



UNITED STATES DEPARTMENT OF COMMERCE
Office of Inspector General
Washington, DC 20230

April 25, 2011

Catherine A. McMullen, Esq.
Chief, Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, NW, Suite 300
Washington, DC 20036-4505

Re: OSC File No. DI-10-0454

2011 APR 26 PM 1:50
SECRET
WASHINGTON DC

Dear Ms. McMullen:

This letter is in response to a March 24, 2011 email from Karen Gorman of your staff to Department of Commerce officials that requested additional information related to Edgar Dion Lee's whistleblower disclosure of asbestos conditions in the 8th floor/attic area of the Herbert C. Hoover Building (HCHB). In that email, your office requested supplemental information regarding individuals who Mr. Lee believes may have been responsible for the conditions that we described in our January 20, 2011 report to Secretary Locke addressing the initial whistleblower allegations.

Because our office conducted the initial investigation on behalf of the Department, your office and the Department have each agreed that it is appropriate for our office to respond directly to your email. Our responses to your questions are provided below:

Question 1. You requested that we identify the names and titles of all responsible Office of Administrative Services (OAS) officials referred to in the statement on page 15 of our report that "[w]e do not have a recommendation that administrative action be considered for any responsible OAS personnel because those officials bearing responsibility for mismanaging HCHB's asbestos conditions are no longer with the Department."

Response: The former OAS officials referred to on page 15 of our report as bearing responsibility for mismanaging HCHB's asbestos conditions are: 1) Fred Fanning, former Director; 2) and, to a lesser extent, 3) Mario Aquino, former HCHB Building Manager.

As noted in our report to Secretary Locke, our investigation disclosed that, among other things, these three individuals failed to take timely, proper action to protect employee health and safety upon learning that air samples from the 8th floor/attic taken in February and April 2007 exceeded the Occupational Safety and Health Administration (OSHA) Permissible Exposure Limit (PEL) for airborne asbestos.

Question 2. In Mr. Lee's comments to you regarding our report to Secretary Locke, he identified nine individuals whom he believes bear responsibility for mismanagement of asbestos conditions in the 8th floor/attic. You requested findings regarding any responsibility that those nine individuals may have had with respect to such conditions. To assist with this request, your office provided Mr. Lee's contact information.

Response: In addressing this question, our office both relied upon information previously gathered for our report to Secretary Locke and also conducted additional inquiry into Mr. Lee's expanded allegations. Although we had previously interviewed and spoke at length with Mr. Lee, his comments on our report were, to our knowledge, the first time that he had suggested that certain of these nine persons were involved in the mismanagement of 8th floor/attic asbestos conditions. Thus, to assist our follow-on inquiry, we again spoke with Mr. Lee to clarify his concerns regarding those individuals.

With the exception of Otto Wolff, former Chief Financial Officer/Assistant Secretary for Administration, all of the individuals named by Mr. Lee are or were employed within OAS or the Office of Human Resource Management (OHRM). As background, OAS is divided into the following sections: Office of Real Estate Policy and Major Programs (OREPMP), Office of Space and Building Management (OSBM), Office of Administrative Operations (OAO), Office of Management Support Services (OMSS), and the Office of Building Renovations (OBR). OHRM is divided into ten sub-offices, including the Office of Occupational Safety and Health (OSH). Both OHRM and OAS report to the Chief Financial Officer/Assistant Secretary for Administration.

As discussed in our response to Question 1, we previously determined that three of the individuals named by Mr. Lee in his comments — Mr. Fanning, _____, and, to a lesser degree, Mr. Aquino — were responsible for mismanagement of asbestos conditions in the 8th floor/attic. As for the remaining six individuals identified by Mr. Lee, our investigation did not produce evidence indicating that those persons knew and failed to respond to, or should have known of, the conditions in the 8th floor/attic detailed in our report to the Secretary. A summary of Mr. Lee's allegations regarding each of these six individuals, along with our findings, is provided below:

- A. **Bill Fleming** - Mr. Fleming was the Deputy Director of OHRM between 2005 and 2010, and has been Director of OHRM since 2010. Mr. Lee produced an email, dated May 4, 2007, from Ms. Brooks to Mr. Fanning, several other OAS employees, and Mr. Fleming in which she transmitted test results indicating that air samples taken from the 8th floor/attic on May 3, 2007 had not exceeded the Occupational Safety and Health Administration (OSHA) Permissible Exposure Limit (PEL) for airborne asbestos, but that 28.6% of the samples collected contained asbestos fibers.

OHRM is responsible for implementing Government-wide and Departmental policies, employee programs, and activities in all aspects of human resource management and administration. According to multiple individuals, Mr. Fleming has never had any

responsibilities for maintaining or controlling asbestos in the HCHB, as that task was assigned to OAS and outside the scope of the separate OHRM.

Regarding the May 2007 email from Ms. Brooks, our investigation indicates that Mr. Fleming was included on that communication for purely administrative reasons. At that time, Ms. Brooks was on detail to OAS from OHRM, where she was a subordinate of Mr. Fleming. Peter Wixted, a former OAS employee, indicated that Ms. Brooks likely included Mr. Fleming merely to provide Mr. Fleming with a record of her work while on detail, and that Mr. Fleming was not involved in OAS's handling of asbestos in the HCHB. Ms. Brooks was permanently reassigned to OAS from OHRM in mid-2007. This email is the only reason that Mr. Lee provided for believing that Mr. Fleming was responsible for asbestos conditions in the 8th floor/attic, and is also the only piece of documentation that we reviewed during our investigation that mentioned Mr. Fleming.

- B. Nancy McWilliams - According to Mr. Lee, Ms. McWilliams, current Director of OSH within OHRM, had knowledge of asbestos conditions in the HCHB. To support this assertion, Mr. Lee provided us with a November 28, 2007 memorandum from the U.S. Public Health Service to Ms. McWilliams that indicates that air samples taken in the 8th floor/attic in that month were below OSHA's Permissible Exposure Limit (PEL) for airborne asbestos.

Ms. McWilliams was not hired as Director for OSH until June 24, 2007, by which time 8th floor/attic air samples no longer exceeded the OSHA PEL. Ms. McWilliams reported to Bill Fleming, then Deputy Director of OHRM, and to Deborah Jefferson, former Director of OHRM. As set forth in Department Organization Order (DOO) 20-8, OSH is responsible for preventing workplace injuries and illnesses and the associated costs, but it does this primarily by reviewing and analyzing injury and workers' compensation claims to assess causal factors and develop guidance for preventing injuries. Given the function of OSH, our investigation determined that any asbestos-related responsibilities that Ms. McWilliams had were limited to protecting employee health after conditions in the 8th floor/attic were discovered in 2007.

Specifically, we determined that Ms. McWilliams was the point of contact on an October 1, 2008, Memorandum of Understanding (MOU) between OHRM and Health and Human Services Program Support Center (DHHS PSC) under which DHHS/US Public Health Service would conduct airborne testing for asbestos in the 8th floor/attic and provide other employee health oriented services on behalf of the Department during FY 2008. The evidence suggests that Ms. McWilliams performed certain duties related to the MOU, including coordinating the procurement of physical exams and respirators for employees who might access the 8th floor/attic. However, we found that it was OAS's responsibility to notify OSH of individual employees who needed such protective equipment and services, and to ultimately pay for most services under the MOU. We found no evidence that Ms. McWilliams was aware that Mr. Lee or any other person was performing duties in the 8th floor/attic without personal protective equipment. Given its limited role, OHRM was not called upon to perform functions related to the MOU until after it was notified that OAS had allowed airborne asbestos in the 8th floor/attic to exceed the PEL.

We further determined that Ms. McWilliams had declined the position of HCHB Building Safety Manager at OAS and that such duties were the responsibility of _____ and Mr. Fanning as the supervisor.

C. Doug Elznic - Mr. Lee stated that Mr. Elznic, the former Director of OSBM and current Deputy Director for OAS, bears responsibility for mismanagement of asbestos conditions in the 8th floor/attic by virtue of his current position as Deputy Director of OAS.

Our investigation determined that Mr. Elznic was the Associate Director of OSBM in 2007 and has been the Acting Deputy Director for OAS since 2008. Mr. Elznic was subordinate to Mr. Fanning in both roles.

Our investigation did not produce any evidence indicating that Mr. Elznic was assigned duties for asbestos management in the 8th floor/attic as Associate Director of OSBM. To the contrary, during the period during which the primary mismanagement identified in our report occurred — in early 2007 and prior years — the evidence indicates that Mr. Fanning, _____, and Mr. Aquino assumed all responsibilities related to asbestos in the 8th floor/attic. For instance, several employees whom we interviewed stated that Mr. Fanning bypassed Mr. Elznic and other subordinate managers to work directly with _____ on asbestos-related matters. Although Mr. Elznic was included on the May 2007 email from Ms. Brooks referred to above in connection with Mr. Fleming, that email was addressed to multiple personnel within OAS and was the only piece of evidence throughout our investigation to mention Mr. Elznic. In particular, the evidence suggests that Mr. Elznic was relegated during that time to OAS duties unrelated to asbestos management, such as recycling, energy conservation, and the Department's electronic stewardship initiative.

With regard to Mr. Lee's allegation that Mr. Elznic is a responsible person by virtue of his current position as Deputy Director of OAS, Mr. Elznic was not promoted to that position until 2008. By that time, asbestos abatement activities in the HCHB had already commenced and air samples from the 8th floor/attic no longer exceeded the OSHA PEL. As detailed in our report, samples from February and April of 2007 were found to have exceeded the PEL, but samples taken in May 2007 and later that year, and in every year since, were below the PEL. The Department had also taken steps by 2008 to achieve compliance in other areas, such as better restricting access to areas with asbestos-containing materials.

D. Larry Hess - According to Mr. Lee, Mr. Hess, current Associate Director of OBR, knew of asbestos conditions in the 8th floor/attic and failed to initiate corrective actions.

Our investigation determined that Mr. Hess was hired on April 16, 2007 as a supervisory general engineer in the OSBM. Mr. Hess was hired in this position solely to oversee the building renovation project. For this reason, combined with his start date, we concluded that Mr. Hess was not in a position to prevent airborne asbestos levels in the 8th floor/attic from exceeding the OSHA PEL in February and April of 2007, or earlier.

In Fall 2007, OAS created the separate OBR and made Mr. Hess its Director. As with his previous position in OSBM, Mr. Hess's sole duties in this role have been to manage the overall renovation of the HCHB. Phase I of the project commenced in January 2008 with the replacement of air-conditioning system cooling towers and construction of temporarily occupied (a.k.a., "swing") space in the HCHB basement. Mr. Hess told us he had peripheral knowledge of the 8th floor/attic asbestos issues in this role, as he was present in meetings where the general matter was discussed. However, our investigation established that management of the 8th floor/attic abatement issue was handled through OSBM (formerly headed by Mario Aquino) and was not a part of OBR's building renovation responsibilities. Mr. Hess told us that, given his asbestos management knowledge from prior employment, he once gave Mr. Fanning a fill-in-the-blank asbestos abatement plan from his former agency. Mr. Hess indicated that did not know, however, what Mr. Fanning did with the template.

E. David Wynn - Mr. Lee also stated that Mr. Wynn, former Safety and Health Specialist, had knowledge of asbestos conditions in the 8th floor/attic, given his subordinate position to Nancy McWilliams, and that he failed to ensure that appropriate action was taken.

We determined that Mr. Wynn was hired in December 2007, after unsafe conditions in the 8th floor/attic were known and remedial steps had begun, to serve as a subordinate to Nancy McWilliams of OSH. In that role, Mr. Wynn was assigned to work on a variety of employee wellness programs, such as health fairs and flu vaccination clinics. He was detailed shortly thereafter to OREPMP in OAS. Given these facts, we determined that he would not have had reason to know of or respond to asbestos conditions in the 8th floor/attic while subordinate to Ms. McWilliams.

We similarly found no evidence that Mr. Wynn had responsibilities related to asbestos in the 8th floor/attic during his detail to OREPMP. At OREPMP, Mr. Wynn was assigned to work on Department-wide environmental policy not specific to the HCHB. Our investigation established that OREPMP was responsible for managing all Department of Commerce buildings *except* HCHB. In fact, both Mr. Wynn and Mr. Wixted, whose duties Mr. Wynn partially assumed, indicated that Mr. Fanning had refused their offers to assist on HCHB asbestos remediation because it was outside the scope of OREPMP responsibility.

Mr. Wynn left the Department in Fall 2010 for employment at another federal agency.

F. Otto Wolff - Mr. Lee stated that Mr. Wolff, former Chief Financial Officer and Assistant Secretary of Commerce from January 2001 to December 2008 (and former Acting Secretary of Commerce from January-March 2009), was aware of asbestos conditions in the HCHB but failed to take appropriate action.

Mr. Wolff left the Department in October 2009. As the former Assistant Secretary and Chief Financial Officer, Mr. Wolff reportedly was aware generally that asbestos was an identified environmental problem in the HCHB. For example, we reviewed several documents sent to Mr. Wolff which pertained to multiple potentially hazardous environmental concerns — including asbestos, in the HCHB. However, we did not uncover any evidence that, prior to abatement commencing in 2008, Mr. Wolff was specifically aware that the 8th floor/attic had

fallen into noncompliance with OSHA requirements. Moreover, our investigation did not produce evidence that Mr. Wolff was aware, or should have been aware, that Mr. Fanning's staff had failed to conduct regular testing of the 8th floor/attic, or that they had failed to implement prompt and appropriate corrective actions once it was discovered that airborne asbestos levels exceeded the OSHA PEL in early 2007.

If I can answer any additional questions or be of further assistance, please feel free to contact me at 202-482-2558, or Erika Vincent, Assistant Inspector General for Special Investigations & Analysis, at 202-482-6351.

Sincerely,



Rick Beitel
Principal Assistant Inspector General
for Investigations & Whistleblower Protection

cc: Mary Pleffner, Director
Office of Administrative Services, U.S. Department of Commerce