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OFFICE OF THE STATE COMPTROLLER

March 6, 1997

Mr. John E. Sweeney  
Commissioner  
New York State Department of Labor  
Building 12 State Campus  
Albany, NY 12240

Re: Assessment and Collection of  
PESH Penalties  
Report 96-S-78

Dear Mr. Sweeney:

Pursuant to the State Comptroller's authority as set forth in Section 1, Article V of the State Constitution and Section 8, Article 2 of the State Finance Law, we have audited the Department of Labor's (Department) assessment and collection of public employee safety and health penalties for the period January 1, 1995 through December 31, 1996.

**A. Background**

New York State's Public Employee Safety and Health Act of 1980 (Act), Section 27(a) of the New York State Labor Law, provides for all non-federal public employees in the State to be protected by safety and health standards in the workplace that are the same as the Occupational Safety and Health Administration (OSHA) standards that apply in the private sector. The Public Employee Safety and Health (PESH) unit, a sub-unit of the Department's Safety and Health Division, is responsible for overseeing the workplace protection of public employees.

The PESH unit currently consists of a Program Management office and nine district offices. Each district office has a supervisor, safety and health inspectors, industrial hygienists and support staff. There are currently about 87 PESH employees, including 44 inspectors and 16 consultants. These staff investigate workplaces and inspect equipment, work practices and procedures. The unit's total operating budget for fiscal year 1996 was almost \$5.9 million.

In 1990, the Legislature amended the Act to give the Department's Commissioner the authority to impose financial penalties on public employers that fail to abate violations within a reasonable period of time. The penalties accrue each day the PESH violation remains uncorrected. In 1994, the New York City Transit Authority challenged the Department's authority to assess PESH penalties. In January 1995, the New York State Supreme Court ruled that the Department was prohibited from imposing PESH penalties absent appropriate regulations (*New York City Transit Authority vs. Department of Labor*). The Appellate Division overruled the lower court's decision in March 1996 and stated that the Department did have the authority to assess and collect PESH penalties. During this litigation, the PESH unit continued to conduct inspections and to calculate penalties for violations. However, during the litigation period, payment of penalties was not enforced by the Department. In April 1996, the Department resumed collecting the penalties imposed prior to the January 1995 court ruling and began billing and collecting penalties that had been determined during the litigation period.

**B. Audit Scope, Objectives and Methodology**

We audited selected aspects of the Department's assessment and collection of PESH penalties for the period January 1, 1995 through December 31, 1996. The objectives of our audit were to determine whether the Department's penalty assessment and collection actions were appropriate, and whether the Department's penalty assessment and collection information systems were accurate and reliable. To accomplish our objectives, we reviewed relevant laws, rules, regulations, policies and procedures. We also interviewed Department management and reviewed Department records.

We conducted our audit in accordance with generally accepted government auditing standards. Such standards require that we plan and perform our audit to adequately assess those operations which are included in our audit scope. Further, these standards require that we understand the Department's internal control structure and its compliance with those laws, rules and regulations that are relevant to the operations which are included in our audit scope. An audit includes examining, on a test basis, evidence supporting transactions reported in the accounting and operating records and applying such other auditing procedures as we consider necessary in the circumstances. An audit also includes assessing the estimates, judgements and decisions made by management. We believe that our audit provides a reasonable basis for our findings, conclusions and recommendations.

We use a risk-based approach to select activities for audit. Therefore, we focus our audit efforts on those activities we have identified through a preliminary survey as having the greatest probability for improvement. Consequently, by design, we use finite audit resources to identify where and how improvements can be made. We devote little audit effort to reviewing operations that may be relatively efficient or effective. As a result, we prepare our reports on an "exception basis." This report, therefore, highlights those areas needing improvement and does not address activities that may be functioning properly.

## **C. Results of Audit**

In general, we found that the Department is performing inspections and continues to assess penalties when appropriate. Further, Department officials affirm that they are planning to continue the penalty assessment and collection process. However, officials acknowledge that the PESH unit is performing fewer inspections, and assessing fewer penalties, while focusing more on meeting the current Department goal of working with employers to achieve compliance.

We found that the Department Counsel's Office should develop written policies and procedures to guide and document penalty reduction decisions to ensure that penalties are collected in a fair and consistent manner. The Department should also ensure that it collects penalties from all violators so that every public employer has a financial incentive to correct violations. Finally, the Department should improve its management information systems to obtain accurate and reliable data, and to provide management with easier access to meaningful information.

### **1. PESH Inspections and Penalty Collections**

#### **a. Inspection Activities**

PESH Safety and Health Inspectors and Industrial Hygienists conduct the PESH public employer work site inspections. The inspectors investigate workplaces for the following reasons: when a serious accident has occurred; when there is imminent danger that an accident could occur; when a complaint letter has been received; or, on a routine basis. Each inspector is responsible for scheduling inspections. If an inspector finds a PESH violation, the inspector issues a Notice of Violation and Order to Comply (order) and, with input from the employer, sets a date by which the employer must correct the violation. A follow-up inspection is conducted after the abatement date. If the employer has not complied with the order at the time of the follow-up inspection, the inspector assesses a per diem penalty. The penalties can be as high as \$50 a day for a non-serious violation and as high as \$200 a day for a serious violation.

The New York State Register states that the Legislative objectives for imposing PESH penalties were to strengthen the effectiveness of Section 27(a) of the Labor Law which requires public employers to provide safe and healthful workplaces, and to provide a financial incentive to public employers "to act in an expedient manner to correct safety and health violations cited by the Department, thereby reducing the exposure of public employees to workplace hazards." Penalties were also intended to serve as a deterrent. According to Department officials, their ability to impose penalties for PESH violations had a dramatic effect on the speed with which employers corrected unsafe and unhealthy conditions. They also stated that the ability to impose penalties made it possible to avoid lengthy administrative and judicial proceedings, and to ensure a safe workplace sooner - rather than later.

Department officials told us that the PESH unit works with employers to help them correct violations, and also offers consulting services to all public employers, in an effort to meet the current administration's goal of using a pro-active approach in dealing with violation problems. According to Department officials, this causes inspectors to spend more time helping employers to achieve compliance within allotted time frames. As a result, according to the Department, employer compliance is increasing and the Department follow-up inspections are decreasing. Department officials also told us that the number of PESH inspections that produce a penalty assessment has decreased under the current administration's philosophy. This view was confirmed by a 1996 OSHA study which stated that the PESH unit is conducting fewer inspections, and that even fewer inspections result in a penalty. The Department's response to our audit further notes that for the period January 1, 1994 through December 31, 1995 OSHA found that the PESH program's overall performance was sound.

We reviewed Department records to determine the number of inspections and follow-up inspections conducted in the past three years. The records show that in fiscal year 1993-94 there were 3,567 inspections (including 1,743 follow-ups), in 1994-95 there were 2,683 inspections (including 1,304 follow-ups) and in 1995-96 there were 2,921 inspections (including 1,250 follow-ups). As the numbers illustrate, the total number of inspections per year have decreased by about 18 percent over the three year period, and the percentage of follow-ups to total inspections has declined from about 49 percent in 1993-94 and 1994-95 to about 43 percent in 1995-96.

**b. Collection of Penalties**

Once the employer corrects the violation, and the correction is verified by a final inspection, PESH issues a final bill to the employer. The employer has 60 days to pay the bill in full or appeal the bill to the Industrial Board of Appeals (IBA). If, after 65 days, the employer has not paid or appealed to the IBA, the PESH unit refers the case to the Counsel's Office for collection proceedings. The Counsel's Office will attempt to collect the amount owed, and if unsuccessful, will refer the case to the Attorney General's Office for collection. A final bill can be reduced by the Department's Counsel's Office, the IBA, or the Attorney General's Office.

We reviewed Department records to identify the total dollar amount for final bills issued from January 1, 1990 through October 25, 1996. We also obtained information on the total amount of PESH penalties collected for the period. However, because of inaccuracies with the Department's information systems (explained later in this report), we could not verify the amounts billed and collected. According to Department records, collections as a percentage of total final bills (for the three years not impacted by the litigation noted earlier) ranged from 6 percent in 1992 to 24 percent in 1994. The following is a listing of bills and collections by year.

<b>CALENDAR YEAR</b>	<b>AMOUNT BILLED</b>	<b>AMOUNT COLLECTED</b>	<b>PERCENT COLLECTED</b>
1992	\$3,060,000	\$197,601	6
1993	\$5,700,000	\$535,325	9

1994	\$2,280,000	\$542,747	24
1995	\$ 834,122	\$ 17,613	NA*
1996	\$3,220,887	\$132,395	NA*

\* Due to the litigation, the Department was prohibited from collecting penalties from January 1995 through March 1996. Therefore, the collection activity for this period is limited and cannot be taken as a portrayal of usual collection activity.

The Department should have written procedures for ensuring the accuracy, integrity and effectiveness of the reduction of penalties ordered by the Counsel's Office. For example, procedures might specify the conditions which warrant a penalty reduction, the documentation that is required to support a penalty reduction, and the level of supervisory approval or additional verification needed to finalize a penalty reduction. In addition, procedures might require that penalties cannot be reduced beyond a certain extent in order to ensure that a financial incentive remains for compliance.

We found that there are no written procedures governing the settlement of the amounts to be collected for PESH penalties. The Counsel's Office informed us that under special circumstances, attorneys have the authority to use their professional judgement to settle cases for something less than the full amount of the assessed penalty. In addition, no documentation is required or maintained to support the rationale for reducing penalties. In responding to our audit the Department points out that Counsel's Office does have a policy regarding settlement practices which has been verbally communicated to each attorney.

We reviewed the final bill listings and penalties collected that related to 1995 and 1996 final bills and also examined them to determine whether penalties had been reduced, and if so, by whom. Department records show that the Department collected on 31 of 171 final bills that were issued in 1995 and 1996. However, of the 31 final bills on which the Department collected payment, 13 had been reduced by the Counsel's Office.

According to Department records, 29 of the 31 1995 and 1996 final bills collected upon had been referred to the Counsel's Office for penalty settlement decisions and collection. For these 29 final bills, the Counsel's Office collected \$102,835 of the \$182,534 billed with the difference being the reduction in penalties (about 44 percent). There were no written procedures governing the reductions in these penalties. As a result, there is a lack of accountability and decreased assurances that the reductions are appropriate.

This conclusion is supported by a penalty reduction for the New York City Board (Board) of Education. At one point the Board had outstanding PESH penalties of more than \$120,000 for 13 different cases. The Counsel's Office reduced the total penalty to \$48,000. Subsequently, the Counsel's Office agreed to permit the Board to pay only 10 percent (\$12,000) of the original assessment in exchange for compliance in abating violations cited. If, after one year, the Board had complied with the stipulation, the remaining \$36,000 would be eliminated. If, however, the Board had not complied, the Board would be required to pay the \$36,000. However, the Department did not

follow-up to determine whether the Board complied with the stipulation and the Board never paid the \$36,000. The Board paid the \$12,000 in August 1994. The Department is now conducting the follow-up to determine if the Board complied with the stipulation.

In responding to our audit, the Department points out that the settlement with the Board was reached under the prior Administration and was negotiated by the former Commissioner, Deputy Commissioner and Division Director. The Department added that these unusual conditions created a problem with follow-up inspection. Accordingly, the Department does not agree that this case should be a basis for our recommendations. We believe formal, written policy and procedures for settlements should be in place and should apply to whomever handles the negotiation. We also believe that the extent of negotiations and the number of individuals involved with this reduction in penalty support the need for procedures specifying the justification, documentation and levels of approval for reductions in penalties.

In addition to strengthening procedures over reductions in penalties, the Department needs to determine what actions to take when a state agency refuses to pay a penalty assessment. For example, Department officials told us that the New York State Department of Corrections (DOCS), in addition to not correcting violations in a timely fashion, refuses to pay PESH penalties. According to information provided by Department officials, DOCS currently owes more than \$172,000 in PESH penalties. The Counsel's Office, following Department procedures, referred some of this amount owed to the Attorney General's Office for collection proceedings. However, the Attorney General's Office explained that it does not accept referrals against state agencies. As a result, none of the DOCS penalties have been collected. Furthermore, lack of financial incentive to abate violations, may diminish state agency motivation to correct unsafe conditions in a timely manner. The Department needs to work closely with the Division of the Budget or lawmakers to work out a process that ensures that penalties cannot be avoided by state agencies. In responding to our audit, the Department indicates that it plans to contact the Division of the Budget regarding the collection of these penalties.

We believe that the Department should reexamine its methods for collecting PESH penalties. While we support the intent of Department's commitment to working with employers to reduce the need for assessing penalties, we question the Department's practice of significantly reducing the PESH penalties that are actually assessed. The Department has stated that penalties are an important enforcement tool, and the Legislature has acted to make penalties serve as both a deterrent to unsafe working conditions and a financial incentive for the timely abatement of violations. However, the significant reductions in penalties may have a negative impact upon the employer's incentive to provide a safe and healthy workplace for public employees and contradict the Act's intent of strengthening the effectiveness of the Labor Law. In addition, in order to maintain the integrity of the penalty process, it is necessary to ensure that the Department collects from all violators.

## **2. Accuracy and Reliability of Department Data**

The Department currently relies on three separate management information systems for its PESH program. One system is a federal reporting system, one is a PESH unit system and one is a Counsel's system. We believe that a single, integrated system would better ensure the timeliness, reliability and usefulness of PESH information. Under the present three system approach, we found it

is very difficult for management to determine in a timely manner the correct amount of outstanding penalties. For example, an October report from the PESH unit shows that \$127,623 in penalties had been referred to the Attorney General's Office. A December report shows that \$93,598 had been referred even though there had been no reported activity since October. We are unsure as to which amount is correct. We also found instances of incorrect data on the systems. For example, the PESH system shows 1995 and 1996 final bills for 10 New York City Board of Education cases totaling \$120,000 are outstanding even though the Counsel's Office had reduced the penalty to \$48,000 and collected \$12,000 as a potential settlement in 1994. As a result, the PESH records overstate the amount of outstanding bills.

Department officials in PESH and the Counsel's Office expressed concerns about their current systems' limitations. Both entities are restricted by the type of data available from the system. Neither PESH management nor Counsel's Office employees have the ability to create special reports to meet their needs. Rather, data processing personnel must prepare the report or develop a program to capture the data. As a result, the system users often piece together several different reports, which may not necessarily correspond, in order to obtain needed information. In responding to our audit, Department officials indicate that rather than providing a single, integrated system, the Department plans to link mainframe systems and provide reconciliation between the three existing systems.

### **Recommendations**

1. *Prepare and implement written policies and procedures governing the reduction of PESH penalties.*
2. *Document reasons for penalty reductions to protect the integrity, accuracy, equity and effectiveness of penalty assessments and collections.*
3. *Seek additional authority to enforce penalty collection from all violators.*
4. *Implement a management information system that provides information which is accurate and reliable and meets the needs of the users.*

A draft copy of this report was provided to Department officials for their review and comment. Their comments have been considered in preparing this report and are included as Appendix A. Department officials generally agree with our recommendations. However, officials do not agree with our conclusion that the settlement with the Board of Education supports the need for formal, written settlement policies and procedures. They indicated that Counsel's Office already has a policy communicated verbally to staff regarding settlement practices, and they indicate they will now establish the policies as written guidelines. The Department also indicates that rather than providing a single management information system, it plans to link mainframe systems and provide reconciliation between the three existing systems.

Within 90 days after the final release of this report, as required by Section 170 of the Executive Law, the Commissioner of the Department of Labor shall report to the Governor, the State Comptroller and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement

the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.

Major contributors to this report were Frank Houston, Kevin McClune, Ken Spitzer, Martin Chauvin, Todd Seeberger, and Karen Bodnar.

We wish to thank the management and staff at the Department of Labor for the courtesies and cooperation extended to our auditors during this audit.

Very truly yours,

Jerry Barber  
Audit Director

cc: Patricia A. Woodworth  
Mark B. Mitchell



**JOHN E. SWEENEY**  
Commissioner of Labor

STATE OF NEW YORK  
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February 14, 1997

Mr. Jerry Barber  
Director of State Audits  
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Albany, New York 12236

Dear Mr. Barber:

This is in reply to your January 17, 1997, letter, which included a copy of your draft audit report (Nu. 96-S-78), resulting from an audit of this Department's assessment and collection of public employee safety and health penalties for the period January 1, 1995, through December 31, 1996. You requested that we provide you with our formal comments in response to the findings and recommendations contained in the draft report. This response will be included as an appendix to your final report.

I do not have any comments or concerns with respect to the background information and the audit scope, objectives and methodology set forth at the beginning of the report. My comments will address specific statements set forth in the results of the audit.

The reference on the bottom of page 2 of the report to the PESH unit performing fewer inspections and assessing fewer penalties requires some clarification. On page 3 of the report you note that the Department is employing a hands-on, proactive approach to resolve PESH violations. This is being done through increased contact and communication between the PESH enforcement staff and the public employers being inspected. It has been PESH's experience that the majority of public employers want a safe and healthful workplace for their employees. However, employers find that they often need further assistance in focusing their efforts after receiving a Notice of Violation. The PESH enforcement field staff is helping public employers and employees to better understand, comply and



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**Appendix A**

abate violations in a timely manner. This action has been very effective in reducing the number of follow-up inspections needed to determine compliance with the Notice of Violation. The improved communication between the enforcement field staff and the public employers and employees has significantly reduced the number of unabated hazards and the assessment of penalties. Additionally, while OSHA's biennial evaluation of the PESH program for the 1/1/94 - 12/31/95 period makes reference to fewer follow-up inspections, it is noteworthy that OSHA found that the PESH program's overall performance is sound.

The statement on the top of page 3, that Counsel's Office should develop written procedures to guide and document penalty reduction decisions to ensure that penalties are collected in a fair and consistent manner, is misleading. The report does not acknowledge that Counsel's Office does have a policy regarding settlement practices which has been communicated to all attorneys working on PESH cases. However, we do acknowledge that these policies are not in writing and Counsel's Office will establish them as written guidelines.

There is a discussion on page 4 of the report regarding the collection of 31 of 171 final bills that were issued in 1995 and 1996. The report notes that 13 of these 31 final bills were reduced by Counsel's Office. There is a conclusion on page 5 of the report that without written procedures governing the reductions in these penalties, there is decreased assurance that the reductions are appropriate. The report goes on to state that this conclusion is supported by a penalty reduction for the New York City Board of Education. Although Counsel's Office does not have a formal, written policy, it has been clearly communicated to each attorney that he/she may settle a case within certain parameters if specific circumstances appear to warrant such a reduction. Accordingly, there are procedures in place to assure that reductions are appropriate.

The discussion regarding the settlement reached with the New York City Board of Education fails to note that this settlement was reached under the prior Administration and that special circumstances surrounded the negotiations. The former Commissioner and Deputy Commissioner, in conjunction with the Division Director, directly handled the negotiations with the Assistant Chancellor of the New York City Board of Education. These unusual procedures created a problem with the follow-up inspection concerning compliance with the settlement terms. Accordingly, we do not agree this case should be the basis for any recommendation with respect to the Department's current settlement practices.

Regarding the comments on page 5 of the report with respect to the Department of Corrections (DOCs), the Department plans to contact the Division of the Budget regarding the collection of these penalties. It is unclear at this time whether these penalties will be collected.

I also have general comments with respect to the statement on page 6 of the report about the Department's "practice of significantly reducing the PESH penalties." There is no discussion of the unusual circumstances facing the Department due to the significant backlog created by the inability to impose penalties for over 1.5 years. This situation

warrants some flexibility to close out this backlog (i.e., the Counsel's Office settlement of the 13 cases). I also note that most of these fines accrued due to violations written under the prior Administration and prior to the implementation of the new policy of working with the public employers to correct the violations. Accordingly, the settlement of these cases is not inconsistent with, or contrary to, our new policy.

With respect to the recommendation on page 6 of the report to design and implement a single management information system that provides information that is accurate and reliable and meets the needs of the users, I offer the following comments. First, it is not possible at this time to have one system instead of three. We are required to provide information for the Federal Integrated Management Information System (IMIS). The IMIS system does all the tracking of inspection activity and generates notices of violation. In addition, that system is used in concert with the Department's mainframe system. Second, the Department does recognize the need to link the mainframe systems and to provide for reconciliation between the systems. Our DPIS staff are working with PESH and Counsel's Office to modify the mainframe systems to allow them to generate quarterly reports for reconciliation between the systems on a quarterly basis.

Finally, I wish to thank you for providing us with the opportunity to respond to the draft audit report.

Sincerely,



John E. Sweeney  
Commissioner of Labor