



**STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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September 24, 2010

Mr. Kenneth Nishiyama Atha
Regional Administrator
Occupational Safety & Health Administration
San Francisco Federal Building
90 7th Street, Suite 18100
San Francisco, California 94103

Dear Mr. Atha:

This is in response to the 2009 Federal Annual Monitoring and Evaluation Report (FAME) of the Hawaii Occupational Safety and Health Program (HIOSH).

I. Preface

The HIOSH acknowledges the Occupational Safety and Health Administration's (OSHA's) efforts to partner with HIOSH to take significant strides toward making Hawaii's workplaces safer for all our residents. The HIOSH wishes to continue this partnership and work with OSHA to ensure safe and healthful workplaces in the State of Hawaii.

II. General Response

The HIOSH recognizes that over the past few years it has not performed as well as OSHA or HIOSH would prefer. There have been many different factors contributing to these performance issues; the primary one being staffing levels. Over the last two years, the State of Hawaii has dealt with severe budget constraints due to the economy. This affected HIOSH staffing levels as well as staffing levels in all Departments statewide. As of today, September 22, 2010, HIOSH has received approval to fill two health inspector positions. While this does not bring HIOSH to full benchmark, HIOSH believes this is a step in the right direction and a show of good faith and a renewed commitment to having a viable and effective State Plan. There is also a request for one consultation position currently under review. In addition, the legislature has included several new HIOSH positions in the budget. Because of the problems HIOSH has had in retaining positions in the past (see III. A.), we are working on re-describing positions to create a better career path to allow us to keep trained staff.

III. Specific Responses

Achievement of Annual Performance Goals

Finding 1: Public Sector Injury and Illness Rates increased 10 percent from the baseline in 2005 to 2008. The HIOSH did not complete as many public sector inspections and consultations as it projected in FY 2009.

Response: The HIOSH did not meet its projections for inspections and consultations in the public sector. The primary reason for this is low staffing levels. HIOSH has historically had difficulty maintaining adequate staffing levels. In more prosperous economic times, HIOSH salaries could not compete with those offered in the private sector, which sometimes paid twice as much. Additionally, HIOSH would often serve as a training ground for those who sought training to increase their competitive advantage in the lucrative private sector. In challenging economic times, as we are currently experiencing, HIOSH has difficulty hiring due to State budget constraints. Notwithstanding the circumstances outlined above, HIOSH has revised its program inspection, targeting those areas of public sector employment that have experienced the most significant increases in injury and illness rates. We commit to conducting at least two additional inspections per month.

Finding 2: In the State of Hawaii, the number of fatalities from falls to lower level went from three in FY 2007 to two in FY 2008 to zero in FY 2009, and then back up to three in the first half of FY 2010.

Response: HIOSH has taken action by conducting a Fall Protection Campaign starting in April 2010. The multi-faceted campaign consisted of the following components: 1) a radio spot media campaign aimed at reaching construction workers during prime drive time to and from work; 2) safety and health compliance officers performing follow up inspections of employers who were cited for serious fall protection violations; and 3) sweeps over the course of several weeks conducted by safety and health compliance officers assigned to specific sectors on all islands. To date, approximately 68 citations for serious fall protection violations are in the process of being issued. Also, since the initiative's implementation, Hawaii has not experienced a fatality from a fall from heights. We will continue to target fall protection as a major area going forward. HIOSH has also recently partnered with the Hawaii Technology Development Corporation to conduct a fall protection training seminar for solar and green energy oriented companies.

Performance of Mandated and Other Related Activities

Enforcement/Complaints

Finding 3: HIOSH did not notify all complainants of inspection results within 20 workdays of citation issuance or within 30 workdays of closing conference without citation.

Response: This procedural defect has been addressed and corrected. Letters informing the complainant of the outcome of the inspection now accompany the proposed citation for review and sent out at the same time the citation is issued. For instances resulting in no citation, managers and supervisors will provide the Operations Manager a draft of the letter to the complainant with their recommendation as to why there was no citation proposed and a memo indicating that the following areas are in compliance: hazard communication, evaluation of safety and health program, first aid, emergency action plans, and OSHA 300 logs.

Finding 4: The OSHA 7 was not always completed correctly and was not always in the related case file. Letters that acknowledged receipt of the complaint and those that discussed HIOSH's Findings about the complaint items were not always found in files where complainant name and contact information were known.

Response: The HIOSH conducted refresher training for all staff in June 2010, addressing the proper completion of forms, including the OSHA 7. We have also prepared a checklist that must be completed by all inspectors for each inspection to ensure that all procedures are followed.

Finding 5: Hawaii did not respond to two out of nine complaints classified as imminent danger within a day of receiving the complaint.

Response: HIOSH has put special emphasis on imminent danger complaints. Previously, only the Branch Managers would handle imminent danger complaints. The Operations Manager and the Operations Manager's Secretary are now also monitoring and fielding imminent danger complaints. One factor contributing to untimely responses was that of travel to neighbor islands. The Operations Manager has discussed this issue with the DLIR Business Management Officer and travel approval has been expedited.

Enforcement/Fatalities

Finding 6: HIOSH classified inspections as FAT/CAT in seven cases where there was no death and where less than three employees were hospitalized.

Response: HIOSH does not know which seven cases were misclassified as FAT/CATs. We would appreciate it if OSHA would provide us with the information so corrective action or case reviews can be conducted. The HIOSH supervisors and managers have been instructed to review the relevant FAT/CAT definitions and ensure their inspectors properly classify inspections.

Finding 7: Although the information had been entered into IMIS, there was no copy of the OSHA 170 in four of the five cases classified as FAT/CATs.

Response: The HIOSH has conducted refresher training concerning the proper completion of forms, including the OSHA 170. Inspectors, managers, and supervisors will ensure that the proper forms are included in the case files.

Finding 8: Families of the victims of occupational fatalities were sent the initial contact letter in only one out the five fatality cases. There was no evidence of any other written contact with the families in the fatality case files.

Response: The HIOSH has conducted refresher training concerning the proper completion of all forms, including the correspondence to families of victims of occupational fatalities. Checklists have been developed to ensure that such correspondences are properly included in the files.

Enforcement/Targeting/Inspections

Finding 9: HIOSH health inspectors conducted sampling in only five of 121 health inspections conducted in FY 2009.

Response: The HIOSH will work to ensure that its health inspectors conduct monitoring whenever necessary.

Finding 10: HIOSH completed only 426 inspections (51 percent) of its goal of 835 inspections in FY 2009.

Response: Low staffing levels and fewer inspectors contributed to these results. The HIOSH submitted requests to fill positions and as of September 22, 2010, two (2) Health Inspector positions were approved to be filled.

Finding 11: Enforcement inspection activities on the neighbor islands were not proportionate to the population of workers represented on each island, especially Maui.

Response: To remedy this situation inspectors from Oahu are being sent to the neighbor islands to conduct inspections. As more positions become available, HIOSH will look to fill positions on the neighbor islands.

Finding 12: Construction contractors working on military bases were seldom inspected by HIOSH.

Response: HIOSH is in the process of giving jurisdiction on military bases back to OSHA to address this. HIOSH has opened dialogue with military leaders and the safety community. All have supported the move which would allow HIOSH to focus its efforts on higher risk areas. HIOSH expects to send the letter to OSHA in October 2010.

Finding 13: Case file documentation and required forms in HIOSH inspection files were not organized and ordered consistently.

Finding 14: In 10 of the 43 case files reviewed, there was no diary sheet.

Finding 15: The OSHA 1 and the OSHA 1A were not always signed and dated.

Finding 17: OSHA inspection forms and related documentation were not consistently completed or filled in with all appropriate information and documentation.

Response to 13, 14, 15 and 17: HIOSH has trained clerical staff to ensure paperwork is being filled out properly and is maintained in an organized and consistent fashion. Clerical staff is also using the aforementioned checklist to ensure proper documentation organization.

Finding 16: In four OSHA 1Bs, the employee's address and/or phone number was not obtained. In one case with six 1Bs, there was no injury or illness documented. On five OSHA 1Bs, the incorrect standard was cited. In three cases, grouping was not used correctly.

Response: HIOSH would appreciate the cases being identified so that corrective action can be taken. HIOSH will continue to strive for accurate standard citing.

Finding 18: S/W/R violations were not found in the same proportion of HIOSH programmed inspections as in OSHA programmed inspections.

Response: HIOSH has begun discussions to refine its targeting system to ensure that the establishments selected on the program inspection list are the ones that could most benefit from inspection. Specifically, HIOSH is working with the Disability Compensation Division and Research and Statistics Staff to improve the incorporation of workers' compensation data to hone in on the establishments with recent injuries and illnesses.

Enforcement/Employee and Union Involvement

Finding 19: There was not always evidence in the case file to show that union representatives had accompanied the walk around. There was no evidence to show that union representatives participated in the closing conference, were sent copies of the citations issued, or were notified of informal conferences.

Response: HIOSH has reemphasized to its inspectors the requirements for employee representative involvement as outlined in the FOM.

Enforcement/Citations and Penalties

Finding 20: In 24 of the 43 case files reviewed, HIOSH did not appropriately classify the violations and/or cite all of the obvious hazards. Seven other-than-serious violations (OTS) should have been classified as serious (S). There were 19 case files where the narrative or a photo provided sufficient information to document a hazard which was not cited. There was nothing in the case files to indicate why these hazards were not cited.

Response: HIOSH management has emphasized the absolute necessity to inspectors to thoroughly document facts to justify the proposed citations and ensure serious citations are issued when appropriate.

Finding 21: There was no documentation that all relevant safety and health programs required by the HIOSH standards were evaluated during programmed planned comprehensive inspections.

Response: The need to properly document all evaluations performed during an inspection, including evaluations of all safety and health programs, has been reemphasized with all staff. A checklist has been developed to ensure that review of such files will catch any inadvertent omissions.

Finding 22: HIOSH did not cite any standard from 29 CFR 1910.38 during FY 2009.

Response: Inspectors will emphasize the need to evaluate all workplaces to determine if they are required to have Emergency Action Plans during comprehensive and planned general industry inspections.

Finding 23: Documentation that employer injury illness records were reviewed and evaluated as part of the inspection process was missing from the case files.

Response: HIOSH has reemphasized to staff the need for proper documentation.

Finding 24: HIOSH altered the OSHA 2 to print the compliance officer's full name on the first page of the citation.

Response: The practice of including the compliance officer's full name on the first sheet of the citation began before 2007. The HIOSH stopped the preexisting practice of printing the compliance officer's full name on the citation in March 2010, when the issue was brought to our attention.

Finding 25: The average number of calendar days it took HIOSH to issue citations has more than doubled since FY 2007 to an average of 102 days, which is approximately twice as long as federal OSHA.

Response: NCR training has already been scheduled with OSHA personnel to address the need to run management reports to ensure the efficient processing of citations. Since the Reduction-in-Force in December 2009, the number of persons that a proposed citation must be routed to in order to be processed has decreased. The clerical supervisor no longer reviews the proposed citations. Instead, the proposed citations go directly from the Branch Manager or Supervisor to the clerk who formats the citation. The HIOSH is open to all feasible means of reducing additional review time.

Finding 26: Penalties were not always calculated in accordance with Ch.VI of its FOM.

Response: The HIOSH would appreciate knowing which cases are affected so corrective action and reviews can be done.

Enforcement/Abatement

Finding 27: S/W/R violations were not always abated in a timely fashion, nor were follow-up inspections conducted in all instances when required.

Response: Training for managers on the NCR system has already been scheduled to afford managers the ability to effectively track abatement issues.

Review Procedures

Informal Conferences

Finding 28: Case files did not document the rationale for changing citations during the informal conference.

Response: The Branch Manager and/or Supervisor explains the rationale for any proposed discount on a form which is reviewed by the Operations Manager and approved by the Director. This form should be included in the file to explain the rationale for any settlement agreement. Any failure to do so was an oversight that has been corrected by training aimed at ensuring filing uniformity.

Formal Review of Citations

Finding 29: There was no evidence of the final outcomes of contested cases (i.e. copy of the Formal Settlement Agreement) in the files reviewed.

Response: Before a file is closed, either a settlement is reached, which is approved by the Hawaii Labor Relations Board (HLRB), or, a final decision by the HLRB is rendered and the time for appeal has passed. Any failure to include this information was an oversight that has been corrected by training aimed at ensuring filing uniformity.

Public Employee Program

Finding 30: The number and percentage of inspections HIOSH has conducted in the public sector has decreased in the past three years from 86 (10 %) in FY 2007 to 30 (6%) in FY 2008 to a low of 22 (5%) in FY 2009. This corresponds disproportionately with the increase in the last three years in the public sector injury and illness rates.

Response: See Response to Finding 1, above.

Information Management

Finding 31: Valid backups of the NCR and the Windows computer systems have not occurred since the former IT administrator was transferred to another department.

Response: With the aid of OSHA personnel, the HIOSH has taken the necessary steps to improve the administration of its information management system to ensure that complete and valid backups of the NCR and the Windows computer systems are performed on a daily, weekly and monthly basis.

Finding 32: As of 2/17/10, there were 110 error rejects listed on the SOD report.

Finding 33: HIOSH was not running and using the Desired State Reports.

Finding 34: As of 2/18/10, there were 220 draft forms in HIOSH's NCR.

Response to 32, 33, and 34: NCR training has already been scheduled with OSHA personnel to address the need to run management reports to ensure the efficient processing of citations. The necessary training will enable HIOSH to convert draft forms into a final format or delete them as appropriate.

Finding 35: HIOSH has not designated a back-up administrator.

Response: On or about April 19, 2010, the Director of the OSHA Directorate of Information Technology appointed a HIOSH Office Assistant III as the Secondary Site Systems Administrator for the OSHANet. For the previous six years, this HIOSH Office Assistant has assisted in conducting the start of day and end of day routine for the NCR.

Finding 36: The current person designated as the System Administrator, as well as the entire Enforcement Branch, has not had sufficient training in how to effectively use and maintain the NCR and the OSHA IMIS system.

Response: On or about September 8-12, 2008, the HIOSH Administrator's Secretary attended OSHANet/NCR and related computer training conducted by OSHA in Laurel, Maryland. Prior to taking the position of the OSHA Administrator's Secretary, she worked for the State's Information and Communication Services Division for 12 years, where she had extensive experience in troubleshooting State network computer systems.

Standard and Plan Changes

Standards Adoption

Finding 37: HIOSH did not adopt federal OSHA standards within the six month requirement.

Response: Adopting new OSHA standards in Hawaii currently requires changes in Administrative Rules. The rulemaking process is cumbersome and can often take a year for completion. Generally, the process for adopting federal OSHA standards is as follows:

- Obtain comments from the Small Business Regulatory Board in the Department of Business and Economic Development regarding publication of proposed rules;
- Obtain approval from the Governor to publish proposed standard in newspapers for public hearing and comment;
- Publish proposed rules in newspapers on Oahu and neighbor islands;
- Conduct public hearing on proposed rule;
- Address any public comments concerning proposed rule;
- Obtain comments from the Small Business Regulatory Board regarding post-public hearing amendments, if any;
- Obtain approval from the Governor to adopt proposed standard.

The Operations Manager is now primarily responsible for shepherding OSHA standards through this process. The HIOSH management will take the necessary measures, including the development and implementation of an effective tracking system, to ensure that standards are passed as expediently as possible. When no changes are needed, we will inform OSHA of our acceptance on a timely basis. The Operations Manager has begun review of all outstanding standards and is looking at various options to receive support in this endeavor. For the longer term, HIOSH will consider introducing legislation to allow changes in OSHA standards to be immediately accepted without going through the rule making process.

Federal Program/State Initiated Changes

Finding 38: HIOSH has not yet adopted OSHA's revision to the *Field Operations Manual*.

Response: The HIOSH is committed to having a FOM that reflects actual practices that have been developed in the field and are consistent with OSHA's revisions to the FOM. The HIOSH has adopted the revisions to the FOM as of June 2010.

Consultation Activities

Finding 39: HIOSH did not ensure that 65% or more of serious hazards documented during consultation visits were abated on site or by the original abatement date.

Response: The HIOSH will take measures to ensure proper abatement of serious hazards as quickly as possible. HIOSH has submitted a request to fill a consultation staff position to the Governor's office.

Discrimination Program

Finding 40: Only four of 14 (29%) of discrimination cases were completed within the 90 day statutory period.

Response: The HIOSH will implement measures to ensure that discrimination cases are completed within 90 days of the initial complaint. HIOSH is in the process of reallocating a Health Inspector III to Health Inspector IV so they can handle discrimination cases.

Finding 41: All HIOSH staff assigned to conduct discrimination investigations had not received formal training.

Response: The HIOSH training records reflect that the Health Branch Manager, who conducts and oversees discrimination investigations, attended a two-day discrimination training course in Hawaii, conducted by OSHA Region IX personnel on or about April 26-27, 1995 (16 hours). He also attended the Whistleblowers Investigators' Conference in Pittsburg, Pennsylvania, on or about July 16-19, 2001 (26 hours).

Additionally, a senior inspector who conducts discrimination investigations attended the 11c Basic Whistleblower Investigator Training, Course #142, conducted by OSHA-TI (OTI) in Des Plaines, Illinois, on or about April 16-23, 2002 (36 hours).

Moreover, an inspector who has been promoted to the IV level (highest level) attended the 11c Basic Whistleblower Investigator Training conducted in by OSHA Region IX staff in Oakland, California in 2008.

Finding 42: HIOSH does not accept verbal discrimination complaints.

Response: The HIOSH will explore the efficacy of accepting and docketing orally filed complaints in IMIS upon receipt and not require a complainant to submit a complaint in writing, per OSHA's Whistleblower Manual.

Finding 43: Not all of HIOSH staff knew that they could use unilateral settlements.

Response: Hawaii statutes differ from federal statutes because they allow a claimant to continue to pursue a civil action against an employer despite a HIOSH determination to unilaterally settle with the employer. Consequently, employers have no incentive to settle a case without first obtaining the consent of the complainant because they may still be liable in a civil action brought by the complainant notwithstanding a unilateral settlement.

Voluntary Compliance Programs

Finding 44: One site has not been timely re-evaluated and has not been removed as a VPP participant.

Response: The HIOSH will move to revoke the employer's VPP status. The HIOSH has sought OSHA assistance in developing a team to evaluate the site.

Finding 45: HIOSH charged its VPP activities to the 21(d) grant.

Response: HIOSH is unsure which VPP activities were allegedly charged to the 21(d) grant. HIOSH will continue to ensure that the correct program is charged for corresponding activity.

Program Administration

Finding 46: HIOSH lapsed \$144,095.37 at the end of FY 2009.

Response: HIOSH erred in identifying the amount of funds to deobligate. The HIOSH mistakenly deobligated a total of \$325,000 in State funding and \$325,000 in federal funding for a total of \$700,000. However, HIOSH intended to deobligate only a total of \$325,000 (\$162,500 in State funds and \$162,500 in federal funds). After notifying OSHA Region IX personnel about the error, OSHA took measures to effectuate the original intent of HIOSH. On September 11, 2009, HIOSH notified OSHA that it would require only \$86,000 (\$43,000 in State funds and \$43,000 in federal funds) back instead of the full \$325,000. The OSHA Region IX personnel informed HIOSH that they had to accept the full amount back and would have to lapse the excess funds instead of taking only the funds which it needed. Notwithstanding the above, every effort will be made to return funds to OSHA that are not projected to be expended by the end of the grant period at the beginning of the fourth quarter.

Finding 47: Ten disbursements totaling \$377,000 have been made since December 29, 2009 without approval.

Response: We are investigating the matter and if any disbursements were made without the requisite approval, HIOSH will take appropriate measures to rectify the situation.

Finding 48: Drawdown of grant funds was not uniform during the fiscal year.

Response: We are in the process of doing a thorough review of the drawdown process. Upon the completion of the review, we will be forwarding the results to the OSHA Region IX Administrator.

Finding 49: HIOSH paid a temporary employee with 23(g) money without requesting permission to do so.

Response: The former Departmental Personnel Officer (DPO) – Region IV officials, particularly the former Director of Analysis and Evaluation for OSHA Region IX, was informed of the Department of Labor and Industrial Relations (DLIR) Director's intention of employing the former DPO, to help fill vacancies in the HIOSH and deal with the division's personnel matters. Specifically, the individual was tasked with refining and completing interview packets for positions that were under recruitment.

The former DPO was employed by the HIOSH from approximately October 30, 2008 to February 2009. The individual's timesheets reflect that he charged project code 731 (23(g) Federal Administration) exclusively during his time with the HIOSH.

However, since he also spent time completing interview packets and participating on interview panels to fill Boiler and Elevator positions, charging 100% of his time to Project Code 731 was not accurate.

Corrective Action: For employees conducting several activities involving different funding streams, reminders will be made regarding the processing of their timesheets. Specifically, those responsible for approving the timesheets of an employee that charge multiple funding streams will be provided with a listing of that employee's activities and the codes to which those activities should be charged. Review and approval of those timesheets should be done in consultation with such list(s). Additional findings shall be communicated to OSHA.

Finding 50: Grant funds were used improperly to purchase and maintain a color copier in the Director's office.

Response: The copier was leased in 2004 and the cost was allocated based on the indirect cost methodology approved by the federal government. The cost of the lease was allocated to all DLIR agencies and divisions.

In August of 2004, the HIOSH Administrator was placed on special assignment and day-to-day management of operations was shifted to the Director's office. As such, the copier was primarily used for HIOSH-related activities. These activities included day-to-day correspondence, inspection and consultation tracking reports, forums and conferences, small business workshops, etc.

The lease for the copier expired in November 2006. As the copier had been used primarily for HIOSH-related activities, HIOSH funds were utilized to exercise a buy-out option in July of 2007. This buy-out did not include the cost of quarterly meter reads, which HIOSH continues to pay. While other programs have utilized the copier since the buy-out, usage was minimal to the extent that allocation or charges to those programs did not warrant tracking and charge backs. This conclusion was based not only on the minimal outside usage, but also upon the fact that all programs were charged for the lease from 2004 to 2007, even though it was primarily utilized by the HIOSH program.

Due to concerns raised by federal OSHA, the copier is being relocated to the HIOSH office.

Finding 51: HIOSH staffing levels are below benchmarks.

Response: See Response to Finding 10, above.

Finding 52: None of the employees in the enforcement branch had completed all of the required classes listed in OSHA's training directive, *TED 01-00-018 Initial Training Program for OSHA Compliance Personnel*.

Response: The effective date of OSHA's training directive is August 6, 2008. The majority of HIOSH compliance and consultation staff were hired well before this effective date. Importantly, the training directive is targeted to newly-hired inspectors. Notwithstanding the above, HIOSH understands the need to obtain uniform formal training as much as possible for compliance staff.

The HIOSH has historically had difficulty in sending its staff to OTI in Arlington Heights, Illinois. Severe budget constraints have impacted the HIOSH's ability to send its compliance officers to Chicago to attend OTI courses. Currently, all mainland travel requires justification and approval by the Governor's Office.

It should be noted that other states, such as California, have elected not to send their compliance officers for training outside of the state.

The HIOSH has continuously requested that required training courses be made available in Hawaii. However, OTI has not made all of the courses contained in the OSHA training directive available in Hawaii.

The HIOSH Operations Manager, Health Manager, Safety Supervisor, and Consultation Manager are currently identifying training needs by reviewing training records and the core competencies that OSHA identifies as essential for inspectors. We are actively seeking certified classes that can be conducted in Hawaii. Given the low staffing levels and the need to complete inspections, it is difficult to justify the additional time that travel to Chicago would entail. Any help that OSHA can provide to allow for more training opportunities in-state would be appreciated.

Mr. Kenneth Nishiyama Atha
September 24, 2010
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Should you have any questions concerning our responses, please do not hesitate to contact me at 808/586-8844.

Sincerely,

/signed/

for PEARL IMADA IBOSHI
Director

c: Galen Lemke, USDOL/OSHA