



U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

April 29, 2013

The Honorable Carolyn N. Lerner  
Special Counsel  
Office of the Special Counsel  
1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

USDSC HQ DC 13APR23

Re: OSC File No. 12-2300

Dear Ms. Lerner:

PN5:51

I am in receipt of your May 14, 2012 correspondence wherein you conclude that allegations raised by an anonymous whistleblower (“the whistleblower”), an employee of the United States Department of Justice, Federal Bureau of Prisons (BOP), constitute a substantial likelihood that an abuse of authority, or a substantial and specific danger to public health or safety, has occurred. The whistleblower has made allegations related to a mercury spill which occurred at Federal Correctional Institute (FCI) Morgantown, in Morgantown, West Virginia.

You will recall that, initially, the Department of Justice’s Office of the Inspector General (OIG) conducted a criminal investigation into the FCI Morgantown mercury spill. Prosecution was declined, and OIG submitted its report to your office. Subsequently, the Attorney General referred the matter for investigation to the BOP Office of Internal Affairs for an administrative investigation. The BOP Office of Internal Affairs report is attached hereto.

In the instant matter, the whistleblower alleged that the FCI Morgantown Plumbing Worker Foreman Chad McDonald created a substantial and specific danger to public health and safety by failing to obtain permits for demolition work in a confined vault space which contained a mercury valve, and by allowing inmates to work in the confined vault space.

The whistleblower alleged that Mr. McDonald created a substantial and specific danger to the public health and safety when he failed to ensure that appropriate personnel were working in and around the vault, which was a permit-required confined space (PRCS). The whistleblower also alleged that Mr. McDonald’s failure to follow standard operating procedures for handling a mercury spill by improperly disposing of the waste, created a substantial and specific danger to the public health and safety. The whistleblower claimed that Mr. McDonald further created a substantial and specific danger to the public health and safety by attempting to cover-up the incident.

Letter to Carolyn N. Lerner, Office of Special Counsel  
Page 2

In addition, the whistleblower claimed that FCI Morgantown personnel, including Mr. McDonald, Facility Manager Steve Funk, Trustfund Supervisor Frank Land, Associate Warden Dr. Tamara Lyn, and Warden Timothy Stewart, abused their authority after the spill by preventing a thorough investigation of the incident. The whistleblower posited that the two inmates received increased salaries and extra commissary items as part of the alleged abuse of authority.

The Office of Special Counsel requested an investigation and report on the allegations made by the whistleblower. Please accept this correspondence as a summary of our investigation and findings. It should be noted that the Attorney General delegated to me authority to review and sign the report, in accordance with 5 U.S.C. § 1213(d).

Sincerely,

A handwritten signature in black ink, appearing to read "Julie R. Zebrak". The signature is fluid and cursive, with a long horizontal stroke at the end.

Julie R. Zebrak  
Deputy Chief of Staff

Enclosure

United States Department of Justice  
Federal Bureau of Prisons - Office of Internal Affairs

Report of Investigation

OSC File Number DI-12-2300

Subject: ALLEGED ABUSE OF AUTHORITY AND A SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH AND SAFETY AT THE FEDERAL CORRECTIONAL INSTITUTION, MORGANTOWN, WEST VIRGINIA

**(1) Summary of the Information with Respect to Which the Investigation was Initiated**

This investigation was initiated based upon a whistleblower disclosure alleging that employees at the United States Department of Justice, Federal Bureau of Prisons (BOP), Federal Correctional Institution (FCI), Morgantown, West Virginia, are responsible for abusing their authority and causing a specific danger to public health and safety. The Office of Special Counsel (OSC) received these allegations from a whistleblower who wishes to remain anonymous.

In brief, the whistleblower alleged that Plumbing Worker Foreman Chad McDonald created a substantial and specific danger to public health and safety by:

- Failing to obtain proper permits for demolition work in a confined vault space that contained a mercury valve;
- Failing to ensure that the appropriate personnel were working in and around the vault, which was a permit-required confined space; and
- Failing to follow standard procedures for handling a mercury spill by improperly attempting to dispose of the waste rather than immediately contacting the appropriate authorities.

Additionally, the whistleblower alleged Mr. McDonald, Facilities Manager Steven Funk, Trust Fund Supervisor William (Frank) Land, Associate Warden Dr. Tamara Lyn, and Warden Timothy Stewart abused their authority by preventing a thorough investigation into the incident.

**(2) Conduct of the Investigation**

On October 17, 2011, Safety Manager Blandi Bond reported a mercury spill to the Department of Justice, Office of the Inspector General (OIG). On November 4, 2011, the OIG commenced its criminal investigation. On May 14, 2012, the OSC requested that the Attorney General conduct an investigation pursuant to 5 USC § 1213. The OIG completed its criminal investigation and submitted their investigative report to the OSC. The OIG also submitted their investigative report to the BOP, Office of Internal Affairs (OIA), on January 8, 2013. The OIG report indicated the United States Attorney's Office, Northern District of West Virginia, declined criminal prosecution in this case, and provided the report to the BOP for appropriate action. The OIA found the OIG's report to be incomplete for proposing administrative disciplinary sanctions against any FCI Morgantown employees. Accordingly, the OIA commenced a non-criminal investigation and was tasked with completing a report for the OSC by March 29, 2013. OSC provided the Attorney General with an extension for filing the BOP report, with a due date of April 29, 2013.

On January 18, 2013, the OIA visited FCI Morgantown to conduct interviews and to review relevant documents. In the course of conducting its own investigation, the OIA reviewed the OIG's investigative report, thirteen OIG memorandums regarding interviews their investigators conducted, transcripts of three interviews taken under oath, and one polygraph examination report. In addition, the OIA, on its own, conducted twenty-eight interviews and gathered documents to include inspections, audits, diagrams, and photographs.

### **(3) Summary of Evidence Obtained from the Investigation**

#### **Background:**

FCI Morgantown is located in Morgantown, West Virginia. This BOP facility has been in operation since January 1969, and it is designed to hold 1,323 inmates within seven housing units.

FCI Morgantown's water supply is provided by the Morgantown Utility Board (MUB). The MUB supplies water up to the property line of FCI Morgantown, where water lines enter an underground metering vault located on FCI Morgantown property. The water lines pass through the metering vault and into a separate underground valve vault. The water is then passed into the water storage tank, which supplies FCI Morgantown with its water supply.

In a memorandum dated August 4, 2011, Warden Timothy Stewart reported to the Mid-Atlantic Regional Director that, on August 3, 2011, the water storage tank's altitude valve had stopped functioning. The altitude valve is a water level control valve located inside the underground valve vault. The altitude valve is a critical mechanical component that supplies water to the water storage tank, which provides water for fire protection for FCI Morgantown. Stewart requested emergency funding (\$16,000) for the replacement of the non-functioning altitude valve. The Regional Director granted the approval, as an "emergency project," on that same day.

The valve vault is approximately eight feet wide, ten feet long, and seven feet deep. The sole means of vault entry and exit is through a manhole cover (approximately two feet in diameter). The altitude valve weighs several hundred pounds and is too large to fit through the manhole. Therefore, jackhammering of the concrete surrounding the manhole was necessary to widen the entrance for altitude valve replacement. Plumbing Worker Foreman Chad McDonald used two inmates<sup>1</sup> for this task. The jackhammering caused pieces of concrete and other debris to fall into the vault.

On August 23, 2011, McDonald and the two inmates continued work at the valve vault site. McDonald tasked the two inmates to enter the vault, via a ladder built into the vault wall, and to remove concrete debris from the vault. McDonald also instructed the inmate workers to remove two metal canisters<sup>2</sup>, which were four to five inches tall. The canisters were mounted on the vault wall. These canisters were not in use with the existing altitude valve system and were not connected to any part of the water supply system. Because the canisters had open-ended connections, and because the glass viewport on the canisters showed dried sediment inside the canisters, McDonald believed that the canisters were dry inside.

After McDonald instructed the inmates to remove the debris and the two canisters from inside the valve vault, he departed the valve vault area to another area of FCI Morgantown to supervise other projects.

---

<sup>1</sup> Allen Jones, inmate register number 58532-083, and Terry Jones, inmate register number 33069-183.

<sup>2</sup> Later determined to be manometers, which are instruments for measuring pressure in pipes.

As the inmates were removing the canisters from the vault wall, the canisters fell to the ground and liquid began to leak from one of the canisters.

A short time later that day, McDonald returned to the valve vault site where the inmates explained to him how one of the canisters had leaked when it fell to the floor. During his interview, McDonald stated he "assumed" that the liquid was "some type of oil." He described the appearance of the liquid as "thick chocolate milk."

McDonald stated he then entered the valve vault and used a shovel in an attempt to scoop the liquid, mixed with debris, into a bucket, which he said he left inside the vault. Because this occurred toward the end of the workday, McDonald decided to return the following morning, with an absorbent, to finish cleaning the liquid from the valve vault floor. McDonald stated that he had no idea what the substance was, and that he had no concerns at that time, on August 23, that the liquid contained a hazardous substance.

On the morning of August 24, 2011, McDonald and the two inmates returned to the valve vault to clean the remaining liquid and debris from the floor. At this time, McDonald and the inmate workers opened the door to the valve vault. McDonald stated, "Everything was shiny and separated," referring to the spillage from the canister. McDonald then immediately notified his supervisor, Facilities Manager Steven Funk. McDonald also notified Safety Manager Blandi Bond.

At approximately 11 AM that morning, Bond responded to the valve vault site with Senior Industrial Hygienist Stephen Berardinelli. Berardinelli examined numerous silvery droplets and positively identified them as elemental mercury. Berardinelli then notified the Mongolia Emergency Centralized Communication Agency of the mercury spillage, and he requested an emergency HazMat response.

Emergency responders to FCI Morgantown included the Truine Halleck Volunteer Fire Department, the Mongolia County Hazardous Materials (HazMat) response team, the Brookhaven Volunteer Fire Department, an official from the state Environmental Agency, and a representative from the West Virginia University Safety and Health Department.

On August 24, 2011, Miller Environmental, Inc., Morgantown, West Virginia, began remediation of the mercury spillage at the

valve vault. Due to a lightning storm in the area and because the vault is located outdoors next to the metal water storage tank, remediation was not completed until August 26, 2011.

On September 1, 2011, Compliance Environmental International, Inc., Glen Burnie, Maryland, certified the remediation of the mercury spillage.

As part of the mercury remediation process, several items of clothing, work boots, and bedding were confiscated from the two inmate workers. Facilities Manager Steven Funk called Trust Fund Supervisor William Land for his assistance with replacing the confiscated items, and gave Land a list of the items which needed to be replaced.<sup>3</sup>

Funk then took the two inmates to the inmate laundry to pick up their items from Land. Land had prepared two laundry bags filled with the items requested by Funk. Land had also prepared two boxes containing food items, which were sample food products vendors routinely give to Land for consideration for future commissary sales. Land estimated the value of the sample food items at approximately \$32 per box.

FCI Morgantown Safety Manager Bond investigated the incident.

McDonald and the two inmate workers did not come into direct contact with the mercury, and their subsequent medical examinations revealed no symptoms of toxic exposure, and normal levels of mercury in their blood.

**Allegation 1a. The whistleblower alleged that Mr. McDonald failed to follow standard operating procedures, including Permit-Required Confined Space (PRCS) procedures<sup>4</sup>, and other applicable rules regarding operations in confined spaces, to include failing to obtain an entry permit to the water valve vault. First, the whistleblower states that Mr. McDonald failed to obtain an entry permit that, per PRCS procedures and BOP policy, must be requested from the Safety Manager prior to entering a PRCS.**

---

<sup>3</sup> Land supervises the inmate laundry, warehouse, and commissary operations.

<sup>4</sup> PRCS procedures address the practices and procedures necessary to protect employees in general industry from the hazards of entry into permit-required confined spaces. See 29 CFR Part 1910.146, Permit-required Confined Spaces.

The United States Code of Federal Regulations, section 1910.146, defines a Permit-Required Confined Space (PRCS) as follows:

*Confined space* means a space that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, **vaults**, and pits are spaces that may have limited means of entry); [*Emphasis added*] and
- (3) Is not designed for continuous employee occupancy.

*Permit-Required Confined Space* means a confined space that has one or more of the following characteristics:

- (1) Contains or has a potential to contain a hazardous atmosphere;
- (2) Contains a material that has a potential for engulfing an entrant;
- (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or
- (4) Contains any other recognized serious safety or health hazard.

FCI Morgantown's Procedural Memorandum entitled, Permit-Required Confined Spaces, (also known as PRCS), requires that the Safety Manager issue a work permit for all entries into a PRCS. Section 15 of the Procedural Memorandum lists the location and classification of confined spaces at FCI Morgantown. At the time of the August 23, 2011 mercury incident at FCI Morgantown, the Procedural Memorandum did not list the water valve vault as a PRCS.

Although the water valve unit was not listed as a PRCS, the record demonstrates that McDonald should have been able to identify the vault as a PRCS, based on his recent training on confined spaces. On May 20, 2011 (approximately three months

prior to the mercury incident), McDonald successfully completed training at West Virginia University in Safety & Health. One of the topics covered was "Confined Space," in which one learning objective was to "Learn the Characteristics of Confined Spaces." The course is described to include the following: "This course encapsulates the safety regulation of the workers working in permit required confined spaces. It instructs about the hazards that may occur during the work in confined spaces."

Having recently learned the meaning and characteristics of a PRCS, a reasonable evaluation of the vault site should have alerted McDonald to treat the vault as a PRCS, despite its absence from the BOP list. Specifically, the location in question is called a "vault," it is large enough to enter and perform work, but it has a restricted means of entry and exit, the vault space is not designed for continuous occupancy, and the vault contains 8-inch water pipes which, if ruptured, create a potential for engulfing an entrant. Given the physical structure of the vault and his recent coursework on confined spaces, McDonald reasonably should have known he was working with a PRCS and treated the vault as such. Accordingly, by neglecting to obtain an entry permit, McDonald violated FCI Morgantown's standard operating procedures.

**Allegation 1b. The whistleblower states that the manhole vault cover was clearly labeled as a PRCS. However, there is no evidence that a permit was requested or that the Safety Manager was even made aware of the demolition work in the vault prior to the spill.**

In addition to being absent from the list, the vault cover was missing the appropriate PRCS label.<sup>5</sup> Photographs of the manhole cover do not show any evidence of a label, and the FCI Morgantown's Procedural Memorandum exclusion of the vault as a PRCS is consistent with the label's absence. Accordingly, the record lacks sufficient evidence to support the whistleblower's claim that the manhole was labeled as a PRCS.

With respect to a permit for the valve and vault door replacement work, the record lacks evidence to support the

---

<sup>5</sup> CFR 1910.146(c)(2): If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of the danger posed by the permit spaces. NOTE: A sign reading DANGER - PERMIT-REQUIRED CONFINED SPACE, DO NOT ENTER or using other similar language would satisfy the requirement for a sign.

whistleblower's claim that a permit should have been sought in advance. According to BOP Program Statement 4200.10, Facilities Operations Manual, the Safety Manager is to review and sign any plans for alterations, renovations, and new construction before submission to the Regional Office. The Regional Facilities Administrator then approves all construction plans for all projects. Routine replacement of existing components, like the altitude valve replaced in this instance, does not require regional approval since no plans were required. The replacement of the altitude valve and vault lid did not constitute an alteration, renovation, or new construction. BOP Chief of Facilities Programs Chuck Procaccini confirmed that replacement of FCI Morgantown's altitude valve and vault lid constituted routine replacement activities which required no approved plans. Here, the Safety Manager need not have been initially advised of the emergency work in the vault for permitting purposes.

In sum, the record reveals that FCI Morgantown should have, prior to August 2011, identified the vault as a PRCS in its Procedural Memorandum and posted the required label on the manhole cover. These missing notifications do not excuse McDonald's failure to assess the situation, with common sense and observation, as one involving a PRCS and accompanying permits. As described above, McDonald's recent training should have alerted him to the potential dangers with the vault as a PRCS. Consequently, the record shows that McDonald's failure to obtain from the Safety Manager the required entry permit for the vault created a substantial and specific danger to public health and safety at FCI Morgantown.

**Allegation 2. The whistleblower alleged that Mr. McDonald failed to have the proper personnel working in and around the vault during the demolition. Per PRCS procedures, there must be at least one attendant outside the PRCS during the duration of operations in the confined space.**

The investigation revealed sufficient evidence that McDonald and two inmates entered the water valve vault to remove debris and to remove unused canisters which were mounted on the vault wall. The record shows that despite the physical conditions of the confined space, McDonald failed to have the proper personnel and equipment around the vault during this time, as required by FCI Morgantown's Procedural Memorandum<sup>6</sup>.

---

<sup>6</sup> FCI Morgantown's Procedural Memorandum lists, in part, the following requirements prior to entering a PRCS: Entry permit, atmospheric testing and monitoring, forced air ventilation, personal protective equipment, a trained

Other PRCS violations were also committed, as specified in CFR 1910.146, sections (d)(6) and (i). Specifically, McDonald should have had stationed at least one attendant outside the PRCS for the duration of entry operations. Accordingly, the record supports the whistleblower's claim with respect to arranging for proper personal coverage at the work site. As such, McDonald violated FCI Morgantown's standard operating procedures.

**Allegation 3. The whistleblower alleged that Mr. McDonald violated FCI Morgantown policy, which strictly prohibits inmates from working in a PRCS due to the liabilities that could coincide with such work.**

The investigation revealed sufficient evidence that McDonald violated FCI Morgantown policy with regard to the prohibition of inmates working in a PRCS. The Procedural Memorandum states, "Inmates are prohibited from working in permit required confined spaces." The Procedural Memorandum specifically lists "vaults" as an example of a confined space, and notes that a Permit-required confined space "contains a material that has the potential for engulfing an entrant" (e.g., water). Although the water valve vault was not on the Procedural Memorandum PRCS list, the physical conditions of the vault -- coupled with McDonald's recent confined spaces training -- should have alerted McDonald that the vault was a PRCS and inappropriate for inmate entry. Accordingly, the record shows the whistleblower's claim to be substantiated with respect to this allegation.

**Allegation 4a. The whistleblower alleged that, subsequent to the mercury spill, Mr. McDonald created a substantial and specific danger to public health and safety through his initial efforts to cover up the incident. Allegedly, when Mr. McDonald arrived on the scene of the mercury spill, he immediately entered the vault, shoveled the mercury into a bucket and disposed of the bucket and the broken barometer, which was the source of the vault's mercury, in a public trash receptacle at FCI Morgantown.**

The investigation revealed that when McDonald arrived at the vault on August 23, the inmates told him that something had spilled out of the canisters. McDonald looked down into the vault to assess what had spilled. During an interview with McDonald, he stated as follows:

---

attendant to communicate with workers inside, and emergency rescue equipment must be available at the site.

I looked down in there and I thought, well, heck the floor is muddy. So, at that point, it was just like, it looked kind of like a thick chocolate milk to me, I'm color blind. So I was like okay, let me go down and look at it. Well, I go down in there. We had a shovel and a bucket because they were cleaning up, so I was like whatever this oil stuff is I'll pick it up and throw it in the bucket and then we don't have to worry about it. It was getting toward the end of the work day. So I thought, well, we'll just close up and we'll do down and get everybody rounded up. I said we'll come back up and we'll finish in the morning. At that point, I had no concerns of anything, hazardous material, nothing like that whatsoever. I still can't believe that something like that was even in there.

McDonald went on to describe the floor of the vault as being covered with mud, dirt, debris, water, dust and chunks of concrete, gravel, and with little pieces of metal cut from rebar and pipe. McDonald stated that he used a shovel to place some of the spilled liquid into a bucket.

The record contains insufficient evidence to conclude that McDonald knew, or even suspected, that the liquid or substance contained mercury. McDonald and other witnesses described the floor of the vault as being covered with dirt, mud, and other debris. Additionally, they described the vault as being dark inside. A photograph of the vault revealed it was, in fact, dark and that the vault is overshadowed by the metal water storage tank, which measures 32 feet high and 52 feet in diameter. The water storage tank is approximately four feet from the vault entrance. In addition, McDonald is color-blind,<sup>7</sup> which may have impacted his assessment of the substance.

With respect to the bucket and the canister disposal, there was conflicting but insufficient evidence to support the whistleblower's claim that McDonald disposed of the bucket and the broken barometer (canister) into a public trash receptacle at FCI Morgantown.

---

<sup>7</sup> McDonald submitted to an eye examination in April, 2013, which confirmed that he is color-blind.

On the one hand, in inmate Allen Jones' and inmate Terry Jones' initial written statement, they said that while McDonald was inside the vault on August 23, 2011, they lowered the bucket into the vault and McDonald began scooping the spillage into the bucket. They said McDonald then climbed out of the vault. They said they then loaded the shovels and "the bucket" onto the buggy and McDonald drove them to a dumpster near the Facilities Department. The inmates said McDonald told inmate Terry Jones to throw the bucket into the dumpster.

On the other hand, Senior Industrial Hygienist Stephen Berardinelli stated that when he responded to the vault with McDonald and the Safety Manager on the morning of August 24, 2011, he saw the bucket on the vault floor. Berardinelli said it was dark inside the vault, and he could only see a bucket which contained rags, chunks of concrete, and a rope. He stated that he could not see everything that was inside the bucket. He also described the floor of the vault as being dark, wet, muddy, and with concrete on the floor.

Mike Miller, owner of Miller Environmental, Inc., also served as a witness. Miller remediated the vault site. Miller stated he removed a bucket from the vault, which contained "mainly dirt<sup>8</sup>."

McDonald's own recollections do not illuminate the issue. McDonald initially told OIG investigators that he left the bucket and canisters inside the vault at the end of the workday on August 23, 2011. Over a period of questioning, and during subsequent OIG interviews, McDonald was told there was evidence that the canisters had been placed into the dumpster. During the OIG investigation, McDonald conceded that it was possible that at least one of the two canisters could have been removed from the vault and taken to the dumpster without his knowledge.<sup>9</sup>

---

<sup>8</sup> In a picture (DSC00058) taken of the bucket in the vault prior to Miller's arrival, objects other than dirt can be seen inside the bucket.

<sup>9</sup> McDonald voluntarily submitted to a polygraph examination conducted by the OIG. Their report noted that the examination rendered a "deception indicated" result when McDonald responded to relevant questions regarding whether he knew the substance was mercury on the day of the spill and whether he directed the inmate to dispose of the bucket. However, given that there are no transcripts of the pre-test or post-test interviews, and because the post-test interview was terminated and no confession was elicited, the "deception indicated" result alone cannot be considered sufficient evidence to support a confident conclusion that he lied about knowing if the substance was mercury on August 23, 2011, and attempted to cover up any part of the mercury incident.

Other than the two inmates who claimed to have placed the bucket and canisters into the dumpster, there were no witnesses who could verify this. McDonald's consistent testimony during the OIG investigation was that there were multiple buckets at the vault site. Thus, the inmates' reference to "the" bucket cannot be confidently construed as referring to the bucket into which McDonald shoveled the substance when he was inside the vault on August 23, 2011, where he maintained it remained.

McDonald's contention with respect to the substance has remained consistent -- that he did not become aware until August 24, 2011, that the substance was mercury was never successfully refuted. In his February 26, 2013 OIA affidavit, McDonald continued to state that he did not recognize the substance as mercury on August 23, 2011. His conduct supports this statement - on the morning of August 24, 2011, he immediately sought assistance from the appropriate parties once he realized that the substance might be mercury.

The conflicting and inconclusive evidence in this matter precludes a definitive confirmation or refutation of the whistleblower's complaint in this regard. However, in considering the totality of the evidence, there is not a preponderance of evidence to support that McDonald knew the substance was mercury on August 23, 2011, or that he directed inmates to place the substance in the dumpster as alleged.

**Allegation 4b. The mercury remnants on the shovel were then rinsed off into the main water supply of the institution without taking the proper precautions.**

According to the inmates and McDonald, after they placed the debris from the vault site into the dumpster at the end of their workday on August 23, 2011, they returned to McDonald's office where the inmates washed the shovel in a sink.

As noted above, there is insufficient evidence that McDonald knew about the mercury on August 23, 2011, or that he knowingly failed to take precautions with regard to contaminating the water supply with mercury when the inmates washed the shovel. Because the shovel was not examined or tested for mercury remnants before being washed by the inmates, there is insufficient evidence that the water supply was contaminated with mercury. Even though the shovel was bagged

and treated as contaminated waste, neither the Waste Material Profile of the Miller Environmental report, nor any other source, identified the shovel as actually containing mercury remnants. As such, the whistleblower's claim cannot be substantiated.

**Allegation 4c. Prior to contacting the Safety Department the next day, Mr. McDonald retrieved the bucket and barometer and placed them back into the vault to make it appear as if they had been there since the initial incident.**

The only source for this allegation of an attempted "cover up" is inmate Terry Jones, who claimed that McDonald said he took the bucket from the dumpster and placed it into the vault. No other witnesses saw McDonald remove a bucket from the dumpster. McDonald stated that on August 24, 2011, he placed a broom and a shovel into a plastic bag and brought it from his workshop to the vault site. He said he did not retrieve the canisters from the dumpster.<sup>10</sup> A photograph taken at the vault site on August 24, 2011, shows a clear plastic bag with the shovel and broom. Next to the bag with a shovel and broom is another clear plastic bag. Fire Chief Roger Shuttlesworth, one of the first responders on August 24, 2011, was interviewed and was asked to examine the photograph. He identified the plastic bag with the shovel and broom as the only bag he saw McDonald with, and stated the second bag in the photograph was already at the vault site when he arrived.

In order to substantiate the allegation that McDonald made efforts to "cover up" the incident, there must be sufficient evidence that prior to notifying the Safety Manager on August 24, 2011, of the spill, that McDonald knew the spilled substance contained mercury. This would establish a motive. The investigation, however, revealed insufficient evidence that McDonald knew the substance contained mercury on August 23, 2011.<sup>11</sup> Moreover, witness descriptions of McDonald's behavior on

---

<sup>10</sup> It should be noted that OIG's investigation reached a different conclusion as to McDonald's retrieval of the canister. OIG's report indicated that McDonald acknowledged that he retrieved the bucket. The BOP investigation took into account the OIG investigation, as well as its own investigation. Based on a totality of the evidence, BOP could not definitively conclude that McDonald retrieved the canister.

<sup>11</sup> As noted in the discussion of Allegation 4a, McDonald voluntarily submitted to a polygraph examination conducted by the OIG. Their report noted that the examination rendered a "deception indicated" result when McDonald responded to relevant questions regarding whether he directed the inmate to dispose of the bucket. However, given that there are no transcripts of the pre-test or

August 24, 2011, (e.g., returning home to retrieve apparently contaminated clothes from the laundry at his home) are consistent with his contention that he did not become aware the substance was mercury until that day. Likewise, McDonald's prompt morning spill and safety alert on August 24, 2011, undermines any claim that he had prior suspicion on August 23 of a mercury spill. Because the record supports a finding that McDonald did not realize the substance was mercury until August 24, 2011, because the record lacks conclusive evidence that McDonald retrieved the canister, and because the record lacks sufficient evidence of a cover up, this whistleblower allegation cannot be substantiated.

**Allegation 5. The whistleblower alleged that FCI Morgantown management officials abused their authority by preventing a thorough investigation into the mercury spill during the immediate aftermath of the incident.**

The whistleblower specifically alleged the following:

- a. *McDonald, Facilities Manager Steven Funk, and Trust Fund Supervisor William Land arranged for the involved inmates to (1) receive increased salaries, and (2) receive extra commissary items to ensure that the inmates had factual recollections of the incident favorable to the institution.*

#### **1. Increased Inmate Salaries**

Inmate Terry Jones stated he found it "suspicious" that in the month following the incident, he received inmate pay totaling "\$70 instead of \$45." Jones also said that he believed he was given this money in exchange for his "not telling the true story" about the incident.

A review of official inmate payroll documents revealed that the hourly rate of regular pay for inmate Terry Jones and inmate Allen Jones was 29 cents per hour. During the month of August 2011, they each worked 161 hours, which is recorded on their official payroll documents. Therefore, they each received \$46.69 of

---

post-test interviews, and because the post-test interview was terminated and no confession was elicited, the "deception indicated" result alone cannot be considered sufficient evidence to support a confident conclusion that he attempted to cover up any part of the mercury incident.

regular work performance pay. Each inmate was also paid \$23.34 of bonus pay for the removal of concrete, which is also noted on their official payroll documents.

The investigation revealed insufficient evidence that employees Funk, Land, McDonald, or any other BOP employee or manager arranged for the involved inmates to receive increased salaries to ensure that the inmates had factual recollections of the incident favorable to the institution.

## **2. Extra Commissary Items for Inmates**

The investigation revealed sufficient evidence that Trust Fund Supervisor William (Frank) Land gave extra commissary items to inmates Allen Jones and Terry Jones. According to Land, he elected to give the items to the inmates due to their "unfortunate experience with the mercury incident," and because one of the inmates had missed his shopping day at the commissary due to the mercury incident. The record lacked sufficient evidence that Facilities Manager Steven Funk had any part of Land's decision to give the items to the inmates, or that any FCI Morgantown employee attempted to ensure, in any manner, that the inmates had factual recollections of the incident favorable to the institution.

- b. *Warden Stewart and Associate Warden Tamara Lyn discouraged Ms. Bond from conducting a thorough investigation, which they referred to as a "pissing contest with the institution" and a "witch hunt."*

The investigation revealed insufficient evidence that Stewart and Lyn discouraged Bond from conducting a thorough investigation. There was a preponderance of evidence that Stewart told Bond not to get into a "pissing match" with the Facilities Department, but insufficient evidence that the comment was intended to discourage Bond from investigating the mercury incident. The investigation found no supporting evidence that Lyn accused Bond of being on a "witch hunt," or that Lyn attempted to interfere with Bond's investigation.

- c. *Associate Warden Lyn, as Ms. Bond's direct supervisor, went so far as to advise Ms. Bond to focus more energy on building relationships with peers, such as Mr. Funk, rather than focus on the required investigation.*

Associate Warden Lyn acknowledged that she has had to formally speak with Bond regarding her "abrasive" communications with staff from other departments.<sup>12</sup> Lyn denied making any attempts to hinder Bond's investigation of the mercury spill. Without more, the investigation revealed insufficient evidence to support the whistleblower's allegation with regard to Bond's investigation of the mercury incident.

- d. *Mr. Funk refused to cooperate with the Safety Office's investigation in that he (1) refused to provide Ms. Bond with his employees' training records regarding PRCS, and (2) failed to provide Walt Richardson, BOP's Mid-Atlantic Safety Administrator, with the requested incident report.*

#### **1. Training records**

The investigation revealed insufficient evidence to support the allegation that Funk failed to cooperate with Bond's investigation. According to Bond, as part of her investigation into the mercury incident, she asked Funk for the training records of those entering confined spaces. Bond said that Funk "blatantly" told her that he was not going to cooperate with any inquiry into her investigation of the mercury spill. Bond stated that Funk entered her office and stated, "I see where this is going, and I'm not going to allow it to happen."

With regard to Bond's request to Funk for confined space training records, Funk said he directed Bond to the Employee Services Department where all training records are maintained. Funk also stated that he gave McDonald's training record to Bond.

Despite the whistleblower's contentions, Funk denied the whistleblower's claim that he refused to cooperate with Bond in any way. Funk explained that, during the conversation with Bond, he tried to express his concerns with regard to the classification of the water valve vault. He said the vault was not classified as a confined space on FCI Morgantown's Procedural Memorandum, and he did not want anyone to say that it was just because mercury had been found in the vault. When Funk

---

<sup>12</sup> Warden Stewart also expressed concerns with Bond's communications with staff from other departments.

was pointedly asked if he made the statement, "I see where this is going and I'm not going to allow that to happen," Funk responded as follows:

*I see where it is going because they are not going to go back and say, 'It was a confined space and we knew the mercury was in there.' I did say that. My intentions in saying that was we're not going to say yesterday, 'Hey, this was a confined space,' when no, it was not a confined space yesterday and you want to put the blame on Chad [McDonald] because it was a confined space yesterday. No, today if you want to consider it a confined space, okay; we'll start today and go for a confined space. But to go back and say yesterday that it was, no.*

The record lacks sufficient evidence to support the whistleblower's claim that Funk attempted to obstruct Bond's investigation.

## **2. Incident report**

One additional fact bears noting. BOP Policy<sup>13</sup> requires that the Safety Manager, within eight hours after a serious incident, notify the Regional Safety Administrator by telephone and e-mail of the circumstances of the incident. Although Funk, as the Facilities Manager, did not have a responsibility to report the incident to the Regional Safety Administrator, on August 24, 2011, at 11:24 AM, Funk sent an e-mail to the Regional Engineering Technician notifying him of the incident.<sup>14</sup> This notification does not support the whistleblower's claim of a cover-up.

Funk's notification of the Regional Safety Administrator of the incident promptly on the morning of August, 24, 2011, undermines the whistleblower's claim of his failure to cooperate.

---

<sup>13</sup> Program Statement 1600.09, Occupational Safety, Environmental Compliance, and Fire Protection.

<sup>14</sup> On August 24, 2011, Bond also telephonically notified the Regional Safety Administrator of the incident.

**(4) Violation or Apparent Violation of Law, Rule, or Regulation**

Allegation 1a.

Plumbing Worker Foreman Chad McDonald violated BOP policy by failing to obtain an entry permit to enter a PRCS.

Allegation 2.

McDonald violated BOP policy and CFR 1910.146 by failing to have the proper personnel working in and around the vault.

Allegation 3. McDonald violated BOP policy by instructing inmates to enter a PRCS to perform work.

Allegation 5a.2. Trust Fund Supervisor William Land violated BOP policy by giving food products not available to other inmates to the two inmate workers.

**(5) Action taken or planned as a result of the investigation**

(A) Changes in agency rules, regulations or practices:

Since the date of the incident, FCI Morgantown has issued a revised procedural memorandum regarding permit-required confined spaces. The water valve vault and the water metering vault are now classified as permit-required confined spaces.

FCI Morgantown also posted the required warning signs on the water meter vault, and on the water valve vault.

Confined Space Training is conducted during FCI Morgantown's annual refresher training.

FCI Morgantown surveyed the entire property to ensure all confined spaces have been identified.

(B) Restoration of any aggrieved employee.

Not applicable.

- (C) Disciplinary action against any employee.

Disciplinary action will commence for employees McDonald and Land for their respective violations of applicable policy as noted under Allegations 1a, 2, 3, and 5a.2.

- (D) Referral to the Attorney General of any evidence of criminal violation.

According to the OIG investigative report, the United States Attorney's Office (USAO), Northern District of West Virginia, declined criminal prosecution in this case based on several factors. Criminal prosecution was declined regarding McDonald due to witness problems and the lack of substantial evidence that McDonald committed any criminal violations by his actions relative to the mercury accident. The USAO also cited insufficient evidence to criminally charge Funk or Land relative to the mercury accident. The USAO also cited insufficient evidence to criminally charge Funk or Land with obstruction of justice and a lack of prosecutive resources to charge either with a contraband violation. The USAO also concluded that there was no federal offense evident relative to the conduct of Lyn and Stewart.

**Dollar savings, or projected savings, and any management initiatives:**

The BOP will augment existing training to staff on how to identify devices that may contain hazardous materials such as mercury. The emphasis should be on identification and prevention, but should also re-emphasize what to do in the event mercury or other hazardous materials are accidentally released.

The BOP already has a strong Environmental Management System program, and implementation of this augmentation would allow the BOP to better protect both staff and inmates. Therefore, the nominal costs would likely ensure a substantial future return on the investment. The projected savings are difficult to estimate, but considering that the clean-up activities for this one accidental release of mercury cost the government \$32,704.16, savings could be substantial.