

Eileen M. Franko, DrPH
Division of Safety and Health

New York State Department of Labor
Harriman State Office Campus
Building 12, Room 522, Albany, NY 12240
www.labor.ny.gov

August 6, 2018

Mr. Robert D. Kulick
Regional Administrator
Occupational Safety and Health Administration
New York Regional Office
201 Varick Street, Room 670
New York, NY 10014

RE: Comprehensive Federal Annual Monitoring and Evaluation (FAME)

Dear Mr. Kulick,

New York has received the FY 2017 Comprehensive Federal Annual Monitoring and Evaluation (FAME) final report. The State disagrees with a number of the conclusions reached in the report. We specify the nature of those disagreements below. More generally, while we welcome and rely on your review of our PESH program, we take strong exception to the number of observations rising to the level of deficiencies and submit that most of these would have been best handled as constructive suggestions. As you are aware, we are continuously striving to improve our program and we hope that our specific rebuttals below demonstrate where OSHA and the State of New York may work more cooperatively on our mission.

All of the items described in the 2017 FAME are being actively addressed as suggested with the exception of the following, to which we take exception:

Next-of-Kin Involvement / Next-of-Kin Notification of Investigative Results

Observation 17-01

Of the 16 fatality case files reviewed, two (13%) lacked evidence/documentation that the next-of-kin was notified of PESH's involvement, and three (19%) lacked evidence that the next-of-kin were notified of the results of PESH's investigation.

State Response – The observation made is incorrect

Our process, which differs from OSHA's, is to provide the next-of-kin with the complete report narrative and violations, if any. While there was no standard letter for notification of the findings, the complete report is provided to all parties including the next-of-kin. The mailing of the report is noted

in the case files. While this process differs from OSHA's procedure, we believe that what we do exceeds the OSHA practice of simply sending a letter.

In addition, for the two cases mentioned in the observation we reviewed the file after the OSHA audit. These cases both contained the initial next-of-kin letter. We believe your observation is incorrect. These two cases are:

#1187254 – West Seneca Town Highway
#1235606 – Volney Town Highway Department

Missed violations

Observation 17-03 – The observation had erroneous elements

Injury/Illness data was not collected and/or sufficiently cited nor was there documentation that the logs were reviewed by CSHOs for injury/illness trends in 14 of the 62 (23%) cases files reviewed that required the SH900 logs. In one of the health case files reviewed, there was a missed opportunity to evaluate the exposures to chlorine during cylinder changeouts and to issue citations under the respiratory protection standard.

State Response

For the inspection involving chlorine referenced in the observation this was a programmed inspection, conducted under the OSHA NEP for inspecting PSM covered facilities. The inspection scope was focused on the compliance with the standard 29 CFR 1910.119 with the goal of “preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals. These releases may result in toxic, fire or explosion hazards.”

The employer had an extensive sampling database, based on in-house and contracted consultants sampling. These data were used to support the employer's appropriate selection, use, and maintenance of respiratory protection, gas detection equipment, and compliance with the standard 29 CFR 1910.134 Respiratory Protection. Consistent with the purpose of a PSM inspection, the potential hazards, including those mentioned in the audit observations, were cited under the PSM standard. PESH's purpose is to ensure that a PSM site has an effective process safety management program, through the use of safe processes and adequate controls, citing the employer for any program deficiencies. Our inspection documented that the employer did have an effective program, outside of the citation issued, and therefore we did not miss an opportunity to evaluate the exposure to chlorine during the cylinder changeouts.

Petition for Modification of Abatement

Observation 17-04 (FY 2016-OB-03) – The observation made was incorrect

In two of the eight (25%) case files reviewed that included PMAs, PMAs were granted without the employer providing the reason why the PMA was needed nor were the interim steps necessary to protect workers provided and/or adequate.

State Response

We disagree that the reasons for granting the PMAs did not include the reason why it was necessary and there were not interim steps included. Upon review of the Kendall School District PMA file it detailed that they requested an extension after the school was shut down due to weather emergencies. There was no employee exposure while the school was closed. It seemed reasonable and fair to grant the PMA as the weather emergency was out of the employer's control and the employer needed a few days more to complete the abatement. Correspondence on this is in the case file.

The other PMA was from Kings Point Village and this employer was trying to comply with the State's workplace violence prevention violations that included a lack of a written program and employee training. There is an email in the file from the village clerk stating that they were hiring an outside contractor to help them. The employer found that they needed additional time and they did provide interim protection by providing employees with a copy of the workplace violence prevention policy statement and provided a contact person for the reporting of any workplace violence incidents. The interim protection was deemed appropriate by the PESH program.

Workplace Retaliation Settlement Agreements

Observation 17-05 (New) - The observation was made in error

PESH did not follow its procedures detailed in the Field Operations Manual (FOM) Chapter X, Settlements. For example:

- In one of the six (17%) administratively case files reviewed, PESH did not review the settlement agreements to determine if they were fair, adequate, reasonable, and consistent with the purpose and intent of the New York State Labor Law.
- In two of the eight (21%) docketed case files reviewed, PESH did not ensure these settlements adhered to the criteria for approval of third party agreements. PESH failed to determine if the settlement agreements prohibited complainants from engaging in future protected activity, if the agreements restricted complainants from participating in investigations or testifying in proceeding relating to matters that arose during complainant's employment (gag order), and if complainant's decision to enter into the agreement was voluntary.

State Response

The audit notes, provided to us by OSHA, appear to mistakenly reference settlement agreements in the following two cases. Neither of these cases involved a settlement and therefore are incorrect findings:

Case #23182256 Case was closed administratively on 4/04/2017 due to untimely filing.

Case #23283484 Case was closed by voluntary complainant withdrawal on 9/25/2017.

Workplace Retaliation Sound Legal Reasoning

Observation 17-06 (New)

In two of the 14 (14%) workplace retaliation case files, the determination reached was not based on substantive evidence in the case file and sound legal reasoning. One of the dismissed cases alleged three separate adverse actions. Only one of the three was investigated, and the complaint was dismissed. Absent an investigation of the two other alleged adverse actions, it is unclear if the determination was appropriate. Another administratively closed complaint remained in the screening phase for more than five months although the case file indicated a limited investigation had been initiated. It did not appear that the respondent was notified of the allegation leaving it unclear if the appropriate determination was reached.

State Response

The highlighted passage above appears to reference a case in which the complainant resigned from a voluntary fire department position on 11/12/2016 after filing their discrimination complaint on 10/04/2016. Case #23128549 was closed administratively on 4/07/17 as there was no basis to continue the investigation due to the complainant's voluntary resignation and lack of material loss. Audit notes reference the complainant's attempt to amend his discrimination claim during January 2017 after his dismissal from a county position. The county is a separate employer, unrelated to the fire department which was the subject of the discrimination case. We believe this observation is untrue and should be removed from the audit report.

Consultation Policies and Procedures Manual (CPPM)

Observation 17-07 - The observation was made in error

Written policies and procedures for PESH's on-site consultation program are not at least as effective as the OSHA's latest CPPM (CSP 02-00-003) dated November 19, 2015. Examples where PESH's (September 20, 2005) CPPM differs from OSHA's CPPM includes, but are not limited to, the following:

- If the employer elects to have union representation, representatives may participate in the on-site visit. (OSHA's FY 2015 CPPM requires unions to be invited to participate in the on-site visit.)
- There is no requirement to provide a copy of the list of identified hazards to the union. (OSHA's FY 2015 CPPM requires that the union be provided with a copy of the list of identified hazards.)
- In both PESH's CPPM and the report to the employer, there is no requirement to post the list of hazards identified at the worksite. (OSHA's FY 2015 CPPM requires the list of hazards be posted at the worksite for at least three days or until the hazard is abated/corrected.)
- A process to grant abatement extensions as well as providing an updated list of hazards after an extension is granted are not covered. (OSHA's FY 2015 CPPM requires the employer to meet four criteria for an extension and when granted the consultation program must prepare and provide an updated list of hazards.)

- There is no requirement to submit a list of hazards to the employer and the employee representative no later than 20 calendar days from the closing conference date as stated in OSHA's FY 2015 CPPM.
- PESH never adopted FORM 33; however, an evaluation of the worksite's Safety and Health Management System (SHMS) is required for full service consultation visits. All three (100%) of the full-service visit case files reviewed did not contain a SHMS evaluation.

State Response

We do not agree this is an accurate finding for two reasons; we do not fall under the CPPM item as stated in the directive, and, it has already been determined that PESH is "at least as effective" as the OSHA program. We disagree that CSP 02-00-003 dated November 19, 2015 is applicable to PESH. This directive applies to the Consultation Programs funded under Section 21(d), which would only apply to our On-Site Consultation program. The directive states "Although private sector Consultation Programs funded under Section 23(g) grants are not subject to the specific policies and procedures documented here, they must operate programs that are at least as effective as the Consultation Programs funded under Section 21(d) of the OSH Act".

As stated in the Federal Register in 2006 regarding the New York State Plan: The plan narrative provides a general overview of PESH's legal authority, standards and variances, regulations, enforcement policies and procedures (the "Field Operations Manual"), voluntary compliance activities (including consultative services and training and outreach programs), an occupational safety and health laboratory, personnel policies and procedures, recordkeeping and reporting requirements, budget, staffing and funding, all of which, together with the supporting documents contained in various appendices, have been determined to provide authority which is "at least as effective as" that of the OSH Act and to meet the criteria and indices for plan approval contained in 29 CFR part 1956.

While it is our understanding that the aforementioned activities in your observation are not required, we will take them under consideration as we move forward, if they will help to improve our program.

We appreciate the opportunity to respond to the FAME findings and observations and the ongoing dialog with you regarding the operation of the state program.

Sincerely,



Eileen Franko, DrPH
Director
Division of Safety and Health