

April 1, 2014

California State Auditor
621 Capitol Mall
Suite 1200
Sacramento, CA 95814

Dear State Auditor,

With this letter, I am filing a “whistleblower” complaint as a recently retired state employee who worked for the Division Occupational Safety and Health (DOSH or Cal/OSHA) as a Compliance Safety and Health Officer¹ in the Oakland District Office between 1993 and 2011, and then Special Assistant² to former Chief Wides in DOSH Headquarters between 2011 and 2013.

I am writing to express deep concern about improper, possibly illegal, diversion by the Department of Industrial Relations (DIR) of federal and state funds designated for use by the Division of Occupational Safety and Health to protect California workers. The DIR misuse of DOSH-designated funds has occurred in at least three areas: budgets and funding; real estate; and personnel.

Detailed below are 16 items related to improper and possibly illegal use of DOSH funds by DIR, as well as mismanagement and waste of DOSH resources by DIR – all with the result that health and safety protections for California’s workers and the general public have been weakened. Included in the 16 items below are:

- Excessive administrative fees by DIR that have diverted several million dollars of DOSH funds to DIR;
- DIR’s failure to use a \$13.3 million transfer into DOSH funds, and other available funds, to strengthen worker protections;
- DIR’s failure to fully utilize the \$5.4 million in new fees on the state’s oil refineries to protect refinery workers and the surrounding communities;
- Administration budget proposals that would fail to allow the use of already collected funds – and create a large pool of unused money like the recent State Parks fund – while critical needs go unmet;
- Use of DOSH funds to pay the rent of other DIR units in the Oakland State Office Building costing \$300,000 a year since 2011;
- DIR mismanagement of DOSH office moves in Los Angeles, San Francisco and Oakland in 2012 and 2013 that resulted in DOSH paying tens of thousands of dollars in rent for empty offices;
- Use of DOSH funds and positions for DIR staff performing work not related or only tangentially related to DOSH’s legally mandated work; and
- Establishment in the DIR Office of the Director a set of employees directing DOSH which duplicates the functions of DOSH headquarters staff; the DIR staff have no experience in DOSH operations and two-thirds have no training or experience in occupational health and safety.

Based on my experience between April 2011 and November 2013 as the designated budget and personnel policy staffer in DOSH Headquarters, I do not believe these issues can be effectively examined in legislative hearings. DIR staff control all the information needed to make an unbiased analysis, and, in my opinion, they would not be forthcoming and accurate in responding to questions asked in the hearing format.

I request that the California State Auditor conduct a full scale, forensic audit of DIR's handling of DOSH-designated funds for the last four years – the current FY 2013/14; FY 2012/13; FY 2011/12; and FY 2010/11. Only trained accountants familiar with state operations and procedures will be able to penetrate what has been an opaque “black box” of DOSH's finances under DIR, and determine if DOSH funds have been administered in compliance with the law.

The consequences of this misuse and mismanagement of Cal/OSHA funds is that the state's workplace safety agency is unable to hire more inspectors, unable to conduct more inspections of high-hazard work sites, unable to do more to protect immigrant, low-wage and other vulnerable workers, and unable to provide more assistance to employers seeking to create and maintain safe and healthy workplaces. As a result, Cal/OSHA is not able to meet all of Federal OSHA's performance benchmarks and the activity timelines required by the California Labor Code.

Background

DOSH does not control either its budget or its personnel decisions – the DIR Director does. During my 2.5 years at DOSH Headquarters, Cal/OSHA's leadership team never received a full briefing or complete information from DIR on DOSH's budget and finances. The partial information we were provided often did not match the data generated by the DOSH Budget Unit, and there were numerous inconsistencies that were never explained.

In July 2008, the Legislature removed state-level funding for DOSH from the General Fund altogether by creating the Occupational Safety and Health Fund (Fund 3121), which draws funds from a very small surcharge on employers' workers compensation insurance premiums.

Overall, DOSH's funding now consists of annual grants from Federal OSHA and a combination of state funds, none of which draw money from the General Fund. DOSH funding can be divided into four general categories – Federal grant money, OSH Fund money matching the Federal grant, OSH Fund money over and above the Federal grant match (called state “overmatch” money), and state funds generated by user fees on operators of equipment such as Elevators and Pressure Vessels.

I believe DIR's handling of DOSH funds may include improper or possibly illegal use of money in all four categories – Federal grant money, OSH Fund money matching the Federal grant, OSH Fund overmatch money, and user fees funds. However, only a

forensic audit by trained accountants will be able untangle the web of conflicting explanations and partial reports we received in DOSH HQ since 2011.

I need to emphasize the following are examples of the fiscal improprieties discovered by DOSH HQ staff during my tenure there. What follows should not be considered an exhaustive or complete list of misuse of DOSH funds by DIR. An audit by independent professional accountants with access to all pertinent documents will likely discover more instances.

Budget and Fund Issues

Item #1: Historically, DIR has taken a fee of 8% or less for administering the budgets and personnel of divisions administered by that department (see Attachment 3.A.1). But under the current DIR Director this fee – called “distributed administration” or “indirect costs” – has grown significantly, meaning DIR has allocated itself several million dollars in additional fees from DOSH’s budget in recent years.

How this has developed is as follows:

- The five-year average of the distributed administration fee for state fiscal years FY2006/07 through FY 2011/12 was 7.38% (see Attachment 3.A.1);
- The distributed administrative fee for state fiscal year FY 2012/13 was 8.99% at initial allotment, grew to 9.27% by the end of the fiscal year – with DIR fees on the total of personal services (PS) and operating expenditures and equipment (OEE) amounting to 10.2% (see Attachment 3.A.2);
- The distributed administration fee for state fiscal year FY 2013/14 was 8.7% under the Budget Act, with DIR fees on PS and OEE amounting to 9.5% (see Attachment 3.A.3);
- The January 2014 budget report indicates for the FY 2013/14 expenditures to date (1/15/2014) the distributed administration fee amounted to 11.9%, with DIR fees on PS and OEE amounting to 13.5% (see Attachment 3.A.4).

With a DOSH budget for personnel and operating expenses of close to \$100 million (the grand total all Federal and various state funds) an increase of every one percent in the distributed administration fee above 8% means \$1 million less for DOSH program activities and \$1 million more for DIR uses. For example, in just the first six months of the current state fiscal year an extra \$2 million went to DIR, and was lost to DOSH, when DIR’s Distributed Administration fee was 11.9%.

This diversion of funds from DOSH to DIR has meant fewer resources available for workplace health and safety protections for California workers. DOSH Headquarters staff were told repeatedly in 2012 and 2013 that vacant positions throughout the Division could not be filled for lack of funds.

Item #2: Over the last three years, DIR Director Christine Baker has repeatedly claimed that DOSH is “in the red,” with deficits of \$3 to \$4.5 million, depending on when the claim was made. As indicated in Attachment 3.A.2, DIR imposed a mandatory “forced savings” on the DOSH budget, starting in 2011, of \$3-3.5 million, depending on the fiscal year. DIR continued to prohibit use of DOSH funds to fill vacant positions despite the developments described below and in Attachment 3.B:

- the large number of staff vacancies, over 60 vacancies Division-wide in recent years, which reduced salaries, benefits and operating expenses for these empty positions;
- the elimination of 41.4 DOSH positions at the end of FY 2011/12;
- the closing of multiple DOSH offices over the past three years;
- All DOSH salaries were reduced by 5% between July 2012 and June 2013 as a result of the Governor’s one-day-a-month furlough policy, reducing salary expenses; and
- Aggressive cost-cutting by DOSH Headquarters starting in 2011 that resulted in reductions in operational expenses on the order of \$2.5 million dollars between state fiscal years 2011/12 and 2012/13 (see the “DOSH OE&E History” box Attachment 3.A.4).

Ironically, the fewer DOSH staff and offices there are, the “deeper in debt” the Division is, according to DIR.

Yet, as a result of the factors above, the Enforcement program element (Element 40.10) of the DOSH budget actually ended in the black in the final “13th month” budget reports for state fiscal years FY 2011/12 and FY 2012/13, according to the DIR Budget Unit reports received in DOSH headquarters.

Item #3: During the last three years, DIR failed to exercise its authority to take legitimate measures to shift some expenses within DOSH’s budget to provide more resources for core enforcement and other activities. Among these measures that could have been taken are:

- charging the legal settlement costs of the *Cal Pro* case to the Elevator Safety Fund (which includes amusement ride oversight) rather than the Enforcement fund;
- securing state financing for the ongoing legal costs of the *Bautista* law suit (more than \$1 million to date) so the DOSH budget did not have to bear these costs;
- reducing the “SWCAP”³ charges on Federal funds received to a lower level once the 2013 Federal “sequestration” reduced the grant to DOSH; and
- using the positive balance of the OSH Fund – above the reserve needed for cash flow – to cover the \$3.2 million cut caused by Federal sequestration and filling the 21 vacancies held open, especially with the transfer of \$13.3 million into the OSH Fund in state fiscal year 2013/14;
- earlier implementation of fee increases for pressure vessel inspections; the fees had lagged behind the recoverable costs of the program for several years,

requiring the operating expenses of the pressure vessel unit be made up from the OSH Fund. Although DOSH had requested in 2011 that DIR allow DOSH to do rulemaking to increase the fees, as per the Labor Code mandate, it was not until February 2013 that the fees were increased. With the current fee increase, the PV fund should not require any OSH Fund subsidy this fiscal year as it has in the past.

Again, the failure to make use of these resources resulted in understaffing and lack of other resources for protecting California workers, and the general public who use elevators, aerial tramways and amusement rides.

Item #4: DIR has claimed DOSH has a structural deficit of \$3-4 million caused by the 2006 reclassification of industrial hygienists to safety engineers, which resulted in a \$15,000 a year increase for the then-85 industrial hygiene inspectors, to achieve pay parity between the two types of DOSH field inspectors. This salary increase was never incorporated into DOSH's ongoing budget by the Department of Finance. DOSH HQ prepared Budget Change Proposals (BCPs) for the last several fiscal years to rectify this situation – which continues today – but DIR has failed to advance these BCPs to the Labor Agency.

DIR's enforced austerity at DOSH is occurring when there are substantial, untouched resources noted below at the disposal of the Administration to fund some key activities.

Item #5: DIR has failed to utilize the large surplus in the Elevator Safety Fund (Fund 0452) to hire additional field inspectors, see Attachment 3.C and 3.D. DOSH's Elevator Unit is currently understaffed at a time when more than 35% of the state's elevators have permits that have expired and are on a "backlog" status for inspection. Uninspected elevators pose a threat to workers and the public who use them.

DIR has claimed that DOSH did not have the spending authority to hire additional elevator inspectors, but DIR failed to advance BCPs that DOSH specifically developed for this purpose in fiscal years 2011/12, 2012/13 and 2013/14. No BCP to increase the elevator unit's spending authority has been advanced to date by DIR, and the public, elevator workers and building owners have been adversely affected by the resulting understaffing. This understaffing also has delayed DOSH's regulatory revisions in response to technological changes.

Item #6: DIR has not utilized the transfer of \$13.3 million from the elimination of the Targeted Inspections and Consultation Fund (TICF, Fund 0096) that the OSH Fund received in the current fiscal year FY 2013/14.

Part of this transfer was used for a \$5 million loan from the OSH Fund to the State Public Works Enforcement Fund, which will be used for wage enforcement by the Division of Labor Standards Enforcement (DLSE, another division within DIR). Apparently DIR has no difficulty using OSH Fund money to make a loan to DLSE enforcement operations,

but chose not to use the OSH Fund transfer to fund DOSH enforcement activities, which is the Fund's designated purpose.

Item #7: The Governor's proposed Labor and Workforce Development (LWD) agency budget for fiscal year 2014/15 appears to lay the basis for the OSH Fund – like the recent situation with the State Parks funds – to have a positive balance of millions of dollars left idle and unused while DOSH has needs requiring these resources.

In attachment 3.D (page LWD 7), the OSH Fund income from regulatory fees on employers is projected to rise from \$35.4 million in the current fiscal year (2013/14) to \$57.1 million in the next fiscal year (2014/15) – an increase of \$21.7 million.

On the same page, the “total expenditures” line projects an increase from \$39.4 million in fiscal year 2012/13 to \$52.9 million in the current fiscal year – an increase of \$13.5 million. Yet the only additional expenses in the current fiscally year are the 15 additional positions required by legislative action for Cal/OSHA's Process Safety Management (PSM) unit. DIR projects these additional costs as \$2.4 million in its Budget Change Proposal for PSM expansion for FY 2014/15.

In the total expenditures line for fiscal year 2014/15, expenses are projected to increase to \$59.2 million – an additional increase of \$6.3 million – for a total over the two years of \$19.8 million. But the only additional expense in fiscal year 2014/15 is the BCP to fund hiring for 26 existing vacant positions for a cost of \$3.3 million, plus the PSM expansion costs for the year.

Thus for the additional income from increased regulatory fees of \$21.7 million, and for additional projected expenses of \$19.8 million for the current and the next fiscal year, the only identified added costs are \$8.1 million in the PSM and DOSH BCPs for 2014/15. This could generate an unused surplus of between \$10.9 and \$13.6 million generated by increased OSH Fund revenue over and above the only identified additional costs.

As was the case in the recent State Parks fund controversy, there are critical needs for the potential unused resources in the OSH Fund for DOSH staff and operations.

Item #8: Another issue of concern is the handling of funds generated by the recently enacted fee on oil refineries in the state which the Governor has projected to raise \$5.4 million annually (see Attachment 3.D), but the Governor's Proposed FY 2014/15 budget projects expenses of DOSH's Process Safety Management enforcement unit (supported by this refinery fee) to be only \$2.4 million a year. It is not clear why only \$2.4 million in expenses is projected when regulatory revisions and increased enforcement will require additional rulemaking, enforcement and legal staff.

Moreover, it is unclear what DIR, which collects the refinery fee, intends to do with the resulting \$3 million surplus. In addition, if up to 50% of the costs of the new PSM enforcement staff will be covered by the annual Federal enforcement grant, then refinery fee surplus will be even greater.

Item #9: In 2011 DIR received state Private Attorney General Act (PAGA) funds for use in fiscal years FY 2012/13, 2013/14 and 2014/15 by DIR agencies. DOSH was to receive \$200,000 a year of these funds earmarked specifically for DOSH internal training costs. It is not clear that this \$200K has been allocated and used for this purpose by DIR.

Item #10: The expenses for the Labor Enforcement Task Force (LETF) may be being charged to both the Federal enforcement grant and to the state Uninsured Employers Benefits Trust Fund (UEBTF), resulting in double-charging of these funding sources and generating a surplus in DIR's accounts.

Real Estate Issues

Item #11: Since 2011, DOSH's budget has been charged for the entire 19th floor of the Oakland State Office Building (see Attachment 1). In reality, DOSH occupies approximately half (the north side) of the floor's 19,000 square foot space for the DOSH Headquarters, Legal, and Research & Standards units. The entire southern half of the floor is occupied by DIR Administration/Information Systems units. This excess billing to DOSH funds for DIR unit space on the 19th floor amounts to more than \$300,000 a year since 2011.

It is not clear which portion of DOSH's revenue stream – Federal funds, State matching funds, State “overmatch” funds, or the state user fee funds – have been used to pay the excess rent for the 19th floor of the Oakland State Building. If Federal funds were used for DIR office rent on the 19th floor in Oakland, this would be in violation of the Federal grant.

Item #12: Over the last 18 months, DIR has required DOSH offices in Los Angeles, San Francisco and Oakland to move, “restack” and “compact” in a mishandled manner that has resulted in higher costs and ongoing disruptions in the Division's work:

- Los Angeles: In November 2012, DIR required the DOSH offices in the Los Angeles State Building to be “restacked” and “compacted” in a rushed fashion with an absolute deadline of November 2012 for moving the District and Legal offices. This move was completed but the Division continued to pay rent on the empty spaces (in effect, paying double rent for the District Office) between November 2012 and July 2013, when the space vacated by DOSH was finally occupied by other state agencies. Moreover, the District Office staff is now split between two floors, making supervision and coordination by the District Manager much more difficult; and there is now no space available to accommodate any new hires in an office that is understaffed.
- San Francisco: In March 2012, DIR required the San Francisco District Office to move from privately leased space to the State Office Building in San Francisco. The District Office was moved into a space that was 1,700 square feet larger than it needed, and then required to pay the rent for the entire space for more than a

year until the empty space was occupied. In 2013, the state Department of General Services (DGS) raised rental fees in the State Building, making the rental charges to DOSH higher than in the privately leased space.

- Oakland: In June 2013, DIR required the DOSH offices on the 13th floor to be compacted into half the floor where these offices had occupied the entire floor previously. The new offices for the District, High Hazard and LETF field enforcement units are now too small to accommodate any new hires in these understaffed units. The resulting change also eliminated DOSH's large (2,400 ft²) 13th training room on the south side of the floor, requiring the relocation of numerous trainings and meetings from July through September. Then in October, DIR reactivated the 13th floor training room – at additional expense – removing the junked furniture that had been stored there and reconnecting the video conference equipment that had been moved to the 11th floor. Only a part of the original furniture for the Training Room has been replaced. It is not clear whether DIR or DOSH was charged for the reactivation of the training room.

Personnel Issues

Item #13: In the spring of 2012, DOSH Headquarters decided to eliminate the DOSH Technology Unit whose functions were largely a duplication of activities done by existing DIR and DOSH Administration units (such as handling facilities, computer and communication equipment, and letting contracts). The DOSH Technology Unit consisted of one Principal Safety Engineer (Jovic Tirona), one Senior Safety Engineer (Vicky Albano), and at least three high-level administrative staff positions. When the DOSH Technology Unit was disbanded, the administrative staff were assigned other duties within DOSH.

Tirona and Albano, however, stayed on the DOSH payroll for at least the next 18 months (from the spring 2012 to October 2013) while more than 90% of their activities were DIR projects not related, or only marginally related, to DOSH work. Despite an Executive Order from Governor Brown that imposed travel restrictions to limit travel to mission-critical purposes, with which DOSH complied and minimized DOSH travel, the pair also traveled extensively together – multiple times a month – from southern California to the Bay Area and Sacramento. These frequent trips for DIR work generated thousands of dollars of Travel Expense Claims (TECs) paid by DOSH funds. In 2013, a student intern also generated TEC expenses while traveling with Tirona and Albano for 3-4 months.

In October 2013, Tirona and Albano were reportedly transferred to the DIR payroll, with the acknowledgement that no more than 10% of their time is allocated to DOSH activities, and their job assignment continued as before.

In addition, at a time when the Governor has eliminated use of state cars for DOSH field personnel, Tirona and Albano have been assigned state cars by DIR, which they also use to commute from home. Two other administrative personnel in Tirona's unit have also been assigned state vehicles. State law requires that when it is necessary for Division

work that an employee store their state car at home, it cannot be used for regular commuting to work and the employee must have a “home storage permit.” Neither Tirona and Albano, nor the other two employees in the unit, have home storage permits.

The salary of the Principal Safety Engineer is \$122,100 a year, while Senior Safety Engineers earn \$121,860 annually. With the TEC reimbursements and other travel costs, the DOSH budget paid out approximately \$500,000 to these two staff members and the student intern conducting DIR activities. It is not clear which DOSH revenue stream paid these salaries and expenses, but use of Federal funds could be in violation of DOSH’s grant. It is also not clear whether the duties these staff performed – largely administrative – were appropriate for and required to be conducted by a highly paid Principal Safety Engineer and Senior Safety Engineer.

Item #14: DIR has redirected a large number of positions from DOSH to other DIR units, using DOSH funds to cover the salaries and benefits for these positions in most cases. The list of redirected positions and salaries includes:

- at least four (4) positions for the DIR Information Systems unit; including 1 position from the DOSH Elevator Unit to develop the 2012 “PSIMS” software (the position was not returned after completion of the PSIMS project), and 1 position from the DOSH Amusement Rides and Tramways unit (the position also not returned at the completion of an IT project);
- two (2) positions for DIR Accounting unit from DOSH’s EEEEC (Economic & Employment Enforcement Coalition) unit in 2011-12;
- two (2) positions for DIR Personnel unit in 2011-12;
- one (1) position for the DIR “Return to Work” unit since 2012;
- one (1) position for the Occupational Safety and Health Appeals Board in 2013 (OSHAB may be paying the salary, but DOSH lost the FTE position).

Item #15: In May 2013, the DOSH Administration unit learned that an Office Technician from the Division of Labor Standards Enforcement (DLSE, another division within DIR) was issued overtime pay from DOSH funds. This pay was later returned to the DOSH budget, but it is not clear how long the DLSE employee was being paid by DOSH funds, and whether other non-DOSH staff are also drawing salary and benefits from DOSH funds.

Item #16: Over the last year, the DIR Office of the Director (OD) has established a set of employees directing DOSH work that duplicates the functions of DOSH headquarters staff (see Attachment 3.B). Only one of this duplicate oversight and decision-making staff has worked for DOSH, and only two others have any training or experience in occupational health and safety. This OD staff frequently holds policy discussions with key stakeholders and makes decisions without the participation of the career occupational health and safety professionals in DOSH headquarters. This duplicative OD staff has been assembled while two of the three top positions – Chief of the Division and Deputy Chief for Enforcement – have been filled by “Acting” staff for months and years, since

June 2012 in the case of the Deputy Chief position and since September 2013 for the Chief position.

This management practice by DIR means that staff trained in other fields without experience in DOSH are making critical decisions on DOSH policies and procedures while career OHS professionals in DOSH headquarters have been marginalized.

Summary

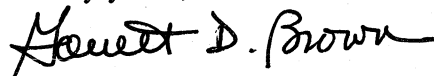
In summary, I believe there have been instances of improper, possibly illegal, use of DOSH funds by DIR over the last three years. This includes possible misuse of Federal OSHA grant money that could be in violation of the terms of DIR's grant agreement with Federal OSHA. There are instances where funds intended for DOSH's direct use in the protection of California workers' health and safety have been diverted to other purposes by DIR. There are also instances of mismanagement on DIR's part that have resulted in unnecessary costs to DOSH's resources, an inability to fill critical vacancies and meet the Division's statutory mandates and mission to protect California workers.

The net impact of these DIR practices is to weaken the protections for California workers, and the general public, under state law by mismanagement and diversion of resources intended for use by Cal/OSHA.

Given the non-transparent handling of DOSH's budget and fiscal matters by DIR, I believe a forensic audit by the California State Auditor is the only way to determine the extent of the apparent diversion and misuse of state and federal funds described above.

Please do not hesitate to contact me at garrettdbrown@comcast.net if you have any questions or would additional information from me.

Sincerely yours,



Garrett D. Brown, MPH, CIH

Retired from state service on January 1, 2014

DOSH employee 1993-2013

Compliance Safety and Health Officer in the Oakland District Office, 1993-2011

Special Assistant to the Chief of the Division, Oakland Headquarters, 2011-2013

Notes

1 = official job title was Associate Safety Engineer.

2 = official job title was Senior Safety Engineer.

3 = Statewide Cost Allocation Plan (SWCAP), is a surcharge place by the Department of Finance to recover money from federal grants for state administration of the grant.