



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

February 6, 2014

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

Re: OSC File No. DI-12-2300

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), please find enclosed the agency report received from Julie R. Zebrak, Deputy Chief of Staff, Office of the Deputy Attorney General, U.S. Department of Justice (DOJ). The report is DOJ's response to disclosures made by an anonymous whistleblower regarding allegations of an abuse of authority and a substantial and specific danger to public health in connection with the mishandling of a mercury spill at the Bureau of Prisons (BOP), Federal Correctional Facility (FCI) Morgantown, Morgantown, West Virginia.

The agency investigation substantiated that Plumbing Worker Foreman Chad McDonald violated federal regulation and BOP policy, and created a substantial and specific danger to public health and safety when he failed to: 1) obtain a permit for demolition work in a permit-required confined space (PRCS); 2) ensure that there were sufficient personnel working in and around the vault as a PRCS; and 3) follow standard operating procedures for handling hazardous materials by attempting to dispose of the mercury in a facility dumpster instead of contacting the appropriate facility authorities. The investigation also concluded that Trust Fund Supervisor William Land violated BOP policy by giving the two inmates involved food products not readily available to the rest of the prison population. I have determined that the agency's report in this matter is reasonable.

The allegations were referred to Attorney General Eric H. Holder, Jr., on May 14, 2012. Mr. Holder referred the allegations to BOP Office of Internal Affairs (OIA) for investigation and delegated authority to Ms. Zebrak to review and transmit the OIA report to OSC. Ms. Zebrak transmitted the agency's report on April 29, 2013. The whistleblower declined to comment. As required by 5 U.S.C. § 1213(e)(3), I am transmitting the report to you.¹

¹The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the

The Whistleblower's Allegations and DOJ's Report

The whistleblower alleged that Mr. McDonald failed to obtain permits required for work in a confined vault space, in this case the underground valve vault for FCI Morgantown's water storage tank. The whistleblower further alleged that following a mercury spill in the vault on August 24, 2011, Mr. McDonald failed to follow standard operating procedures for handling hazardous substances such as mercury, improperly disposed of the hazardous waste, and attempted to cover up the spill. The whistleblower also alleged that BOP personnel attempted to prevent an investigation of the mercury spill and provided increased salary and commissary items to inmates to ensure their cooperation.

The OIA investigation partially substantiated the whistleblower's allegations. The investigation included twenty-eight interviews and review of documentary evidence, including inspection reports, audits, diagrams, and photographs. The agency report explains that on August 4, 2011, FCI Morgantown Warden Timothy Stewart notified the Mid-Atlantic Regional Director that the altitude valve in the water storage tank had stopped functioning. Warden Stewart requested and received that same day emergency funding in the amount of \$16,000 to repair the valve.

The report states that the altitude valve weighs several hundred pounds and did not fit through a manhole cover, the only means of entry to the valve vault.² In order to conduct the repair work and replace the faulty valve, Mr. McDonald had two inmates jackhammer the concrete surrounding the manhole cover to widen the opening. During the course of this work, concrete and other debris fell into the vault. Mr. McDonald then tasked the inmates with removing from the vault the concrete, debris, and two metal canisters mounted on the wall.

Mr. McDonald reported that the canisters were neither used by nor part of the water supply system. In addition, a visual inspection of the canisters showed dried sediment in the glass viewport; thus, Mr. McDonald believed the contents of the canisters were dry.

Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c) and (g).

Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

²The valve vault is approximately eight feet wide, ten feet long, and seven feet deep.

After he instructed the inmates to remove the debris and the canisters, Mr. McDonald left the valve vault to supervise other projects at the facility. When he returned later, the inmates informed him that one of the canisters had leaked. Mr. McDonald stated that he assumed the liquid was some sort of oil. He entered the vault and attempted to scoop the liquid and other debris into a bucket. Because it was the end of the day, Mr. McDonald left the vault intending to return and finish cleaning up the substance the next day.

The report states that the next day, August 24, 2011, when Mr. McDonald and the inmates returned to continue the work and clean-up, the substance appeared shiny and separated. Mr. McDonald immediately notified his supervisor, Facilities Manager Steven Funk and Safety Manager Blandi Bond. The Monongalia County Hazardous Materials³ response team and fire department personnel were also called to the scene. Miller Environmental, Inc., began remediation the same day and completed the remediation process on August 26, 2011.

Investigators reviewed FCI Morgantown's Procedural Memorandum on PRCS. The memorandum requires that the Safety Manager issue a work permit to enter PRCS and lists the PRCS locations at FCI Morgantown. The investigation determined that the valve vault was not listed as a PRCS as alleged; though, it should have been. Moreover, investigators concluded that given Mr. McDonald's recent training in safety and health issues, which included instruction on confined spaces, he should have recognized that the vault was a PRCS and that a work permit was required for entry into the space. Therefore, the investigation found that Mr. McDonald violated FCI Morgantown's standard operating procedures by not requesting a permit for the work in the vault and created a substantial and specific danger when he failed to obtain a permit. Further, the report states that Mr. McDonald violated FCI Morgantown's policy prohibiting inmates from working in PRCS.

The review of official inmate payroll documents established that the two inmates who worked in the vault received payment for hours worked and bonus pay for the removal of concrete. These payments reflect regular payroll payments to inmates, not an increased salary to ensure that the inmates gave favorable testimony regarding the spill. However, the investigation noted that the inmates did receive extra commissary items following the incident. Trust Fund Supervisor William Land explained that he gave each of the two inmates a box of extra commissary items consisting of sample food items vendors regularly provide as possible future commissary purchases. Mr. Land stated that the estimated value of the items was \$32 per box and he gave the inmates the items because of the "unfortunate experience with the mercury incident" and because one of the inmates had missed his shopping day at the commissary due to the incident. Thus, the agency found that Mr. Land engaged in misconduct by providing the extra commissary items to the inmates, but did not find that Facilities Manager Steven Funk was involved

³The report identifies the county as Mongolia; however, the correct name is Monongalia.

in that decision or that the commissary items were provided to ensure the inmates' cooperation.

The investigation did not substantiate the allegation that Mr. McDonald knew or suspected that the substance spilled on the vault floor was mercury, or any other hazardous substance. Mr. McDonald and other witnesses described the vault as dark and the floor as covered in mud, dirt, debris, water, chunks of concrete, and pieces of metal from rebar and pipe. In addition, Mr. McDonald stated, and investigators confirmed, that he is color-blind, which may have affected his examination of the substance. Further, the report notes there is insufficient and conflicting evidence on the issue of whether Mr. McDonald disposed of a bucket containing the mercury and a broken barometer into a public trash receptacle at FCI Morgantown. Thus, the investigation did not conclude that Mr. McDonald directed inmates to dispose of a hazardous material in an FCI dumpster. Similarly, because Mr. McDonald did not know the substance was mercury, and because an examination of a shovel used in the vault did not identify any mercury remnants, there was insufficient evidence to conclude that he failed to guard against contaminating the water supply by allowing the inmates to wash the shovel in the sink. The investigation also concluded there was insufficient evidence that Mr. McDonald attempted to cover up the incident.

Finally, the investigation found there was insufficient evidence that BOP employees or managers failed to cooperate with Safety Manager Blandi Bond or discouraged her from conducting a thorough investigation. The agency report also stated that neither Mr. McDonald nor the inmate workers came into direct contact with the mercury. Moreover, subsequent medical examination did not reveal any symptoms of toxic exposure and blood tests showed normal levels of mercury in the individuals.

Actions Proposed and/or Taken by the Agency

In response to the investigation's findings, FCI Morgantown issued a revised procedural memorandum on PRCS and posted the required warning signs on the water meter and water valve vaults. Additionally, FCI Morgantown surveyed the facility to ensure that all confined spaces have been properly identified and confined space training is conducted during FCI Morgantown's annual refresher training. The report states, further, that BOP will augment its existing training on identifying hazardous materials with an emphasis on the proper response to the discovery or accidental release of hazardous materials. Warden Timothy Stewart considered the suspensions proposed against Messrs. McDonald and Land as disciplinary action. After review and consideration of this matter, Warden Stewart declined to impose disciplinary action in this case.

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The Special Counsel's Findings

I have reviewed the original disclosure and the agency report. Based on that review, I have determined that the report contains all of the information required by statute and the findings appear to be reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency report to the Chairmen and Ranking Members of the Senate and House Committees on the Judiciary. I have also filed a copy of the report in OSC's public file, which is available online at www.osc.gov. This matter is now closed.

Respectfully,



Carolyn N. Lerner

Enclosure