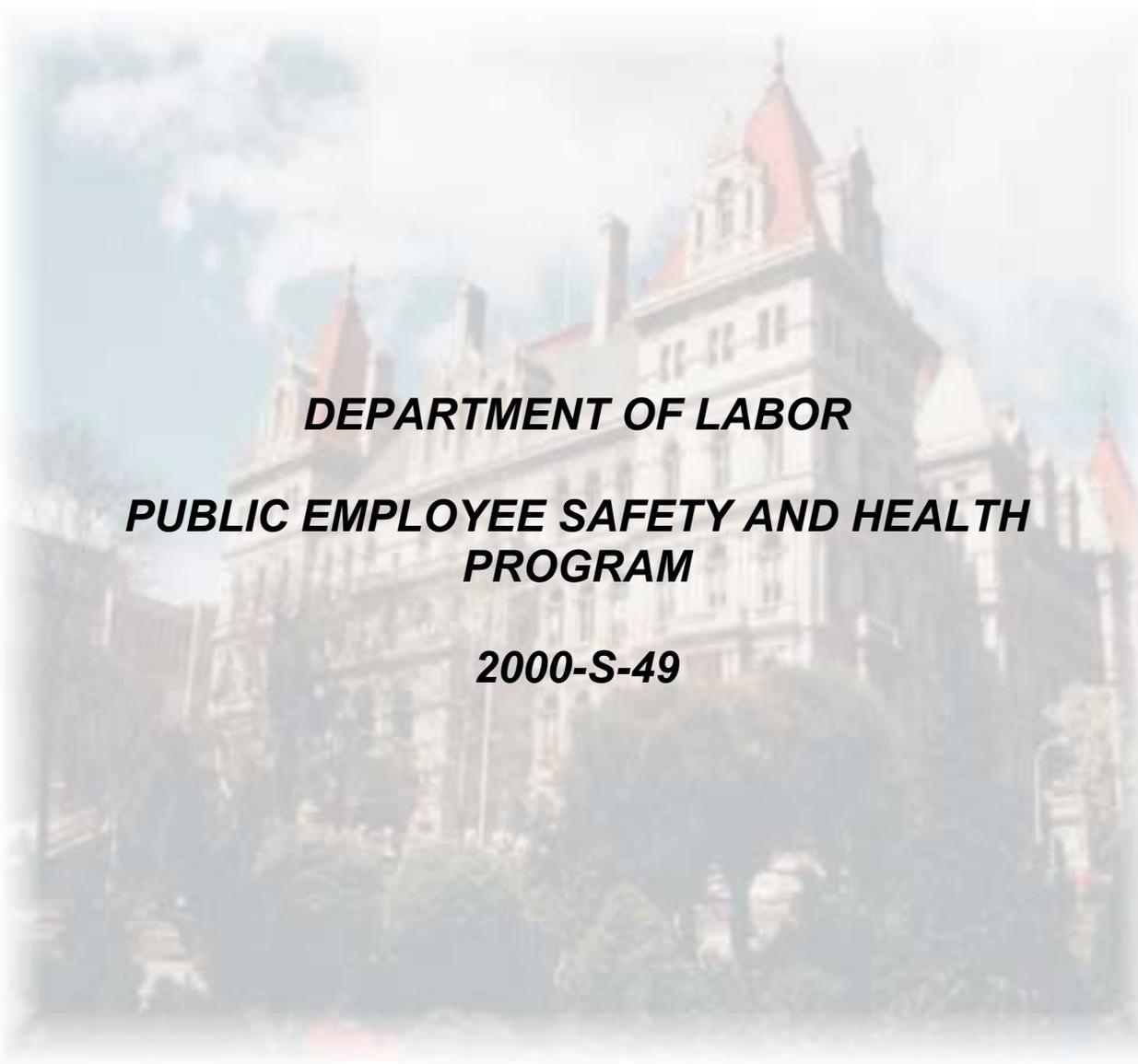


NEW YORK STATE OFFICE OF THE STATE COMPTROLLER

**H. Carl McCall
STATE COMPTROLLER**



**DEPARTMENT OF LABOR
PUBLIC EMPLOYEE SAFETY AND HEALTH
PROGRAM**

2000-S-49

**DIVISION OF MANAGEMENT AUDIT AND
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H. Carl McCall
STATE COMPTROLLER

Report 2000-S-49

Ms. Linda Angello
Commissioner
Department of Labor
Building 12, State Office Campus
Albany, NY 12240

Dear Ms. Angello:

The following is our audit report addressing the Department of Labor's Public Employee Safety and Health Program.

This audit was conducted pursuant to the State Comptroller's authority, as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law. We list major contributors to this report in Appendix A..

Office of the State Comptroller
Division of Management Audit
and State Financial Services

June 6, 2002

Division of Management Audit and State Financial Services

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EXECUTIVE SUMMARY

DEPARTMENT OF LABOR

PUBLIC EMPLOYEE SAFETY AND HEALTH PROGRAM

SCOPE OF AUDIT

The Department of Labor's (Department) Public Employee Safety and Health Unit (PESH) within the Division of Safety and Health is responsible for overseeing the workplace protection of over 1.3 million public employees in the State. The State Labor Law provides for all non-Federal public employees in the State to be protected by workplace safety and health standards that are as effective as Federal Occupational Safety and Health Administration (OSHA) standards for private sector employees. States with workplace protection programs for public employees must have State Plans indicating how they will ensure this protection. OSHA is charged with reviewing and approving State Plans and with actively overseeing state-operated programs.

PESH has a central office and nine district offices. PESH staff do workplace safety investigations when an accident has occurred, when a complaint is received or on a routine basis. In doing workplace safety inspections, PESH personnel follow procedures set forth in the PESH Field Operations Manual (Manual), which establishes standards for response times, complaint classification, the recognition of hazardous conditions, comprehensive case processing and the issuance of variances. PESH Safety and Health Inspectors (inspectors) issue citations for violations and do follow-up visits to ensure the cited problem was corrected.

Since 1996, PESH has undergone two program-wide OSHA evaluations, two OSHA special studies and a Public Employees Federation survey of PESH inspectors. These evaluations and studies found numerous and continuing problems with the PESH program. Our audit addressed the following questions about Department management of the PESH program for the period April 1, 1998 through July 31, 2001:

- Is Department oversight and investigative efforts effective in ensuring that the State's public employees work in a safe and healthy environment?

- Does the Department ensure that employers cited for violations correct the problems promptly?

AUDIT OBSERVATIONS AND CONCLUSIONS

Our audit concluded that PESH investigative efforts do not provide adequate assurance of a safe and healthy workplace. We found numerous instances in which complaints were misclassified, investigations were delayed and case processing was inefficient, with the result that cited hazards may not be corrected promptly.

Anyone with a complaint about the administration of a State Plan can file a formal Complaint About State Program Administration (CASPA) with OSHA. Of the 11 CASPAs investigated and finalized between November 1999 and April 2001, OSHA sustained 9 complaints (82 percent) against PESH. These cases highlight examples of PESH's failure to recognize hazards, and to respond to complaints quickly. Persistent program deficiencies can jeopardize the safety and health of public employees who count on PESH for workplace protection. We recommend the Department monitor PESH operations to ensure that it conforms to Manual guidelines when conducting investigations. (See pp. 5-10)

Our audit sought to identify the causes of PESH's continuing performance problems, and examined what Department management has done to correct them. We found that inadequate training, as well as potentially inadequate staffing, are prominent among the causes of PESH deficiencies, but that management has done little to correct either issue. For example, PESH does not ensure inspectors complete required core courses, take at least one course every three years at OSHA Training Institute or take courses designed for compliance personnel. District supervisors and staff acknowledged they needed more training. Further, even though OSHA has questioned whether PESH's fluctuating staff size can handle complaints in a timely and effective manner, PESH has not kept inspector staff numbers at their planned level. To address the causes of PESH's chronic performance problems, we recommend the Department make adequate training of inspectors a priority, and that it reexamine staffing levels and other aspects of its 17 year-old State Plan. (See pp. 11-16)

We also reviewed the process PESH uses to investigate complaints by employees who report they have been discriminated against because they filed a safety and health complaint. We visited the four district offices that had received such complaints during 2000 and found that, while district staff were generally knowledgeable about the overall process, they do not always process complaints timely, uniformly or in compliance with the Manual. We recommend that the Department train staff in processing these cases, and that it monitor conformance to Manual requirements. (See pp. 17-20)

COMMENTS OF DEPARTMENT OFFICIALS

A draft copy of this report was provided to Department officials for their review and comment. Their comments were considered in preparing this report. In addition, the State Comptroller's Notes to the Department's response are included as Appendix C.

Department officials disagreed with the report's findings and conclusions, and did not respond to any of its recommendations. We believe the results of our audit and the actions of OSHA -- its increased oversight of PESH operations -- demonstrate the need for the Department to consider the improvement opportunities identified in this report. We, therefore, urge the Department to review our recommendations and take the necessary steps to implement them.

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INTRODUCTION

Background

The mission of the Federal Occupational Safety and Health Administration (OSHA) is to ensure safe and healthful workplaces in America for private sector employees. Workplace protection for public employees is provided through state agencies. The Federal Occupational and Safety Act of 1970 requires states that choose to develop workplace protection programs for their public employees, to develop State Plans indicating how they will ensure this protection. As of 1998, states must also develop five-year strategic plans. OSHA is charged with reviewing and approving State Plans and with actively overseeing state-operated programs. OSHA oversight comprises the following features: program evaluations every two years; special assessments, as necessary; and monitoring plans to verify a state's implementation of recommended improvements to the State Plan.

In New York State, Section 27(a) of the 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 as effective as OSHA standards. The Department of Labor's (Department) Public Employee Safety and Health Unit (PESH) within the Division of Safety and Health is responsible for overseeing the workplace protection of over 1.3 million public employees in the State by implementing the State Plan. The 9,000 public employers in the State include State, county, city, town and village government, and public authorities. PESH's objective is to ensure that all employees within its jurisdiction work in an environment free from recognized hazards and risks to their safety and health. During each of the last three years ended September 30, 2000, PESH received combined Federal and State funding of \$6.1 million.

PESH has a central office and nine district offices. Each district office has a Supervisor, Safety and Health Inspectors (inspectors), Industrial Hygienists and support staff. PESH does workplace safety investigations, including equipment inspections, when a serious accident has occurred, when there is imminent danger that an accident could occur, when a

complaint letter has been received, and on a routine basis. When PESH inspectors find violations, they issue citations to correct the deficiencies. PESH has the authority to review and approve an employer variance, or a deviation from the standard remedy for the cited problem, to correct a deficiency. PESH conducts follow-up visits to ensure employers' compliance. All inspections and follow-up inspections should be unannounced regardless of classification. PESH has the authority to impose financial penalties on those public employers who fail to correct hazardous conditions within a reasonable period of time. If a follow-up inspection reveals that an employer has failed to correct a cited hazard, PESH is required to issue a "Failure to Abate" notice, at which time a penalty is assessed. Finally, PESH investigates those cases in which a public employee believes he or she has been discharged, disciplined, or otherwise discriminated against as a result of filing a safety and health complaint. In doing workplace safety inspections, PESH personnel follow procedures set forth in the PESH Field Operations Manual (Manual), which establishes standards for response times, complaint classification, the recognition of hazardous conditions, comprehensive case processing and the issuance of variances.

PESH uses the Integrated Management Information System (IMIS), a case management system provided through OSHA, to record public employee health and safety complaints and related case processing information. PESH uses IMIS to manage its caseload, including complaint classification and inspection scheduling, and to report PESH performance data. For the two State fiscal years ended March 31, 2000, PESH reported the following statistics on safety and health inspections performed, follow-up inspections and penalty collections:

PESH Performance Data: April 1, 1998 - March 31, 2000*						
Year	Safety Insp.	Health Insp.	Total Inspections	Follow Up Inspections	Percentage of Follow Ups per Total Inspections	Penalties Collected
1998-99	1,573	926	2,499	1,046	42	\$377,500
1999-00	1,152	746	1,898	753	40	\$325,000
Decrease	421	180	601	293	2	\$ 52,500

* Latest Data Available

Audit Scope, Objectives and Methodology

We audited selected program management practices of PESH for the period of April 1, 1998 through July 31, 2001. The objectives of our performance audit were to determine whether the Department's oversight and investigative efforts are effective in ensuring that New York State's public employees work in a safe and healthy environment, and that employers cited for safety and health violations correct these problems promptly. We undertook this audit, in part, at the request of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) who has members that depend on PESH oversight for assurance of safe and healthy working conditions. During our fieldwork, we also met with staff in the State legislature, who expressed concern about aspects of PESH performance.

To accomplish our objectives, we evaluated Department internal controls, policies, procedures, and other internal processes for managing and addressing PESH safety and health investigations of public employers. The evaluation is based on meetings with agency officials, and our review of applicable laws, rules, regulations, policies, procedures, and relevant agency records. We also analyzed OSHA reports on PESH performance. In addition, we interviewed officials from OSHA, the Public Employees Federation and the Civil Service Employees Association.

We also visited four regional offices (New York City, Rochester, Syracuse, and Utica district) to review their procedures for processing discrimination cases. At these districts, we also interviewed district managers and reviewed the documentation of selected case files. We selected these four districts to visit because they were the only districts that had discrimination cases.

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 within 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 recorded 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, judgments 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 when selecting activities to be audited. This approach focuses our audit efforts on those operations that have been identified through a preliminary survey as having the greatest probability for needing improvement. Consequently, by design, finite audit resources are used to identify where and how improvements can be made. Thus, little audit effort is devoted to reviewing operations that may be relatively efficient or effective. As a result, our audit reports are prepared on an "exception basis." This report, therefore, highlights those areas needing improvement and does not address activities that may be functioning properly.

Response of Department Officials to Audit

A draft copy of this report was provided to Department officials for their review and comment. Their comments were considered in preparing this final report and are included as Appendix B. In addition, the State Comptroller's Notes to the Department's response are included as Appendix C.

Department officials disagreed with the report's findings and conclusions, and did not respond to any of its recommendations. We believe the results of our audit and the actions of OSHA --its increased oversight of PESH operations -- demonstrate the need for the Department to consider the improvement opportunities identified in this report. We, therefore, urge the Department to review our recommendations and take the necessary steps to implement them.

Within 90 days after 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.

PROGRAM ADMINISTRATION

Since 1996, PESH has undergone two program-wide OSHA evaluations, two OSHA special studies focusing on case processing (complaint classification, comprehensive investigations, and conducting timely inspections) and a Public Employees Federation survey of PESH inspectors concerning critical aspects of the PESH program. The above evaluations and studies found, and informed PESH management about, numerous problems affecting inspection activities. We note that OSHA officials are initiating additional monitoring of PESH program operations because they recognize PESH has made little progress in correcting these problems.

Our audit reviewed the problems identified by OSHA and looked for the causes of what appear to be ongoing deficiencies in PESH's implementation of the program. For example, we found numerous instances in which PESH staff did not respond to safety violations as promptly as they should have. In fact, OSHA is concerned enough about PESH's handling of such investigations that it scheduled another study of PESH. We believe these and other examples of continuing deficiencies in PESH investigations and case processing are attributable, in part, to poorly trained personnel and inadequate or inefficient staffing. To ensure public employees are not exposed to unnecessary hazards or preventable illnesses, Department management needs to commit to protecting employees' health and safety, and demonstrate this commitment by implementing the recommendations made in this and OSHA reports.

OSHA Oversight

A State Plan provides an occupational safety and health program for the protection of State and local government employees. The State Plan provides for the development and enforcement of standards which are at least as effective as OSHA standards in ensuring safe and healthy workplace for public employees. PESH's Manual provides procedural guidance intended to ensure prompt and appropriate action in determining the validity of complaints and referrals, conducting comprehensive investigations of complaints and accidents,

issuing citations (notices of violation) for corrective action, doing follow-up visits to verify citation compliance, and engaging in employer outreach to prevent injuries and illnesses before they occur.

OSHA regulations allow any interested person(s) or their representative to submit a Complaint About State Program Administration (CASPA) concerning perceived inadequacies in the operation or administration of any aspect of a State Plan. For example, a CASPA could be filed alleging delays in processing cases, inadequate workplace inspections, or the granting of variances to employers without regard to the specifications in the State Plan. If OSHA determines there are reasonable grounds to explore the matter, it will initiate an investigation of the complaint.

We found that, between November 1999 and April 2001, OSHA determined that all 17 CASPAs warranted investigation; 6 of these cases are under investigation and 11 have been finalized. We reviewed all 11 of the finalized CASPAs and found that OSHA sustained the same types of allegations from case to case. For example, we found many instances in which OSHA concurred with allegations that PESH did not follow the procedures set forth in its Manual regarding: response times (4 cases); complaint classification (1 case); comprehensive case processing (4 cases); hazard recognition (3 cases); and the issuance of variances (3 cases). In 9 (82 percent) of the 11 finalized CASPAs, OSHA sustained the complaint and required PESH to take corrective action. These 9 sustained CASPAs contained a total of 24 allegations of PESH deficiencies (e.g., delays in responding, improper complaint classification, failure to recognize hazard), 19 (79 percent) of which were sustained by OSHA. We also identified many of the same alleged deficiencies in the six additional CASPAs still under investigation during our audit.

The sustained allegations involved noncompliance with the following requirements:

- Complaint classification. A complaint should be classified according to the apparent level of hazard or health risk to employees.
- Response Time. Imminent danger complaints, which could reasonably be expected to cause death or serious

harm must be inspected the same day or the next working day; serious complaints, presenting a substantial probability of death or serious harm, must be inspected within 30 days; and non-serious complaints, which will likely not cause serious harm but should still be corrected, must be inspected within 120 days.

- Advance notice. There should be no advance notice of inspection given to employers, with relatively few exceptions (e.g., to allow the employer to correct an imminent danger as quickly as possible).
- Case processing. Time frames are stipulated for investigating complaints, doing follow-up inspections and reporting on inspection results.
- Hazard recognition. The investigation should cite all observed violations and address all compliance issues with regulatory requirements.
- Issuance of variances. PESH can allow employers to correct a deficiency in a manner other than that prescribed by standards if materials, equipment or technical personnel are unavailable, or if the alternate correction allows the condition to meet OSHA standards for safety and health.
- IMIS data entry. Complaint classification, inspection scheduling and other relevant case processing information should be entered timely and accurately in IMIS.

When PESH does not meet the above requirements, as outlined in the Manual, the resulting noncompliance may produce a complaint and an OSHA investigation. More importantly, however, the occurrence of deficiencies – particularly the occurrence of a number of deficiencies in the same case – can have a real and very negative impact on workers' health and safety. To illustrate the effect of PESH deficiencies on the public employees involved in such cases, we summarize the history of three of the nine sustained CASPAs below.

- In a December 2000 case, OSHA found that a State agency had requested that PESH review the safety of a fish hatchery. According to the report, during two PESH

inspections at the hatchery, inspectors failed to note a potential fall hazard. This hazard involved the potential that employees could fall into an eight-foot tank that held three feet of water. According to OSHA, the tank should have been enclosed with guardrails so employees would not fall into it. However, PESH granted the State agency a variance from having to install guardrails, and instead approved a “rescue plan” for workers who fell into the tank. The plan calls for workers to: wear helmets with a chinstrap; wear a floatation vest; carry a cordless or cell phone in a waterproof bag; and call the local rescue squad if they fall into the tanks.

OSHA’s report strongly disagreed with PESH’s granting of this variance.

- In September 2000, PESH took six months and 18 site visits to complete a safety inspection involving imminent danger. The allegations involved concerns over the potential harm to employee respiratory systems resulting from the improper use of potentially hazardous chemicals at a municipal water treatment plant. The case file showed that during one of the site visits, the PESH Industrial Hygienist refused to address an imminent danger situation brought to her attention by an employee on the grounds that she was not a Safety Specialist. This lack of attention resulted in delay in correcting the problem. Although the situation was later referred to a Safety Specialist, the Manual requires that PESH personnel include additional hazards identified during an inspection as part of that investigation.

We also learned that OSHA is concerned with PESH’s use of the advance notice provision, and has scheduled a study of PESH’s handling of such investigations in the Fall of 2001.

While a Department official told us he agreed with some of OSHA’s findings resulting from the CASPA investigations, he does not believe OSHA should review CASPAs when complainants have not exhausted all administrative remedies, such as informal conferences. Department officials also stated their belief that complainants prefer to use CASPA rather than go through administrative remedies because of OSHA’s close working relationship with public unions. We also discussed the CASPA investigation process with OSHA officials, who told us

there is no specific requirement that a complainant must first pursue administrative remedies before submitting a CASPA. Further, OSHA officials stated that these complaints against PESH are “of a serious nature and need to be investigated.”

In addition to reviewing CASPAs, OSHA also does routine periodic assessments of how states conduct their hazard-related investigations. Since 1996, New York State has undergone two program-wide OSHA evaluations, two OSHA special studies focusing on PESH case processing, and is scheduled to undergo a special study of fatality investigations in late 2001. These studies found many of the same deficiencies noted in the CASPAs, and pointed out in the Public Employees Federation’s survey of PESH investigators.

An OSHA study issued in February 2001 reported that PESH needs to improve complaint classification and investigation and do investigations more promptly. OSHA’s review of a random sample of 72 inspections found that 17 (23 percent) inspections did not appropriately address all the complaint allegations (e.g., citations were not issued for hazards; items were not investigated; conditions were not described). The study also found that PESH had not issued Failure to Abate notices, as required, when follow-up inspections revealed the public employers had not corrected hazardous conditions. The same study also raised concerns about the accuracy and completeness of complaint information PESH maintains on its IMIS database. The study revealed that some complaints were misclassified, with the result that certain serious conditions were not inspected for months. Further, this study found that 28 violations issued by PESH to employers were still not available on IMIS eight months after they had been issued. Department officials pointed out that on several occasions OSHA’s IMIS was not functioning properly, resulting in data having to be re-entered.

Recommendation

1. Monitor PESH operations to ensure that investigations are conducted appropriately and in accordance with the Manual. This requires:
 - investigators identifying hazardous and unsafe workplace conditions so that all appropriate violations are identified and notices of violation are issued;
 - properly classifying complaints according to the Manual's established definitions and responding to them within the mandated time frames; and
 - accurately recording complaint-related data on the IMIS in a timely manner.

TRAINING AND STAFFING LEVELS

The Department's formal response to the OSHA study issued in February 2001 included a plan of corrective action to address OSHA's concerns. The Department implemented this plan, which included a statewide meeting with all PESH staff to provide training in case file preparation, problem areas and documentation. However, PESH's operational problems are longstanding ones that have been thoroughly and consistently documented by OSHA, its oversight agency. Therefore, our audit looked for the underlying causes of these continuing PESH performance problems to determine what Department management has done, in addition to its statewide meeting, to address them. We found that inadequate training, as well as staffing problems, were prominent among the causes of inadequate PESH performance, as illustrated in the following sections of this report.

Training for PESH Staff

Our review of the training PESH provides for its inspectors, found that PESH's Central Office does not monitor initial inspector training to ensure inspectors have completed the core courses listed in the Manual, and does not ensure that experienced staff attend a minimum of one safety and health course every three years, as required by OSHA. PESH also does not monitor districts to see that they develop appropriate planning for addressing their inspectors' training needs.

PESH's Vision Statement in the Division of Safety and Health's 1999-2003 Strategic Plan states that the inspection services provided are only as good as the first line providers, who must be highly qualified and well trained. PESH adopted OSHA's training and policy guidelines, which are designed to ensure compliance personnel can apply technical information and skills to their work, and to provide a wide range of training opportunities and learning experiences. The policies require that inspectors complete six core courses generally within their first two years of employment. Inspectors must complete the Initial Compliance Course, Inspection Techniques and Legal Aspects and either Introduction to Safety Standards or

Introduction to Industrial Hygiene Standards during the first year of employment. The policy also requires inspectors to attend a safety and health related course once every three years at the OSHA Technical Institute. Inspectors and supervisors are required to develop Individual Development Plans (IDP) to coordinate each inspector's comprehensive training needs.

However, we found that PESH does not check to see whether inspectors complete the required core training, seasoned inspectors attend OSHA training once every three years, or Individual Development Plans are initiated for staff. OSHA noted a significant drop in PESH participation at OSHA Technical Institute classes between 1995 and 1999. The reduced participation occurred because PESH staff were sent instead to local training classes that were not designed for compliance personnel/inspectors. PESH management stated that budget constraints and the lack of Department authorization have prevented PESH staff from attending training at the OSHA Training Institute.

Because supervisors at the four district offices we visited also told us that staff is inadequately trained to carry out the program policies, we reviewed PESH training records for all 59 PESH investigative staff (this number does not include an individual hired at the end of our field work in July 2001) to determine whether their training conformed to PESH's training policy. We found the following deficiencies:

- 58 of 59 compliance personnel had not completed their core course requirements;
- 51 of 59 staff had not completed the Inspection Techniques and Legal Aspects course;
- 53 enrollments for training at the OSHA Technical Institutes were canceled by PESH between July 1999 and April 2001;
- 13 of 49 seasoned staff did not attend a safety or health course at the OSHA Technical Institute between April 1, 1998 and April 1, 2001, as required;
- 9 of 14 staff we interviewed did not know what an IDP was; those who did, said the IDPs are seldom if

ever used to coordinate training needs and progress; and

- 82 percent of safety and health courses PESH investigative staff attended in 1998 were not designed for compliance personnel, according to OSHA Technical Institute officials.

Properly trained inspectors should have the expertise to conduct comprehensive investigations, including recognizing hazards, classifying them accurately and recommending appropriate remedies to correct unsafe or unhealthful working conditions. When staff is inadequately trained, however, hazardous conditions can go undetected and uncorrected, putting public employees' health and safety at risk. For example, OSHA's February 2001 study found an instance in which PESH inspectors did not thoroughly test for exposure to lead in areas adjacent to a firing range by taking personal samples from workers or by documenting tests of surfaces in eating areas. In another instance, PESH staff did not do an on-site investigation of a complaint about the lack of piping on a relief valve to divert steam pressure away from walkways because they could not identify a standard for this specific hazard. However, PESH staff could have issued a general duty clause violation referencing compressor or piping standards. OSHA also found that PESH decided not to investigate an alleged asbestos hazard in an HVAC room because employees did not have access to the room. They did not consider the possibility, however, that asbestos could still enter the HVAC system and potentially endanger the health of the public employees at this facility.

There appears to be consensus that PESH staff needs more and better training. OSHA has reported to the Department that staff is not adequately trained, and PESH and OSHA have discussed training deficiencies during their quarterly program monitoring meetings. In the October 1999 Internal Control Review of PESH, the Department cited a competency problem, which it concluded could potentially have a high negative impact on PESH's ability to deliver quality services. To address this problem, the Department planned to improve competency through training. However, our audit tests did not find evidence that the Department has made any significant improvements in its training program.

The Department has stated that its resources are limited, so it is difficult to ensure PESH staff receive adequate training. However, we question management's explanation that budget constraints were the reason why PESH enrollment in training courses declined. According to Department records for the 3 years ended September 30, 2000, PESH had excess funding of \$200,000, \$500,000 and \$500,000, respectively. These excess monies could have been used for training purposes. Further, while most OSHA courses are held at out-of-state training sites, OSHA does not charge a tuition fee. Therefore, PESH would incur only travel-related costs for the inspectors who attend this training.

PESH Staffing Levels

PESH personnel are responsible for workplace investigations and equipment inspections. Because of the seriousness of the work performed, it is necessary that sufficient qualified staff be assigned to this function. In its periodic program evaluation for 1999, OSHA cited decreased staffing levels as a cause of delays in case processing and recommended that PESH report quarterly on its staffing levels and its attempts to fill positions. Our review of OSHA studies and CASPA reports and our examination of PESH statistics leads us to conclude that decreased staffing and excessive turnover in staffing are responsible, in part, for inadequate PESH performance.

In the State Plan, which was approved in June 1984, the Department committed to a level of 60 compliance staff in the districts. Compliance staff includes supervisors, safety and health inspectors and industrial hygienists and are divided between two programs: consultation (22 positions) and enforcement (38 positions). Compliance staff assigned to consultation respond to calls from employers who ask for assistance in identifying or remedying a problem; staff assigned to enforcement respond to complaints, inspect for violations and follow up on the correction of deficiencies found during consultation work.

PESH management told us that turnover among its staff, especially in New York City, has made it difficult to close the staffing gap. According to Department officials, staff left the program to pursue opportunities with other programs or agencies. The minutes of the OSHA's quarterly monitoring

meeting with PESH note that the turnover rate in PESH is twice that of other State agencies.

While DOL has moved to fill some positions as they became vacant, this activity has not kept pace with staff turnover. For example, our analysis of roster changes from February 1998 through April 2001 shows that the number of filled compliance positions in the districts has declined over this period from 61 filled positions in February 1998 to 56 filled positions in April 2001. During the same period, the level of district support staff (keyboard specialist titles) also fluctuated between a high of 13.5 and a low of 10.5 filled positions. As of April 2001, PESH filled 12.5 support staff positions. In the absence of sufficient support staff, PESH employees state they spend their time completing required reports rather than completing investigations.

We also found that the allocation of compliance staff varies from the numbers stated in the State Plan. PESH has consistently assigned fewer than 22 compliance staff to consultation, leaving more than 38 compliance staff in enforcement. According to a PESH official, fewer compliance staff are allocated to consultation because there is no consultation backlog. We also found that within enforcement, PESH has seven fewer safety inspectors, and ten more hygienists, than are called for in the State Plan.

In their response, Department officials noted that their ability to do inspections is also impacted by certain OSHA requirements. According to Department reports, the total number of inspections PESH completed declined from 2,499 in 1998-99 to 1,898 in 1999-00. The Department states this decline is primarily due to PESH's need to develop and implement a five-year strategic plan with performance goals, as mandated by OSHA, beginning in 1998. Officials state the strategic plan has required 30 percent of PESH employees to devote 60 percent of their time to this effort.

In two CASPA investigations, OSHA questioned whether PESH has sufficient resources to handle complaints in a timely manner and effective manner. OSHA's February 2001 study also reported excessive delays in case processing. Given that the State Plan was developed more than 17 years ago, it should be reexamined to determine if staffing levels and other aspects of the plan need to be updated. Department officials indicated that they have begun discussions with OSHA regarding staffing

formulas. We believe it is also essential to address PESH's high staff turnover rate. Even if PESH can fill all 60 compliance positions, the high turnover rate could make it difficult to do effective investigations in a timely way. When a vacancy occurs in an inspector staff as small as PESH's, that vacancy can have a significant impact on the investigative capacity of a district office. For example, PESH has 11 inspectors assigned to cover the entire New York metropolitan area. If just one inspector leaves, PESH investigative capacity is decreased by nine percent.

Recommendations

2. Verify that inspectors complete the core courses and maintain their knowledge and skills by enrolling, at a minimum, in a safety and health course at the OSHA Training Institute every three years.
3. Use the Individual Development Plans to coordinate training needs.
4. Enroll inspectors in safety and health courses designed for compliance personnel.
5. Evaluate PESH's training policy to determine if the completion of one course every three years is sufficient to assure that inspectors are adequately trained.
6. Evaluate the adequacy of the staffing levels contained in the State Plan and maintain adequate staffing levels.
7. Review the allocations of positions within enforcement to see that a sufficient number of Safety and Health Inspectors are available in each district.

DISCRIMINATION CASE PROCESSING

A public employee who believes that he or she has been discharged, disciplined, or otherwise discriminated against as a result of filing a safety and health complaint may file a discrimination complaint with PESH. At the conclusion of the investigation, the investigator prepares an investigation report without an opinion or statement as to whether or not the case has merit. A target date for completion of the investigation report is within 50 days of assignment to the case. The investigation report is then forwarded to the Department Counsel's Office (Counsel). If the Counsel sustains the complaint, the case is referred to the Attorney General for final action.

We reviewed the laws, regulations and the Manual's stated requirements for investigating and processing such complaints, interviewed PESH management personnel and examined the investigations conducted on all discrimination complaints filed in the 1999-00 State fiscal year. We found that PESH personnel are knowledgeable about the overall process, but that they do not always process discrimination cases uniformly or in accordance with the Manual.

To determine whether PESH investigated discrimination complaints promptly and processed cases appropriately, we visited the four district offices (New York City, Rochester, Syracuse and Utica) responsible for all 11 discrimination cases during the 1999-00 State fiscal year. We developed a checklist of documentation that each discrimination case folder should contain to conform to Manual requirements, and verified the accuracy of the checklist with PESH management. We reviewed the 11 case files to determine how the various districts conduct these investigations, and checked case file data against the checklist requirements.

We found that the district offices use different methodologies to obtain investigative information, such as complainant questionnaires, standard release forms and witness interviews. For example, the New York City district office sends copies of the questionnaire and standard release form to the complainant and witnesses, respectively, and relies on these individuals to

complete and return the forms. The Rochester, Syracuse and Utica offices hold a formal conference with the complainant to help the complainant complete the questionnaire and standard release form, and also hold a conference with witnesses to document their testimony.

We also found that district offices have different methods of determining whether a case has merit or should be closed. Employees in New York City and Syracuse, forward the case file and report to the Counsel's office for a final determination; in Rochester, the district office supervisor reviews the narrative report, consults with the investigator and decides if the case should go to the Counsel's office; in Utica, the investigator decides whether to close the case or submit it to the Counsel's office for further action.

Further, some districts do not understand how to handle discrimination cases. One district office supervisor said he was unsure how a discrimination case should be processed. We also found that one district destroyed the release form authorizing access to personnel records. These staff did not know the district should retain the forms to demonstrate protection of the employee's privacy and to limit any legal liability issues.

In total, our review of the 11 discrimination case folders found 81 exceptions out of a possible 179 procedural attributes (45 percent exception rate). For example, documentation supporting required actions by the investigator, and reviews by management and Counsel's office were missing in several instances. Without the required documentation evidencing investigator actions and management and legal reviews, the Department has no assurance that investigations were handled appropriately.

When we discussed the exceptions with district officials to determine how discrimination case processing could be improved, we found that districts have not received updated copies of the Manual that includes current procedures for processing discrimination cases. District officials also indicated there is a shortage of investigators, and not enough time to perform these types of investigations.

In addition, district officials told us they have not been provided with training for processing discrimination cases. The Manual

states that all safety and health inspectors assigned to conduct discrimination investigations should attend the OSHA Training Institute course on Discrimination Investigation. However, our review of PESH training records dating back to 1986 revealed that only two PESH investigators have attended this OSHA Training Institute course. According to PESH records, these two investigators no longer conduct discrimination investigations.

We also analyzed discrimination case data for the two State fiscal years ended March 31, 2000 to determine the number of cases received, investigations initiated, investigations still open, investigations completed, and the average completion time for a case. We found that all of the cases received had been initiated and all 17 cases from 1999 have been closed out. Six of the 11 cases initiated in 2000 remain open (two of the open cases are under appeal by the complainant). We found that the average investigation completion time exceeded the 50-day time frame stated in the Manual by about 7 days for 1999 cases, and by about 48 days for 2000 cases.

To protect public employees who have complained about discrimination at their workplace, PESH must make sure all district personnel have access to updated Manual procedures, implement these procedures uniformly throughout the State and ensure investigators receive appropriate training in conducting discrimination investigations. Further, to avoid prolonging the period in which an employee may have to endure discriminatory conditions, PESH should process cases as expeditiously as possible and in conformance with Manual requirements.

Recommendations

8. Evaluate and revise the Manual's procedures for discrimination case processing and provide the updated Manual to districts.
9. Evaluate the discrimination investigation process and staffing levels so that discrimination cases are processed within established time frames.

Recommendations (Cont'd)

10. Ensure districts conduct discrimination investigations in a consistent manner. To promote consistency, develop a generic checklist which identifies the documentation discrimination investigators are required to maintain in the case file folders. Documentation should include release forms authorizing the review of personnel histories.
11. Provide discrimination investigators with the appropriate training at the OSHA Training Institute, as required by the Manual.
12. Monitor the timeliness of discrimination case processing through district and central office case reviews.

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January 30, 2002

Mr. William P. Challice
Audit Director
Office of the State Comptroller
Division of Management Audit and
State Financial Services
123 William Street, 21st Floor
New York, New York 10038

Dear Mr. Challice:

Thank you for providing the draft audit report (2000-S-49) addressing the Department of Labor's (Department) Public Employee Safety and Health (PESH) Program.

Department staff conducted a careful review of the findings contained within the report. Attached you will find the detailed Department response to several statements and conclusions contained within your draft report. It should be noted that, in several cases, the attached information, which factually refutes many statements and conclusions contained within your draft report, was furnished to your auditor team. Unfortunately, the draft report was never revised to include this information. Regrettably, that method of operation defeats the intended purpose of the program audit.

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Equally disturbing is the fact that the Department is aware that several of the findings in your audit report are merely re-statements from previously published federal OSHA Studies of the PESH Program. OSHA conducted those studies only through a review of case files. There was no contact with the investigator(s) in charge of responding to these cases or their supervisor(s). Case files depict the facts, but sometimes lack details relative to the specific rationale or methods used to reach conclusions, which are equally important to the outcome of the investigation. PESH provided OSHA with detailed responses to their findings and many of their conclusions were withdrawn or the cases were resolved. Your audit team was furnished copies of the PESH responses to OSHA. Again, there is no reference to the PESH response in this draft report.

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During the audit period (April 1, 1998 to March 31, 2001), PESH performed some 6,084 public employee safety and health inspections. During that same time frame, PESH received 17 complaints about State Program Administration (CASPA). That means that 0.28 percent (or 1 out of every 357 cases) of the completed PESH safety and

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* See State Comptroller's Notes, Appendix C

Appendix B

health investigations were questioned by our customer, which is a significantly low number. Perhaps even more important is that at the conclusion of the CASPA process for each case, there was little, if any, change to the findings reached by PESH in the original investigation.

Lastly, the audit raised concerns with PESH Program administration, and cites “continuing performance problems”. The Department is aware that employee training, especially for newly assigned staff, will enhance the program. As resources permit, this training will continue to be a priority for the PESH Program. However, one measure of the effectiveness of the public sector safety and health program is the annually published statistics on accident and illness rates. For the past several years, these rates have continued to decline, significantly. During the audit period, the rates declined six percent. Further, since 1998, under the federally required cooperative agreement, PESH has met or exceeded its Strategic Plan objectives. Both of these significant accomplishments point to continued improvements in the State’s safety and health program. The Department is proud of the role PESH has in contributing to these declining accident and injury rates and improving the workplace environment of the public sector.

* Note 3

Again, thank you for the opportunity to provide our response to this audit. If you have any questions or would like any additional information, please contact me at (518) 457-9016.

Sincerely,



Karen C. Stackrow
Director of Internal Audit

Attachment

cc: L. Angello
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* See State Comptroller's Notes, Appendix C

**NEW YORK STATE
DEPARTMENT OF LABOR
DETAIL RESPONSE TO SPECIFIC SECTIONS OF DRAFT AUDIT
REPORT (2000-S-49)**

The following represents the Department's response to the Office of the State Comptroller (OSC) Draft Audit Report findings on the Public Employee Safety and Health Program. Responses follow the Contents outlined in the Audit Report.

BACKGROUND:

- The report does not accurately state the intent of the Federal Occupational and Safety Act of 1970. The Act does not require states with workplace protection programs for public employees to develop state plans. Rather, the Act states "Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under Section 6, shall submit a State plan for the development of such standards and their enforcement." In short, what the Act requires is that States, who so choose, adopt and enforce standards and inspection procedures at least as effective as the OSHA standards and inspection procedures.

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PESH's objective is to ensure that all employees within its jurisdiction work in an environment free from recognized hazards and risks to their safety and health. The report omits the word "recognized." In this context, a hazard is one that is recognized by the employer or its industry.

- The decrease in the number of inspections reported on **Page 2** of the Audit Report is primarily due to the required implementation of the OSHA mandated 5-year strategic and annual performance plans. Starting in FFY 1998, OSHA required PESH to implement a 5-year strategic plan made up of outcome oriented strategic and performance goals. The Strategic plan has required 30% of PESH employees to devote 60% of their time for its development and to meet performance requirements. In addition, a significant number of PESH employees were required to have OSHA Training Institute (OTI) Training, to meet the provisions of the strategic plan. This training deviated from our ability to provide required core and technical training for PESH employees. The Department is also pleased to advise that during the audit period, PESH either met or exceeded its work plan requirements under Strategic Plan.

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* See State Comptroller's Notes, Appendix C

- As a matter of clarification, the audit report misstates the procedure for the issuance of variances. PESH inspectors do not have the authority to approve variances. Section 30 of the Labor law and NYCRR Part 800 govern variances, which require the employer to petition the Commissioner for a variance. Subsequent thereto a Notice of Hearing is sent to both the employer and to the labor union representing the workplace. The union has the opportunity to appear in the proceeding both by filing written objections to the petition and by appearing in person or by counsel. After the close of the proceeding, an independent Hearing Officer issues a report and recommendations to the Commissioner, which may be adopted, rejected, or modified at which time a variance may be issued. If a union disagrees with the outcome of the variance proceeding, it may appeal that decision to the Industrial Board of Appeals within 60 days. This is a very important part of the process that was overlooked and misstated in the audit report.

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PROGRAM ADMINISTRATION:

- This Section of the audit report addresses PESH Program Administration and the Complaint About State Program Administration (CASPA) process. Throughout this Section of the audit report, the auditors have merely re-stated OSHA findings for each of the CASPAs that were issued. The OSHA CASPA investigation is a review of the case file, void of any interaction or discussion with the Investigator. OSHA did not conduct interviews with the PESH Investigators or Supervisors to ascertain the technical and administrative methods utilized during the inspection or to review the facts associated with the cases. Unfortunately, a desk audit of case files, which may be good mechanism to analyze the procedural process, cannot in itself conclude that findings were inappropriate. To do such requires a more extensive investigation. PESH responded adequately to OSHA on all of the CASPAs. To date, 15 of the 17 issued CASPAs have now been resolved. In each case, there was little effect on the outcome of the case.
- **Page 7** of the audit report discusses delays in the processing of case file information on the IMIS System by PESH. Many of these delays are caused by the federal computer system, which is slated for replacement in the next year or two by OSHA. In fact, PESH has re-entered numerous case file data because the federal host mainframe, in Washington, did not accept the data. In one instance, the PESH Utica Office had to re-enter data for a dozen case files three separate times before the host computer accepted the information. This has been a documented long-standing problem for all users of this computer system.
- **Page 8** of the audit report provides a case file synopsis of a public employee State highway fatality investigation, alleging that "...PESH should have immediately investigated the accident scene to ensure that any dangerous

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* See State Comptroller's Notes, Appendix C

practices or conditions were corrected...” A review of the case file shows that it was impossible for PESH to conduct an immediate investigation of the accident scene. While the accident, which occurred on January 11, 1999, resulted in serious injuries to the employee, the employer was not required to report the accident to PESH (and, in fact, did not make a report) since only one employee was injured. Only when the employee succumbed to his injuries on January 21, 1999, or 10 days after the accident, did the employer, following appropriate procedures, notify PESH of the accident and the ensuing fatality. Since PESH did not receive notice of the accident until January 21, it was impossible to investigate the accident scene.

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It is important to point out the specific purpose for the necessity to investigate fatalities immediately. Prompt action serves to identify dangerous practices or conditions that might cause other fatalities or injuries and to preserve witness testimony and secure the accident scene for fact finding. In this specific case, the fact that the death was 10 days removed from the accident and the accident scene was no longer there obviated the need for immediate action. Nevertheless, PESH did attempt to quickly review the situation. On January 28, and again on January 29, PESH contacted the employer representative to arrange for an opening conference. The agreed upon date of the opening conference was February 5.

Obviously, what the auditors concluded from reading the OSHA report on this case was not founded. PESH maintains, given the circumstances of this case, the proper procedures were followed with this investigation.

- **Page 8** of the audit report also cites OSHA concerns with PESH use of the “advance notification” procedure. The purpose of this procedure (pursuant to the Field Operation Manual, Chapter III.C.) is clear--where it is to be used to conduct a more effective investigation. PESH utilizes this procedure to insure the presence of employer and employee representatives or other appropriate personnel at the opening conference, which is a critical ingredient of a successful investigation. Advance notification is used by PESH most prominently in the metropolitan New York City area, where traffic and distance logistics may exacerbate opening conference attendance. PESH does not agree that this procedure is misused.
- With respect to the PESH case involving the fish hatchery, the auditors failed to take into account that the variance issued is a temporary measure for the protection of involved employees, while the walls of the “feeding tanks” were reduced from 8' to 3'. The variance was issued in coordination with the employer and with the union representatives. The ongoing issue at the “holding tanks”, which are in use for a 2-week period twice a year, continues to employ the interim steps of the variance.

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* See State Comptroller's Notes, Appendix C

➤ **Page 9** of the report states, "...a Department official told us he agreed with some of OSHA's findings resulting from CASPA investigations..." This statement by the auditors is incomplete and can be misleading. The auditors were informed by DOSH of the Department's agreement with OSHA's findings that case file documentation was deficient and FOM response timeframes were not always met. However, these are "procedural" matters, which would not have affected the outcome of the PESH investigators finding. The PESH response to OSHA on each of the CASPAs documents the facts that were identified throughout the conduct of the investigation and the rationale for the decision reached by the investigator.

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➤ **Page 9** of the report also cites an OSHA official as having stated "there is no requirement that a complainant must first pursue administrative remedies before submitting a CASPA". On two separate occasions, the Department provided the auditors with copies of the federal regulation relative to the CASPA process that specifically states that all administrative remedies must be pursued before submitting a CASPA. What is important is that if OSHA followed its own regulatory requirements with these cases, it is likely that a majority would have been rejected as CASPAs. The Department believes that most of the complaints would have been resolved under state administrative remedies.

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TRAINING AND STAFFING LEVELS:

Training for PESH Staff:

➤ **Pages 11-16** of the report discuss PESH training. In late fall 2000, PESH implemented new procedures for staff training, emphasizing core and required technical course training available at the OSHA Training Institute (OTI) in Des Plaines, IL. PESH did a complete analysis of employee completed versus employee required training. This analysis allowed PESH to register employees for the entire federal fiscal year for those core and technical courses that are required. This effort was implemented prior to the start of the OSC audit. This new procedure emphasizes the completion of employee core and technical training needs while maximizing resources.

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➤ **Page 12** of the report states that 53 enrollments for training at the OSHA Technical Institutes were cancelled by PESH between July 1999 and April 2001. However, there is no qualification for the cancellations. While course attendance may have been cancelled, the reasons for such usually include that: the employee cancelled because of personal conflicts; OSHA cancelled or postponed the course because of low registrations; or, PESH management cancelled employee attendance because of competing workload priorities. Further, beginning in 1999, PESH was required to alter its OTI Training schedule to fulfill the mandates of the OSHA required Strategic Plan. Hence, many employees that may have been originally scheduled for OTI core course training had to take other Strategic Plan related training instead. Finally,

* See State Comptroller's Notes, Appendix C

promotional opportunities in other Department health and safety programs resulted in the movement of many PESH personnel, which necessitated the hiring of new investigators.

- The auditors were advised that more than 50% of the employees found not to have completed basic training have been employed within PESH longer than 10 years. These employees should have had basic training during the 1980s or early 1990s. With a few exceptions, it would not serve any purpose to schedule these employees for basic OTI training at this time. It is more prudent to allow these employees to attend the more advanced technical training, thus enhancing their program delivery.
- **Page 13** of the report states that 82% of the courses taken by PESH employees in 1998 were not designed for compliance personnel. We believe what is being referred to here is the Department's use of the Niagara County Community College (NCCC), which was an OSHA accredited training center. NCCC conducted the same course of instruction as those provided at the OTI Training Center in Chicago, except that the use of required federal OSHA forms was eliminated. However, as at OTI, the NCCC emphasized the standards and those associated hazards. Hence, course delivery was essentially the same as that provided at OTI. Further, PESH employees do not need training on the use of federal OSHA forms, since we use state forms.

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The audit report fails to recognize that 1998 was the first year of the OSHA mandated Strategic Plan for PESH. As such, PESH needed to send employees to Strategic Plan related training at OTI and elsewhere to fulfill the mandates of this plan.

- **Page 13** of the report also discusses the PESH investigation of 2 separate complaints, alleging that hazardous conditions in these cases went undetected. Unfortunately, OSC did not include the facts relative to these cases that were previously provided in this draft report. In the first case, when PESH arrived to investigate the complaint, the employer had already closed, and was committed to thoroughly cleaning the firing range. Samples were taken at other locations proximate to the firing range (weight and locker rooms). The analysis of these samples (lead and dust) was significantly below the standard for action levels. Since the hazard was removed, collection of samples in the eating areas and personal monitoring became moot. In the second case, the report states "PESH staff did not investigate a complaint about the lack of piping on a relief valve to divert steam pressure from walkways because they could not identify a standard for this specific hazard". Again, that conclusion is not correct. PESH did conduct an investigation of this complaint (there were actually 3 separate issues in the one complaint) resulting in the following: referral of the lack of backflow preventors to the regulating authority (County Health Department and then to the Town Code Enforcement Officer) for action; referral of the location of the water

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* See State Comptroller's Notes, Appendix C

expansion tank relief valve to the Department's Boiler Bureau who concluded that there was no requirement under the State Construction and Building Code, the State Fire Code nor ASME Pressure Vessel Code for relief valve discharge to any specified location; and, conclusion that there was no standard for the operation of the high-pressure relief valves on the compressors, which are used to start the diesel generators during time of emergency. Obviously, PESH did conduct an investigation, contrary to the statement made in the audit report.

- **Page 13** states that the audit found that the Department did not improve competency through training. That is not correct. The auditors were provided the details of the employee revised training procedures that were implemented last fall.

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- **Page 14** of the report contains information regarding Department appropriations for the PESH program that need to be clarified. The PESH program operates under a cooperative agreement through OSHA in which there is a 50% state matching fund requirement. In addition, the Department contributes a portion of the State OSH appropriation 100% to the PESH program (referred to as an overmatch). The report goes on to state that the PESH program had excess funding in FFYs 1998, 1999 and 2000 of \$200,000, \$500,000 and \$500,000 respectively. This is true, however, the majority of this excess funding was in State overmatch dollars, not in the 50/50 funding. It should be noted that this excess funding existed due to numerous vacancies within the program and the majority of the savings were in Personal Services/Personal Benefits dollars (PS/PB), not in Non-Personal Services (NPS). The conclusion that the savings could have been used for training purposes assumes that we could have received Division of the Budget approval to interchange from the PS/PB funding to NPS funding. Sending a significant number of employees for training when there exists numerous vacancies would have a negative impact on workload. It would not have been the most prudent use of staff resources to request an interchange from PS/PB savings to NPS so that staff could attend additional training, when this would have negatively impacted workload. Time spent at training is time that would be lost to field investigations and meeting OSHA cooperative agreement program responsibilities.

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- In this same section, the audit report implies that since no tuition is charged by OSHA for OTI training, it is expected that the Department should train all employees immediately. However, this conclusion does not account for out-of-state travel expenses to attend these 1 and 2 week courses as well as the workload impact if we were to send a significant number of employees for training over a short period of time. The average cost for OTI Training per employee per trip is \$1900. According to OSC's audit, PESH employees need to complete some 228 courses. The average time to complete a course is 7 days, which equates to a 7.25 person-year commitment for 228 courses. This

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* See State Comptroller's Notes, Appendix C

is time that would be lost to field investigations and other program responsibilities. The cost to accomplish this training is estimated at \$433,000.

The Department is committed to expending all available resources to ensure that required training is provided to PESH employees in a manner that is consistent with program delivery. Hence, we will continue to utilize the training plan put in place last fall that accomplishes required employee training within acceptable financial guidelines and does not drain field resources.

PESH Staffing Levels:

- This section concludes that the number of filled compliance positions has declined in PESH from February 1998 to April 2001. However, the auditors did not take into account that several of PESH vacancies were promotional opportunities for staff, which required a backfill of their position. Hence, there was no net gain in the fill level for those personnel actions. Further, during the audit period, PESH employees were also promoted to fill vacancies in other DOSH Programs (such as On-site Consultation). To add to this, DOSH has encountered difficulty in attracting qualified entry-level compliance personnel, especially within the metropolitan New York City area. The Department is currently in discussion with Civil Service representatives on this issue and engaged in a significant effort to publicize the new civil service test that was recently given for the Safety and Health Title series.

DISCRIMINATION CASE PROCESSING:

- In a number of areas within the audit, but especially within this Section, OSC reports on the PESH use of procedures. A “procedure” is defined as a series of steps taken to accomplish an end. Obviously, procedures are developed to provide requisite guidance and consistency to those responsible for delivery of the task. Procedures usually are not intended to be so inflexible so as not to permit necessary deviations to achieve a better result. The Field Operation Manual (FOM) is intended to provide instructions regarding the internal operations of the program.

In several instances within the Audit, conclusions are drawn alleging that because the procedural steps were not followed in the sequence listed, it may have jeopardized the outcome of the investigation. Unfortunately, that is not the case. While District Offices may proceed a little differently with the processing of cases, (i.e., when meetings may occur with Counsel, when opening conferences are conducted, when the Supervisor is briefed on case status or when and how complainant materials or forms are handed out, and

* Note 17

* See State Comptroller's Notes, Appendix C

how they are completed) all of the crucial ingredients necessary to conduct a professional and inclusive investigation are performed by PESH Inspectors.

- **Page 18** of the report states that “districts have not received copies of the Manual that includes current procedures for processing discrimination cases.” That is not accurate. In fact, it was the PESH Syracuse District Office that furnished OSC with a copy of the 1996 Discrimination Procedure. Up to that point in time, OSC was using the outdated procedure to conduct their investigation.

- The statement on **Page 19** that only two PESH Investigators, who are no longer employed with DOSH, attended the OSHA Discrimination Training is not correct. The auditors were previously advised that 5 PESH employees, who are geographically located throughout the state, successfully completed this OTI Training. Other PESH employees completed similar discrimination training.

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* See State Comptroller's Notes, Appendix C

State Comptroller's Notes

1. We considered all of the information provided by the Department during the course of the audit. However, we found that often the Department's information was not supported by the facts of the case or by the program results.
2. Our audit demonstrates that the Department has down played the significance of recommendations made by OSHA in two prior reviews. The Department characterizes OSHA's reviews as inadequate and claims that many of OSHA's findings were withdrawn or resolved. We refer to OSHA's findings in our report as OSHA is an expert in this field. For example, of 11 finalized CASPAs at the time of our audit, nine (82 percent) were sustained by OSHA against PESH. Further, our review of the CASPAs found that OSHA is continually sustaining the same types of allegations.
3. The annually published statistics on accident and illness rates are compiled by PESH. As shown in our report, we noted misclassified complaints that also erroneously reflect favorable accident and injury rates.
4. We have clarified the wording in the background section of this report to reflect these issues.
5. The Department's assertion that a significant number of PESH employees were required to have OSHA Training Institute training to meet provisions of the strategic plan misrepresents the facts. For the three calendar years ended December 31, 2000, Department management has sent only two PESH staff to the strategic planning training.
6. We have clarified our report concerning the variance procedure.
7. See Note 2.
8. We deleted reference to this accident from our report based on additional information provided in the Department's response and subsequent follow up.
9. We question how the Department can consider this variance "temporary." The November 2000 progress report showed that the wall modification may not be complete until the summer of 2002, nearly six years after the investigation started. Further, OSHA strongly disagreed with PESH's granting of this variance, as it did not meet the requirements of a variance including the "equal level of protection" requirement. OSHA also strongly urged PESH to refrain from granting variances that do not meet the requirements of a variance.

10. OSHA sustained 9 out of 11 CASPAs in spite of the rationale offered by PESH.
11. Federal regulations do not require a complainant to exhaust all administrative procedures before filing a CASPA. It is merely a consideration, or an option, to be weighed in making a decision. Specifically, the regulations state, “In determining whether an investigation shall be conducted and in determining the timing of such investigation, the Assistant Regional Director shall consider such factors as: (c)(2)(i) The extent to which the complaint affects any substantial number of persons; (c)(2)(ii) The number of complaints received on the same or similar issues and whether the complaints relate to safety and health conditions at a particular establishment; (c)(2)(iii) Whether the complainant has exhausted applicable State (administrative) remedies; and (c)(2)(iv) The extent to which the subject matter is pertinent to the effectuation of Federal policy.” OSHA chose to conduct CASPA investigations because they believe that complaints against PESH are of a serious nature and need to be investigated promptly.
12. In March 2001, the Department gave the audit team a copy of a PESH training directive dated February 1993. This document was referred to and discussed with PESH management throughout the audit. Department management never referred to the Fall 2000 revised procedures until now. Further, pages 12 and 13 of our report show that minimum training requirements were not being met.
13. We contacted officials at the OSHA Training Institute regarding courses offered at OSHA training centers, and the intended purpose of these courses. OSHA officials stated that training centers, such as the Niagara County Community College, are intended for other Federal agencies and private sector employers. They are not intended for compliance personnel, and should not be substituted for the courses offered at the OSHA Training Institute. OSHA indicated that State compliance personnel should enroll in the classes offered at its Training Institutes.
14. Regarding the first complaint, OSHA was concerned that PESH did not take personal samples from workers nor did they find documentation indicating that PESH evaluated the existence of, or the potential for, surface contaminations in eating areas. In addition, there was no indication of any bulk sampling of settled dust or wipe sampling, and it was not known if janitors performing periodic cleaning and vacuuming could reintroduce lead into the air. PESH responded to OSHA that “the hazard was abated at the time of the complaint, but will consider taking the action prescribed by OSHA for this case in future like situations.”

Regarding the second complaint, we clarified our report to indicate that PESH did not do an on-site investigation of this matter to assess the degree of risk the condition posed to employees. OSHA’s review of the case file found that no on-site inspection occurred to investigate the complaint, as no consensus standard existed. OSHA recommended that a general duty clause violation could have

been issued to provide immediate, if only temporary, protection against this safety hazard.

15. See Note 12.
16. We recognize that the Department would have had to work with and obtain approvals from the Division of the Budget to redirect funds to meet training needs, and we understand the workload issue. However, as our report indicates, there is a demonstrated need for training. We believe the Department should address that need in balance with workload priorities. Further, our report does not imply that all employees should be trained immediately. Our report simply points out the fact that PESH would incur only travel costs for OSHA training courses, as tuition is free.
17. A crucial element in discrimination investigations is the determination by the Department's Counsel as to whether a case has legal merit. During our audit, we found that two district offices were making these determinations without the benefit of Department Counsel.
18. During July 2001, we randomly selected four districts to review their copies of the manual to determine whether they had been updated. Each of the manuals contained the 1989 procedures rather than the updated procedures.
19. During the course of our audit, we reviewed PESH training records dating back to 1986. These records indicated that only two investigators received OSHA training, neither of whom conducts discrimination investigations.