of 2021. Through the present time, more than two (2) years later, and through a 15-6 investigation, the Agency still cannot prove one scintilla of documentation regarding the abatement of the Floor Tile.

No one knows who removed the Floor Tile, when the Floor Tile was removed, how the Floor Tile was removed, or where the removed Floor Tile was transported to for disposal.

Thus, it is per se illogical for the IO's finding that the Floor Tile was "probably" properly abated. A more reasonable conclusion would be that the Agency cannot state whether the Floor Tile was properly abated.

Upon further investigation questioning the IO's unreasonable finding, the Agency then relied upon the Sworn Witness Statement ("SWS") of [REDACTED] and [REDACTED] "opinion" of circumstantial evidence. It is worth noting that 22 individuals, plus or minus, were interviewed in this 15-6 investigation regarding their knowledge, direct or indirect, about the Floor Tile issue in Building E2354. The Agency's support for the finding that it was "probably" properly abated relied only upon one "opinion" in one (1) SWS because there was tape residue around windows and doors. [REDACTED] is not a government employee. [REDACTED] is, or at least was, a contractor engaged by All Phase Solutions, LLC ("All Phase"). All Phase was the contractor engaged by the Agency to perform the Facilities Reduction Project ("FRP") FY18 demolition project. In this entire 15-6 investigation, no one else makes any mention of tape residue as a connection to the removal, proper or improper, of the Floor Tile. Moreover, no one else makes any opinion about the propriety of the abatement of the Floor Tile either.

The best the Agency can present as justification that the Floor Tile was "probably" properly abated is one individual's "opinion" based upon his recollection of tape residue around windows and doors. This tape residue was allegedly corroborated by photographs from a survey conducted in 2019 by [REDACTED]. [REDACTED] survey and photographs have not been provided by the IO to the OSC or WB. [REDACTED] was asked

for his opinion whether the asbestos in Building E2354 was properly abated. [REDACTED] replied, "I do not have information regarding abatement of ACM, including the floor tile in question." (emphasis added). See SWS of [REDACTED] at p. 8 of 19. [REDACTED] [REDACTED] experience regarding asbestos is superior to [REDACTED] Allegedly, [REDACTED] took pictures that included the aforementioned tape residue, yet he did state any opinion about whether the asbestos, including the Floor Tile, was properly abated. Again, no other SWS in this entire 15-6 investigation sets forth any other opinion about the abatement of the Floor Tile either, except [REDACTED] SWS. Just like no one affirmatively stated knowledge of when and how the Floor Tile was removed, no one affirmatively stated when the tape was put down, the purpose it served or when the tape was removed. Simply put, no one knows whether the tape was put down before or after the Floor Tile was removed. Despite this uncorroborated circumstantial evidence, the Agency continues to make an unreasonable finding, and this finding is unsupported due to a lack of any other information, documentation or evidence.

The Agency's Response further evidences its incompetence and complete lack of knowledge and understanding regarding the abatement of ACM, especially at this heightened level of a 15-6 investigation. ACM is a sensitive and highly regulated material requiring strict adherence to laws, rules and regulations from "cradle to grave" involving both administrative and performance compliance. It starts with the identification and inventory of the ACM, goes on to the actual removal of the ACM and ends with the proper disposal in a regulated dumping facility. All along that timeline, the abatement of ACM must be done compliantly. Along this timeline related to the Floor Tile, the Agency has not provided the project design abatement plan, the monitoring results before/during/after the

removal, the disposal record or the accredited contractor's information. This is required by laws, rules and regulations. Ipso facto, it is undisputed that the Agency cannot affirmatively state that it complied with the applicable laws, rules or regulations regarding the removal of the Floor Tile.

As one hypothetical example, ACM can be physically removed from the building in a compliant manner, but if it is not done by an accredited contractor or not disposed of properly, then the ACM is not properly abated. So, again, one individual's recollection of tape residue around windows and doors cannot serve as the basis to reasonably conclude that the Floor Tile was disposed of in a proper manner. The presence of tape residue makes it impossible to unequivocally conclude that the Floor Tile was compliantly abated from "cradle to grave."

Moreover, this tape residue is only circumstantial evidence because [REDACTED] mention of the presence of tape residue is *after* the Floor Tile was removed. Circumstantial evidence allows for more than one explanation. In order for circumstantial evidence to be persuasive, there needs to be corroboration. Another reasonable explanation for tape residue is that other buildings at Aberdeen Proving Ground, including buildings without ACM, had tape around windows and doors for the installation of heavy-duty plastic to act as insulation for the buildings. In fact, WB's offices in two separate buildings included the tape/plastic. Therefore, there are other logical explanations for tape residue unrelated to abatement of asbestos. Again, there is no other corroborative evidence regarding the removal of the Floor Tile.

Lastly, it is important to note the connection between [REDACTED] All Phase and this 15-6 investigation. All Phase was the contractor engaged by the Agency to perform the

Facilities Reduction Project (“FRP”) FY18 demolition project and [REDACTED] is, or at least was, a contractor engaged by All Phase. In connection with the performance of the FRP FY 18 contract, including the demolition of buildings that included ACM, in 2021, All Phase submitted an asbestos abatement plan that included the abatement of the Floor Tile in Building E2354, even though the Floor Tile did not exist in 2021. Again, the Agency’s contractor, All Phase, submitted an asbestos abatement plan to abate asbestos that did not exist. Contracting with a contractor to perform work (abate the Floor Tile) that does not need to be done (the Floor Tile was not in existence) is gross mismanagement and a waste of funds. The WB was given this abatement plan that included the removal of the Floor Tile. When WB visited the site, he noticed the Floor Tile was already gone. That prompted the WB’s inquiries into the removal of the Floor Tile. To reiterate, the only evidence the Agency can put forward regarding the propriety of its abatement of the Floor Tile is tape residue. Even though this 15-6 investigation relates to the Agency’s violation of laws, rules and regulations and waste of funds, All Phase has culpability in the Agency’s ongoing issues regarding asbestos at Aberdeen Proving Ground.

In closing, the Agency’s finding that the Floor Tile was “properly abated” or “probably properly abated” cannot be supported by this circumstantial evidence without any other corroboration. Any objective, unbiased investigator could only logically conclude that there is insufficient evidence or information to make any finding about the abatement of the Floor Tile. All in all, the Agency’s Response to this issue further evidences its overall lack of knowledge of the laws, rules and regulations regarding asbestos, and a desperate, yet unsuccessful, attempt to cover up its malfeasance.