

OSHA Response to Draft Report

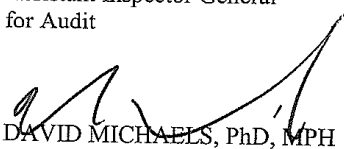
U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



SEP 30 2010

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General
for Audit

FROM: 
DAVID MICHAELS, PhD, MPH

SUBJECT: Response to OIG's Draft Audit Report
No. 02-10-202-10-105
"Complainants Did Not Always Receive
Appropriate Investigations Under the
Whistleblower Protection Program"

This memorandum is in response to your September 20, 2010, transmittal of the Office of Inspector General (OIG) Draft Audit Report No. 02-10-202-10-105, "Complaints Did Not Always Receive Appropriate Investigations Under the Whistleblower Protection Program." We appreciate this opportunity to respond to the findings and recommendations of the OIG. The timing of this report, following the recent Government Accountability Office (GAO) report on OSHA's Whistleblower Protection Program (GAO-10-722, *Whistleblower Protection: Sustained Management Attention Needed to Address Long-standing Program Weakness*), allows the Agency the opportunity to reiterate our commitment to continuously improve this program. Towards that end, the Agency would like to bring to the attention of the OIG the efforts it is taking to fully evaluate its whistleblower protection program, including assessing whether to restructure the Office of the Whistleblower Protection Program (OWPP). Specifically, the Agency is in the process of a top-to-bottom review of this program. This comprehensive review is being overseen by the Deputy Assistant Secretary and will cover policy, resources, equipment, organization and work processes. The objective is to identify any weaknesses and inefficiencies in the program and improve the way OSHA conducts this very important activity. Furthermore, the results of this comprehensive evaluation will include recommendations to the Assistant Secretary on programmatic changes to ensure that there is consistency and program delivery is greatly improved. Our assessment will incorporate the valuable perspective and recommendations we received from the GAO report and this review. The Agency agrees with many of the recommendations, but would like to update the OIG on some activities and policies with regard to whistleblower protections.

While the OIG is very critical of OSHA's internal controls with regard to its whistleblower protection program, it did not report on the Agency's most up-to-date policies and procedures. We believe adoption of these updated policies and procedures address the valid concerns raised in this report. OSHA released its revised Management Accountability Program (MAP) Instruction on September 15, 2010. This Instruction updates the MAP in accordance with OSHA's April, 2009 Statement of Executive Action in response to GAO findings from the GAO report entitled "*Whistleblower Protection Program Better Data and Improved Oversight Would Help Ensure Program Quality and Consistency*" (GAO-09-106), ensuring that whistleblower programs are always included as audit topics. In addition, the new Instruction establishes Agency policy and provides procedures and guidelines for conducting an audit component applicable to Agency programs and activities conducted by Regions and Area Offices. The MAP established by this Instruction is one component of OSHA's internal control system, as required by OMB Circular A-123.¹ The new Instruction revises OSHA's MAP by maintaining and updating audits that still have current relevance, improving communication of audit priorities and response to audit findings, clarifying and providing flexibility in the frequency, scope and methodology of field audits, and providing for greater, independent National Office participation in Regional and selected Area Office Audits.

Finally, while the OIG is critical of OSHA in terms of staffing this program, the explanation it provides is not comprehensive. OSHA is committed to filling all the whistleblower investigator positions as quickly as possible. The 25 new whistleblower investigator positions² were allocated—based on, not only the caseload carried by the regions, but also other factors such as the type and complexity of cases. The Agency fully allocated all 25 FTE positions to the regions and intends to fill all 25 positions, as directed by Congress. As the OIG is aware, the Department has been conducting unprecedented hiring over the last year and OSHA alone has filled over 200 regional FTE positions in FY 2010. The Agency is actively working with the appropriate OASAM Regional Office to fill the remaining whistleblower vacancies and will monitor recruitment activity accordingly.

RECOMMENDATIONS

OSHA appreciates the opportunity to comment on the report and provides the following responses to the recommendations.

¹ OMB Circular A-123 sets out the policy that management controls should be an integral part of the entire cycle of planning, budgeting, management, accounting, and auditing. Controls should support the effectiveness and integrity of every step of the process and provide continual feedback to management.

² In January 2010, the Agency received its FY 2010 budget including the 25 new whistleblower FTEs. This was the first time there was a resource increase for FTEs since the inception of the whistleblower program, despite the expansion and exponential growth of the program over the years.

Recommendation 1: Implement controls to ensure all investigations are adequately reviewed by supervisors, and all supervisors are adequately trained in both the legal and highly technical issues unique to whistleblower investigations and statutes.

OSHA Response: The Agency agrees with this recommendation and is taking a number of steps to address this recommendation. The Whistleblower Investigations Manual, both in the current version and the draft now in clearance, delineates the responsibilities of supervisors, which includes “providing guidance, assistance, supervision, and direction to investigators during the conduct of investigations and settlement negotiations” and “reviewing investigative reports for comprehensiveness and technical accuracy and finalizing Secretary’s findings.” In addition, the Agency has committed that over the next 18 months Area Directors and other personnel who supervise whistleblower investigators who have not taken the mandatory training on whistleblower protection will receive such training. As noted above, the revised MAP requires that the whistleblower protection program be included in every audit. These audits will be used, in part, to ensure cases are adequately reviewed by supervisors. OSHA Regional Administrators will be informed of the findings from these audits and be expected to respond to any shortcomings in the supervisory reviews. Furthermore, the OWPP and regions will hold monthly conference calls to maintain up-to-date awareness of developments in case law and other timely issues. The Agency is reviewing how best to ensure participation on these calls.

Recommendation 2: Implement controls to oversee and monitor caseloads in the regions to ensure adequate caseload management so that all complainants receive quality investigations in a timely manner.

OSHA Response: The Agency agrees with this recommendation. The Agency is currently assessing methods for improving the balancing of caseloads, as part of its thorough evaluation of the whistleblower protection program. In addition, the evaluation will review how to ensure the timely and thorough investigation of every case.

Recommendation 3: Implement controls to oversee and monitor investigations so that investigations are conducted in accordance with OSHA policies and procedures and are consistent across all regions.

OSHA Response: The Agency’s evaluation of the whistleblower protection program will include an assessment on how to address regional oversight, including whether to restructure the OWPP to accomplish this goal. As noted above, the evaluation team reviewing the whistleblower protection program will be making recommendations to the Assistant Secretary on programmatic changes to assure that there is consistency across regions. Once the evaluation recommendations are implemented, the audit program and OWPP’s case file review will be used to monitor that OSHA’s regions are consistent in their approach to program management. In addition, as noted above, the new Instruction revises OSHA’s MAP by maintaining and updating audits that still have current relevance, improving communication of audit priorities and response to audit findings,

clarifying and providing flexibility in the frequency, scope and methodology of field audits, and providing for greater, independent National Office participation in Regional and selected Area Office Audits.

Recommendation 4: Develop and monitor specific performance measures or indicators to ensure the whistleblower program is working as intended.

OSHA Response: The Agency agrees with this recommendation. The Department is currently in the process of developing the Fiscal Year (FY) 2011 – 2016 Strategic Plan. The Department’s outcome goal to “ensure worker voice in the workplace” is directly supported by the Whistleblower Protection Program. To address this goal further, the Agency will look into developing related performance measures in its FY 2011 Operating Plan.

Recommendation 5: Issue an updated Whistleblower Investigations Manual incorporating the recommendations contained in this report, and implement controls to ensure the manual will continue to be updated in a timely manner to reflect current policies, procedures, and statutes.

OSHA Response: The Agency is currently revising its Whistleblower Investigations Manual. On August 30, 2010, the revised manual was sent to all OSHA Directorates and regions for clearance and comment. Responses are due back to the Office of the Whistleblower Protection Program by October 13, 2010. All comments will be thoroughly reviewed and appropriately implemented into the Manual as warranted. We will ensure that the recommendations in this report are assessed in the review process. In addition, the Agency has implemented procedures for real-time updating, either by revising or adding individual chapters.

Recommendation 6: Designate subject matter experts — with technical and legal competencies in specific whistleblower statutes — whom investigators may contact for technical assistance.

OSHA Response: The Agency agrees with this recommendation and has plans to develop a roster of subject matter experts in the field and will ensure it is made available to investigators to supplement the existing resources available through their supervisors and OWPP. The Agency is concurrently developing procedures to ensure that designated experts are providing consistent advice within and across regions, and have direct access to OWPP staff members when they themselves need assistance or advice.

Both the GAO and OIG reports have given the Agency the opportunity to clearly delineate the steps it is taking to continue to improve the whistleblower protection

program. While the OIG has laid forth some of the challenges the Agency faces in administering this programs, I am confident that the developed plan will prove successful. Given the complexity of the program, please feel free to contact the Director of Enforcement Programs, Thomas Galassi at 202-693-2100 if you have any further questions.