

October 15, 2010

VIA E-Mail

Mr. John M. Hermanson
Regional Administrator, OSHA
U.S. Department of Labor
The Curtis Center
170 South Independence Mall West
Suite 740 West
Philadelphia, Pennsylvania 19106-3309

Dear Regional Administrator Hermanson:

Thank you for the opportunity to respond to your correspondence which I received on September 17, 2010. The FY 2009 Baseline Evaluation Report for the State of Maryland provides certain guidance and recommendations that I am sure will help strengthen the MOSH Program. It also contains sections with which we disagree. I asked my staff to prepare a chart with the findings, recommendations and our response to serve as our submission regarding the report (attached).

I truly believe that there are issues that should be addressed between our program and your office, or the national office. We would welcome the opportunity to discuss these issues and stand ready to meet either in our offices or yours to ensure that we move forward. We all share the goal of providing safe and healthful workplaces to the Nation's workers. Ensuring that the relationship between state plans and OSHA is strong is critical in that process.

I appreciate the professionalism exhibited by you and your staff during the conduct of this review. We look forward to working with OSHA to improve our program, but truly believe that it is important to allow the states to continue to have policies that differ, but are at least as effective as OSHA, and to encourage the diversity in state programs that is the cornerstone of an effective national Occupational Safety and Health system.

Sincerely,

/Signed/

✠ Ronald DeJuliis
Commissioner
Maryland Division of Labor and Industry

Attachment

Page 2

cc: Steven F. Witt, Regional Administrator
Barbara Bryant, Director, Office of State Programs
The Honorable Barbara A. Mikulski, Senate of Maryland
Craig Lowry, Deputy Commissioner
Ileana O'Brien, Secretary's Office
Eric Uttenreither, Assistant Commissioner for MOSH
Mischelle Vanreusel, Program Manager for MOSH

Finding #	Special Study Findings – Complaints	Recommendations	
1	<p>Formal complaint letters to employers and letters to complainants with inspection findings were maintained in separate files at the central office in Baltimore rather than in each Regional Office servicing the complaint.</p> <hr/> <p>Information from the complaint letter is often re-typed or re-worded on the OSHA-7 complaint form to maintain complainant anonymity. This practice is problematic in that complaint inspection files are incomplete without the supporting documentation of a signed complaint letter or OSHA-7. Additionally, specific information about a hazard or facility is sometimes omitted from a re-typed or reworded complaint.</p>	<p>Letters received from complainants must be maintained in the inspection file.</p>	<p><u>MOSH respectfully disagrees with this recommendation.</u> This practice is consistent with our FOM and is done for the purposes of ensuring the anonymity so critical to employees who request it. By filing the complaints separately after the case is closed, we are assured that no accidental release of names occurs. For MOSH purposes the information that is maintained separately is considered to be an integral part of the files and our files are stored in a central location, not in regional offices. Our file storage system after a case is closed is a matter of office organization and in no way affects the servicing of a complaint. Any reference that it does affect a complainant’s rights is erroneous.</p>
2	<p>Response letters to complainants were found in files that are maintained in the Baltimore office as mentioned above. However, the response letters are not maintained in the inspection files after they are closed.</p>	<p>Response letters to complainants must be maintained in the inspection file.</p>	<p><u>MOSH respectfully disagrees with this recommendation.</u> As noted above, the inspector has in his/her possession the actual complaint letter during investigation and as instructed in our FOM, a form presented to the employer removes all personally identifiable information and just lists the basic facts to protect anonymity. We believe that ensuring anonymity for a claimant when requested is critical to a vibrant complaint system and in no way affects complaint inspections.</p>
3	<p>During the period October 1, 2008 through September 30, 2009, Maryland received 110 serious complaints and 102 were inspected within five days for a response rate of 92%. MOSH’s FOM outlines that formal complaints involving potentially serious hazards shall be investigated within 3 working days of assignment.</p>	<p>MOSH must respond to serious complaints within 3 days of assignment pursuant to its FOM or change its FOM.</p>	<p><u>MOSH believes this finding is in error. Our FOM speaks of within 3 days of assignment, which means the time it is received in the regional office.</u> The agreed upon time frame with OSHA for response is 5 days from receipt. The number tracked in the audit involves original receipt and not assignment. This is simply a difference in terms and we achieved the goal contained in our strategic plan. This finding should be</p>

			removed. We are willing to align our FOM to our Strategic Plan, but we were not in violation of our FOM.
	Special Study Findings – Fatalities	Recommendations	
4	Case file review revealed that no next-of-kin letters were sent on fatality inspections. MOSH began to send next-of-kin letters in December 2009. Another trend observed was that there was little or no communication with families at the conclusion of the inspections to inform the next-of-kin of inspection findings.	Continue to send condolence letters to next-of kin at start of investigation. Families of fatality victims must be kept up-to-date about investigations and informed of the outcome of MOSH investigations.	MOSH notes that this was a policy that the state had not adopted. However we believed it to be a good practice and had already implemented a communication system. We are initiating communication with the family, in English and in Spanish, when appropriate, at the beginning of fatality investigations and at the time of closure of the investigation.
5	A number of OSHA-170 forms contained inappropriate information in the narrative, e.g., name of compliance officer who conducted the inspection and/or the names of decedents and/or injured employees.	Retrain compliance officers and supervisors in the proper completion of OSHA-170 forms to ensure that names of compliance officers, decedents and/or injured employees are not contained in narrative portion of the OSHA-170 forms.	<u>MOSH believes this to be a very limited problem, which has been addressed.</u> We have provided guidance on the completion of the forms and are working through the supervisors to ensure adherence to the guidance.
	Special Study Findings – Training	Recommendations	
6	Violations cited on programmed inspections include a high percentage of other-than serious citations for hazards that should be classified as serious. <hr/> A number of files reviewed which had violations that were cited as other-than serious and could have been classified as serious. Health compliance officers have a serious violation percentage of 28%, less than half the Federal rate of 70%.	Conduct training on hazard classification for compliance officers and supervisors to ensure consistency with violation classification.	<u>We strongly disagree with these statements.</u> There were no cases found by the audit team that “should” have been classified as serious. When cases were referenced in the first draft of this report, we worked with the auditors to explain the violations were cited and the cases were cleared up and reference to the cases removed from the report. The comments however were not removed. Our inspectors are trained and held accountable to identify and cite hazards based on their merits. They would be reprimanded/held accountable for not citing OTS that existed as well as citing something serious that is not supported as such. Again we request all references made to our inspectors of misclassifying hazards be removed in their entirety. <hr/> <u>MOSH requested the removal of this</u>

			<p>finding because every case referenced during the audit and in follow up discussions was substantiated as cited correctly and discussed/documentated with the audit team. MOSH's Industrial Hygienists cited nearly 25% more other than serious hazards than Federal OSHA did, this will affect the percent serious hazards. Also, 65% of all Health inspections done in FY09 had violations as compared to only 51% of OSHA health inspections having violations. We have noted some statistics at the end of this report that also need to be considered in assessing these rates.</p>
	Special Study Findings – Abatement	Recommendations	
7	Abatement data was not being entered into the database.	Promptly enter abatement verification data into database.	<p><u>MOSH believes this to be a very limited problem, which has been addressed.</u> Abatement data was being entered, but not consistently- there were some instances such as collections and some regional offices that were not performing their data entry correctly. Steps have been taken to rectify this.</p>
8	MOSH was not calling employers or sending abatement letters on all cases where abatement had not been received by MOSH.	MOSH should, in accordance with its own procedures as outlined in its FOM, call employers for outstanding abatement documentation and/or send abatement letters on all cases where abatement documentation has not been received by MOSH.	<p>During the audit there were no findings of unabated hazards. We are currently reviewing our FOM procedures concerning methods of contacting employers.</p>
9	Abatement tracking reports are not routinely reviewed by management on a weekly basis.	Abatement tracker reports should be carefully reviewed weekly by all Regional Supervisors. If necessary, additional training should be provided to Regional Supervisors to ensure that this report is being properly utilized to track abatement.	<p>During the audit there were no findings of unabated hazards. Review of abatement tracking is currently being conducted in the central office, please note our Regional offices are not the same as federal regional offices. The relatively small size of our state allows us to conduct critical operations more consistently in the central office compared to the set up for national offices.</p>

Special Study Findings – Case File Organization		Recommendations	
10	Case file diary sheets were not found in inspection files.	Institute the use of a case file diary sheet. This form needs to be kept at the top of the case file so that a reviewer can tell at first glance the status of that case.	<u>MOSH disagrees with this finding in that a dairy sheet is not currently a part of our FOM or our practices.</u> This is the first time in our monitoring history that this issue has been identified as a recommendation. We are currently assessing the value of having CSHOs start using diary sheets, but the characterization that we were doing this incorrectly is not accurate.
Special Study Findings – IMIS		Recommendations	
11	Contested case information was not being entered into the database.	Retrain staff in the proper database entries for contested cases. Supervisors should review these data entry issues on a weekly basis to ensure that coding is being completed.	Steps were being implemented before audit as this issue was identified internally and has been remedied with retraining of data entry for this small percentage of cases.
Special Study Findings – Federal Program Changes		Recommendations	
12	Not all Federal Program Changes are adopted within the six month period.	It is recommended that MOSH adopt Federal Program Changes within the six month period. (New FOM not yet adopted.)	MOSH is working hard to adopt Federal Program changes within the six month period. However there are certain changes that require comprehensive review and evaluation by key enforcement and management personnel where the six month time frame is not attainable. We would suggest that the overall system would benefit from a more participatory method of adopting major changes and a discussion about time frames for certain types of changes. Sometimes the changes come at the program with such intensity that we have to prioritize them. Without involvement by state plans in the development of new changes states are at a disadvantage time-wise, for example if the federal government spends two or three years with vast resources developing a new procedure without state input or information sharing; states must have additional time to put through their regulatory system. We stress the need for

			state involvement from the beginning to avoid unnecessary state plan issues and avoid duplicative work.
	Special Study Findings –Consultation	Recommendations	
13	Abatement verification data was not being properly entered into the database for 23(g) public sector consultation.	Maryland should regularly monitor its hazard verifications and ensure that data is promptly entered into the database and any coding errors are corrected.	During the audit there were no findings of unabated hazards. This issue was not discussed during the investigation and we are unsure of which case this study is referring to. Despite the lack of supporting information we are currently reviewing our coding procedures in Consultation.
	Special Study Findings – Whistleblower	Recommendations	
14	Files were not properly maintained in accordance with the Discrimination Manual, Chapter 2 through Chapter 5.	Files should be set up and maintained in accordance with the Discrimination Manual, Chapter 2 through Chapter 5.	<p><u>MOSH concurs that major program improvements are warranted in its Discrimination Program and is actively engaged in a comprehensive review and rewrite of its Discrimination procedures.</u></p> <p>We sincerely appreciate the assistance we are receiving from the Regional Office on our efforts to improve the program. The program is being strengthened by a number of steps:</p> <ul style="list-style-type: none"> ✚ Three additional staff are being trained through OTI and current staff are being evaluated. ✚ Management staff is assessing all open cases and moving them to closure ✚ All new cases are being more effectively tracked and appropriate procedures adopted and followed ✚ All existing cases are being assessed and moved towards closure ✚ All documentation is being assessed to ensure documentation of interviews, and settlements ✚ Case logs are being established ✚ Investigation deadlines are being enforced
15	There were no opening (Docketing and Notification) letters to the complainants and respondents contained in the files.	Letters must be prepared, sent out and maintained in accordance with the Discrimination Manual, Chapter 2, § III(E) and Chapter 5, § III(B).	
16	Case file documentation was inserted into the case file with no order and the files were not tabbed.	Case files be prepared and tabbed in accordance with the Discrimination Manual, Chapter 5, § III.	
17	A recently closed case had no dismissal letters in the file	Cases must be closed in accordance with Discrimination Manual, Chapter 4, § IV.	
18	Management and non-management interviews were not always conducted.	Interviews must be conducted and documented in accordance with the Discrimination Manual, Chapter 3, § IV	
19	There was incomplete case information in Web IMIS.	Input complete case information into the Web IMIS in accordance with the Web IMIS guide.	
20	There was no documentation of settlement of Whistleblower cases.	Settlements must conform to and be documented in accordance with the Discrimination Manual, Chapter 6, § IV.	
21	Investigations were not completed in accordance with MOSH FOM, Chapter X, §	Investigations must be completed	

	A3(b), which requires investigations to be completed with 90 days of filing. Section 5- 604(d)(3) of the MOSH Act requires that "within 90 days after the Commissioner receives a complaint, the Commissioner shall notify the employee of the determination under this subsection."	within 90 days in accordance with MOSH FOM and the MOSH Act.	
22	Numerous case files were open for extended periods of time with no current activity documented in the case files.	The Whistleblower program manager should monitor the Web IMIS system to determine what cases are open and determine what appropriate action is required in accordance with the Discrimination Manual and MOSH FOM.	
Special Study Findings – Case File Documentation		Recommendations	
23	Compliance officers' field notes were not contained in case files. (Are destroyed per State policy.)	Compliance officers' field notes must be maintained in case files. OSHA FOM Chapter XII, Inspection Records, should be adopted.	<u>We believe that this procedure is more effective than its federal counterpart.</u> MOSH has more stringent case writing and documentation requirement that makes the retention of field notes unnecessary. Our agency does not rewrite or add additional information before cases are sent to hearing. Before citations are issued the entire case file with all supportive documentation is written and field notes are unnecessary.
Special Study Findings – Program Administration		Recommendations	
24	MOSH offers penalty reductions of approximately 54% and has a penalty retention rate of 46% percent compared to Federal rate of 63.2%.	Rescind Memorandum 01-2 dated April 9, 2001 titled "Employer Incentive 50% Penalty Reduction."	<u>MOSH believes that this procedure is more effective than its federal counterpart and declines to rescind this memorandum.</u> Immediate abatement on site is more effective at reducing employee exposure to hazards and this penalty incentive is a tool to accomplish this shared goal.
25	MOSH does not assess penalties for first instance other-than-serious violations.	Revise MOSH Instruction 98-3 dated September 28, 1998 to eliminate Section C.3 that does not permit penalty assessment for first instance other than- serious violations.	<u>MOSH will take this request under advisement and discuss it with the Governor's staff.</u> This procedure is in place due to a gubernatorial Executive Order and only applies to manufacturing.
26	Enforcement staff, designated as benchmark positions, are not performing enforcement activities.	MOSH must ensure that personnel designated as fulfilling its benchmark requirements pursuant to 29 CFR §1952.213 are	<u>MOSH disagrees with this finding.</u> Benchmark staff do perform certain administrative functions, but all are engaged in performing enforcement

		performing enforcement activities and conducting inspections for the majority of their work time	work. However, although we do not believe to be an accurate statement, we will seek additional positions to begin to assign administrative duties to non-benchmark positions.
--	--	--	---

MOSH would suggest that a comprehensive look at violation and penalty data gives much better insight into the penalties issue. For example our 3rd quarter SIR report provides the following comparison of the MOSH program to the Federal Program.

80% of all programmed safety inspections had violations compared to the Feds 68%

65% of all programmed health inspections had violations compared to the Feds 54%

Only 1.5% of our violations were vacated in informals conferences compared to the Feds 4.8%

Only 1.4% of our violations were reclassified in informals compared to the Feds 4.2%

Only 11.5% of our violations were vacated after formal contestment compared to the Feds 22%

Only 2.2% of our violations were reclassified after formal contestment compared to the Feds 12.5%

We retained 73.5% of our penalties after formal contestment compared to the Feds 54.3%