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April 3, 2006

Mr. Leroy A. Smith, Jr.
c/o Mary Dryovage, Esq.
600 Harrison St., Suite 120
San Francisco, CA 94107

Re: OSC File No. DI-04-2815

Dear Mr. Smith:

We have completed our review of the agency's reports and your comments regarding your disclosure of violations of law, rule, or regulation, abuse of authority, and a substantial and specific danger to public health and safety by employees at the Federal Bureau of Prisons (BOP), United States Penitentiary, Atwater, California (USP Atwater), and Federal Prison Industries, Inc. (FPI). Specifically, you alleged that factory and warehouse workers in the computer recycling facility at USP Atwater and other BOP institutions were being exposed to hazardous materials, including lead, cadmium, barium, and beryllium, without adequate safety precautions. You further alleged a violation of 29 C.F.R. § 1910.141 insofar as the computer recycling facility at USP Atwater contained a food service area that was exposed to the factory floor and toxic contaminants. Finally, you alleged abuses of authority by USP Atwater and UNICOR personnel who, in contravention of BOP Program Statement 1600.08(1)(D), regularly ordered the reactivation of operations in the computer recycling facility without implementing the safety measures you prescribed and without your written authorization.

The Office of Special Counsel required the U.S. Attorney General to conduct an investigation into your allegations pursuant to 5 U.S.C. § 1213(c) and (d). The Attorney General delegated responsibility for investigating these allegations to Harley G. Lappin, Director of the Bureau of Prisons. Director Lappin produced a report to OSC on June 13, 2005, and in response to a request for additional information, BOP filed a supplemental report with OSC on August 4, 2005. OSC forwarded the agency's initial and supplemental reports to you for comment. You submitted to OSC voluminous comments disputing many of the findings contained in the agency's reports as well as extensive documentary evidence in support of your contentions. In addition, you submitted an Executive Staff Paper summarizing your dispute with the agency's findings.

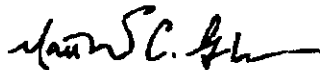
Having reviewed the agency's submissions and your comments, the Special Counsel has determined that the agency's reports, taken together, contain all of the information required by statute, but he also concluded that the findings contained in those reports appeared unreasonable. In particular, the agency's reports made little effort to explain why documentary evidence that appears to contradict the agency's findings is unreliable or how this evidence can be reconciled with the conclusions of its investigation. Moreover, the agency's reports appear to rely on strained interpretations of applicable rules and procedures in order to justify past actions in

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connection with FPI recycling facilities, and the agency's investigation into conditions in recycling facilities at other BOP institutions appears to have been cursory at best. In light of these and other deficiencies, the Special Counsel found the agency's reports unreasonable within the meaning 5 U.S.C. § 1213(e)(2), and underscored the continuing need for a thorough, independent, and impartial investigation into recycling activities at BOP institutions.

As required by law, 5 U.S.C. § 1213(e)(3), the Special Counsel has sent a copy of the agency's reports and your comments to the President and the Chairmen of the Senate and House Committees on the Judiciary. We have also filed copies of the reports and comments in our public file and closed the matter.

Sincerely,



Matthew C. Glover
Attorney, Disclosure Unit

Enclosure

CAM:MCG/mcg



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**Analysis of Disclosure, Agency Investigation and Reports,
Whistleblower Comments, and Comments of the Special Counsel**

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Summary

Leroy A. Smith, Jr., a Safety Manager employed by the Federal Bureau of Prisons (BOP), disclosed to the Office of Special Counsel (OSC) that inmate workers and civilian staff members were being exposed to toxic materials, including lead, cadmium, barium, and beryllium, in computer recycling facilities at United States Penitentiary Atwater, California (USP Atwater) and other BOP institutions. According to the Occupational Health and Safety Administration (OSHA), overexposure to such toxic materials can cause cancer, kidney disease, disruption of the blood-forming system, damage to the central nervous system, impairment of the reproductive system, or even death. 29 C.F.R. §§ 1910.1025 App. A and 1910.1027 App. A. Mr. Smith alleged that BOP and Federal Prison Industries, Inc. (FPI) management discounted evidence of the dangers associated with the computer recycling process and continued to operate recycling facilities without adequate safety precautions.

More specifically, Mr. Smith alleged that factory and warehouse workers in the computer recycling facility operated by FPI at USP Atwater were being exposed to lead, cadmium, barium, and beryllium. According to Mr. Smith, these toxic materials were released when Cathode Ray Tubes (CRTs) were broken as an integral part of the recycling process. Mr. Smith stated that air quality testing repeatedly revealed elevated levels of airborne lead and cadmium in the recycling facility. After each test, Mr. Smith contended, he would direct the suspension of operations and recommend the adoption of additional safety precautions. Mr. Smith alleged, however, that management personnel at USP Atwater and FPI abused their authority by repeatedly ordering the reactivation of operations in the computer recycling facility without implementing the safety measures he recommended and without the written approval of the safety department. In addition, Mr. Smith disclosed that BOP and FPI located a food service area in the recycling facility at USP Atwater despite the fact that it was exposed to the toxic materials released as part of the recycling process in violation of 29 C.F.R. § 1910.141(g)(2). Finally, Mr. Smith disclosed that in the course of his attempts to address safety concerns associated with the recycling facility at USP Atwater, he learned that similar dangers to safety existed in recycling facilities located at other BOP institutions throughout the country.

In light of Mr. Smith's apparent expertise and his intimate knowledge of conditions in the recycling facility at USP Atwater, OSC referred his disclosure to the Honorable John Ashcroft, former Attorney General of the United States, for formal investigation by the agency pursuant to 5 U.S.C. § 1213(c) and (d). Attorney General Ashcroft delegated responsibility for investigating Mr. Smith's allegations to Harley G. Lappin, Director of the Bureau of Prisons.

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The agency produced two reports in response to Mr. Smith's disclosure. Taken together, these reports substantiate some of Mr. Smith's allegations but ultimately conclude that "BOP[,] FPI and Safety Staff appear[ed] to have adequately addressed" the safety concerns raised in Mr. Smith's disclosure. According to the agency, BOP and FPI staff actively engaged in efforts to mitigate or eliminate the dangers to safety associated with the recycling of CRTs once they became apparent. The agency found that BOP and FPI management and staff took "appropriate steps to ensure factories [were] operating safely."

Mr. Smith vigorously disputed the agency's findings and provided OSC with extensive documentary evidence to support his account of events surrounding recycling activities at USP Atwater. Mr. Smith also stated that BOP investigators failed to interview some witnesses in possession of relevant evidence, particularly with respect to recycling facilities at BOP institutions other than USP Atwater. Ultimately, Mr. Smith maintained in his comments that "Federal Prison Industries management officials knowingly and willfully violate[d] ... OSHA guidelines" and that BOP's investigation into his allegations "was not impartial or comprehensive."

Having reviewed the agency's submission and the whistleblower's comments, I have determined that the agency's reports, taken together, contain all of the information required by statute, but I must conclude that findings in the agency's report appear unreasonable. In particular, the agency's reports made little effort to explain why documentary evidence that appears to contradict the agency's findings is unreliable or how this evidence can be reconciled with the conclusions of its investigation. Moreover, the agency's reports appear to rely on strained interpretations of applicable rules and procedures in order to justify past actions in connection with FPI recycling facilities, and the agency's investigation into conditions in recycling facilities at other BOP institutions appears to have been cursory at best. In light of these and other deficiencies, I cannot find the agency's reports reasonable within the meaning 5 U.S.C. § 1213(e)(2), and I am left to conclude that a thorough, independent, and impartial investigation into recycling activities at BOP institutions is still required.

The Whistleblower's Disclosures

Mr. Smith disclosed that factory and warehouse workers in the computer recycling facility at USP Atwater were being exposed to hazardous materials, including lead, cadmium, barium, and beryllium, without adequate safety precautions. Mr. Smith further alleged that management personnel at USP Atwater and FPI abused their authority by repeatedly ordering the reactivation of operations in the computer recycling facility without implementing adequate safety measures and without the written approval of the safety department. According to Mr. Smith, similar wrongdoing has occurred at other BOP institutions located throughout the country.

Mr. Smith has been employed by the BOP for approximately fourteen years, including ten years as a safety manager. He has had extensive experience evaluating occupational safety and environmental health risks and applying federal safety regulations to Federal Bureau of Prisons operations. At the time of his disclosure, Mr. Smith was the safety manager at USP Atwater, and as such, he was well situated to observe personally operations in the recycling facility at USP Atwater.

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FPI has operated a computer recycling facility at USP Atwater since April 2002. Among other items, the facility recycles computer monitors. The process for recycling computer monitors involves stripping monitors of external components on the factory floor and breaking up the remaining CRTs with handheld hammers in a glass-breaking area. Before FPI opened its computer recycling facility at USP Atwater for operation, Mr. Smith discovered that CRTs contain high concentrations of lead, cadmium, barium, and beryllium, all of which are identified as hazardous materials by OSHA regulations. *See* 29 C.F.R. §§ 1910.1001 (barium and beryllium), 1910.1025 (lead), and 1910.1027 (cadmium). Mr. Smith alleged that despite his repeated recommendations, the recycling facility opened for operation without any assessment of potential environmental and health risks.

According to Mr. Smith, repeated air quality testing from June 2002 through January 2004, found lead and/or cadmium levels above OSHA permissible exposure limits in the glass-breaking area. *See* 29 C.F.R. §§ 1910.1025(c) and 1910.1027(c). With each new test, Mr. Smith suspended glass-breaking operations and prescribed minimum safety measures to be implemented prior to reactivation of operations. Mr. Smith asserted, however, that FPI routinely responded with attempts to discredit the testing methodology, cast doubt on the need for prescribed safety measures, and limit future testing. Mr. Smith further contended that nearly every time he suspended glass-breaking operations, FPI reactivated its facility without implementing all the prescribed safety measures and that Warden Paul M. Schultz approved or ordered such reactivation on numerous occasions. Ultimately, Mr. Smith alleged that this cycle of testing, suspension of operations, and reactivation continued until January 2004, when FPI finally implemented engineering changes in the glass-breaking area sufficient to reduce lead and cadmium exposure to below OSHA action levels.

Similarly, Mr. Smith maintained that, despite his repeated warnings, safety hazards persisted in other parts of the computer recycling facility. Mr. Smith stated that CRTs are accidentally broken on a daily basis at inmate work stations and in transit throughout the factory. He further observed that such breakage releases lead, cadmium, barium, and beryllium into the factory and warehouse areas, exposing workers to hazards similar to those found in the glass-breaking area. Mr. Smith pointed to blood tests performed on three factory workers as evidence of this exposure. Yet, according to Mr. Smith, at the time of his disclosure, neither Warden Schultz nor FPI had taken appropriate steps to reduce the risk of exposure to hazardous materials resulting from the accidental breakage of CRTs in these areas.

Mr. Smith further alleged that the location of a food service area in the computer recycling facility at USP Atwater violated 29 C.F.R. § 1910.141(g)(2), which provides, “[n]o employee shall be allowed to consume food . . . in any area exposed to a toxic material.” *See also* 29 C.F.R. § 1910.141(g)(4). Located approximately twenty feet away from areas where workers handle CRTs, the food service area was separated from the work area by a partial wall that did not rise to the ceiling. Given the incidence of accidental CRT breakage in the factory, Mr. Smith asserted that the food service area was impermissibly exposed to toxic materials.

Mr. Smith identified alleged abuses of authority by USP Atwater and FPI personnel in connection with the unsafe operation of FPI’s computer recycling facility. BOP Program Statement 1600.08(1)(D) authorizes safety managers to suspend operations in a “place of employment” where

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conditions could cause "serious physical harm" and makes "[r]eactivation of the work . . . contingent upon the Safety Manager's reinspection and written approval," by management personnel. According to Mr. Smith, BOP and FPI management personnel discounted the requirements of Program Statement 1600.08(1)(D) when overseeing the operations of the recycling facility at USP Atwater. Specifically, Mr. Smith alleged that Warden Schultz, Larry Novicky, Recycling Group Program Manager for FPI, and Thomas A. Stahley, Associate Warden for FPI operations at USP Atwater, repeatedly ordered reactivation of operations in the glass-breaking area without fully implementing the safety measures prescribed by Mr. Smith and without his written authorization. In fact, Mr. Smith alleged that he has not issued written approval for the reactivation of the computer recycling facility since he first suspended operations on July 8, 2002.

In addition, Mr. Smith maintained that in the course of addressing his safety concerns regarding the computer recycling facility at USP Atwater, he learned that other BOP institutions, including those located in Elkton, Ohio, Texarkana, Texas, and La Tuna, Texas, have been recycling CRTs with even fewer safety precautions than those in place at USP Atwater. On the basis of this information, Mr. Smith alleged that workers at these facilities were being exposed to hazardous materials at concentrations above OSHA action levels.

Given the gravity of the issues involved and the apparent technical expertise of the whistleblower, OSC referred Mr. Smith's allegations to Attorney General Ashcroft for formal investigation by the agency pursuant to 5 U.S.C. § 1213(c) and (d).

The Agency's Investigation and Reports

Attorney General Ashcroft delegated responsibility for investigating Mr. Smith's allegations to Director Lappin, and this investigation was conducted by the Office of Internal Affairs for the BOP. According to the agency, investigators interviewed over thirty witnesses and reviewed extensive documentary evidence. On the basis of this investigation, Director Lappin produced a report to OSC on June 13, 2005 (Initial Report). In response to a request for additional information, BOP filed a supplemental report (Supplemental Report) with OSC on August 4, 2005. Taken together, these reports substantiate some of Mr. Smith's allegations but ultimately conclude that "BOP[,] FPI and Safety Staff appear[ed] to have adequately addressed" the safety concerns raised in Mr. Smith's disclosure.

Glass-Breaking Operations

Agency investigators found that "OSHA violations" and exposure to toxic metals did occur in the recycling facility at USP Atwater "during the initial months of its activation" and "on some subsequent occasions." According to the agency, however, "local and national FPI and Safety staff actively engaged in corrective action efforts after becoming aware" of safety concerns connected with the recycling of computer monitors at USP Atwater.

The agency's Initial Report acknowledges that Mr. Smith twice alerted FPI officials in writing to the potential hazards associated with the recycling of computer monitors before the recycling facility at USP Atwater opened for operation. Even after the facility opened for operation, FPI

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officials ignored Mr. Smith's continuing recommendations and declined to initiate testing to determine the degree of exposure to toxic metals arising out of its recycling program at USP Atwater. Indeed, according to BOP investigators, it was Mr. Smith, and not FPI officials, who arranged for the first round of testing to determine whether workers were being exposed to toxic metals in the recycling facility's glass-breaking area. These tests occurred on June 20, 2002, over a month after the facility at USP Atwater began breaking CRTs.

On June 27, 2002, results from the testing commissioned by Mr. Smith revealed that personal air samples taken in the glass-breaking area exceeded OSHA's Permissible Exposure Limits (PEL) and Action Levels (AL) for lead and cadmium. See 29 C.F.R. §§ 1910.1025 (lead) and 1910.1027 (cadmium). The agency found in its Initial Report that "FPI shut down its CRT breaking operation on July 1, 2002." According to the agency, FPI resumed operations on July 24, 2002, after consulting with the BOP's Industrial Hygienist and implementing additional safety precautions. Personal air samples taken on July 24, 2002, again showed lead and cadmium levels exceeding the PEL and AL limits set by OSHA, and, according to the agency, FPI again suspended operations on August 2, 2002. The Initial Report maintains that a "cycle of testing, shutting down, modification, opening, and retesting" continued through 2003. During this period, according to the Initial Report, FPI arranged for several visits to the recycling facility by BOP's Industrial Hygienist to assist in addressing ongoing safety issues and bringing the facility into compliance.

The agency's Initial Report suggests that these safety issues were ultimately resolved in December 2003, when FPI moved the glass-breaking operation off the factory floor and into a separate, ventilated booth. Between January 2004 and September 2004, personal air samples taken from work-stations outside the glass-breaking area showed levels of lead, cadmium, barium, and beryllium below OSHA's PEL and AL limits. One personal air sample taken in February 2004 revealed exposure to cadmium above OSHA's PEL and AL limits, but the agency attributed this result to the unauthorized modification of a personal ventilation system by an inmate worker.

Agency investigators determined that workers were exposed to lead and cadmium in excess of OSHA's PEL and AL limits for at least eighty (80) days during the initial activation of the recycling facility at USP Atwater and for indeterminate intervals during the reengineering of the glass-breaking area in that facility. According to the agency, FPI's attempts to remedy this exposure proceeded without adequate advice from an Industrial Hygienist or other technically qualified person. In addition, the agency found that at various times in the operation of the recycling facility mechanical ventilation did not conform to OSHA standards, workers did not have access to appropriate respirators, and neither FPI nor BOP conducted adequate medical surveillance and biological monitoring of workers in the glass-breaking area. 29 C.F.R. §§ 1910.1025(e)(4)(ii), 1910.1025(f), 1910.1025(j), 1910.1027(g), and 1910.1027(l). FPI and BOP also failed to provide required changing rooms, showers, and lunchroom facilities and adequate employee information, training, and signage. 29 C.F.R. §§ 1910.1025(i), 1910.1025(l)-(m), 1910.1027(j), and 1910.1027(m).

According to the agency's Supplemental Report, BOP was planning disciplinary action against two FPI Program Managers in response to the safety violations it discovered in the course of its investigation. The agency also noted that FPI has now furnished workers in the glass-breaking

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area at USP Atwater with proper safety equipment, instituted proper hygienic procedures, and provided training and information to "all workers associated with CRT destruction/dismantling." Finally, the agency reported that workers in the glass-breaking area at USP Atwater now receive initial and annual biological monitoring to assess blood levels of lead and cadmium in their systems and that FPI contracted for an outside environmental assessment of its computer recycling operations at USP Atwater and elsewhere.

Exposure Outside the Glass-Breaking Area

Agency investigators determined that a technical assessment performed by BOP's Industrial Hygienist in September 2004, which included the collection of personal air samples for workers outside the glass-breaking area, found no evidence that these workers were being exposed to hazardous metals above OSHA's PEL limits. According to the agency, the findings of its Industrial Hygienist were corroborated by an OSHA inspection conducted in March 2005.

The agency further determined that blood tests performed on workers outside the glass-breaking area did not provide evidence on ongoing exposure to toxic metals. The agency acknowledged that blood tests performed on three inmate workers stationed outside the glass-breaking reflected some barium content but maintained that the levels reported were "below acceptable limits."¹ In addition, the agency acknowledged that one inmate worker tested positive for cadmium, but, according to the agency, the concentration of cadmium found in the inmate's blood was consistent with the levels of cadmium found in smokers. The inmate in question was, in fact, a smoker. Consequently, the agency concluded that there is no evidence that workers outside the glass-breaking area are being exposed to toxic metals at levels above acceptable limits.

Nevertheless, the agency reported that FPI has further established procedures to safeguard workers when CRTs are accidentally broken on the factory floor, outside the glass-breaking area.

The Food Service Area

With respect to the food service area adjacent to the factory floor at USP Atwater, the agency took the position in its Initial Report that because there are no tests showing airborne lead, cadmium, barium, or beryllium above OSHA's PEL or AL limits, the area is not exposed to "toxic material" within the meaning of 29 C.F.R. § 1910.141. The agency conceded that the food service was open to the factory floor and that "some material made its way to the eating area." Indeed, the presence of lead and cadmium on surfaces in the food service area was established by wipe sample testing. Nevertheless, the agency maintained that in the absence of air samples showing lead and/or cadmium levels above "an acceptable limit," the food service area could not be in violation of the OSHA requirement that "[n]o employee ... be allowed to consume food ... in any area exposed to a toxic material." 29 C.F.R. § 1910.141.

¹ According to the agency, the laboratory report summarizing the results of these blood tests contained erroneous information, creating the mistaken impression that these inmates had severely elevated levels of barium in their blood. The laboratory later clarified its results in corrected reports.

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The agency noted in its Initial Report that on the basis of wipe samples showing the presence of hazardous metals, BOP's Industrial Hygienist recommended the food service area be isolated from the factory floor and separately ventilated. In response, BOP directed "FPI factories nationwide to close all internal food service operations," where those operations were not isolated and fully ventilated. The decision to close the food service area is explained in greater detail in the agency's Supplemental Report.

Repeated Abuses of Authority

The agency found that BOP and FPI officials did not abuse their authority by ordering the reactivation of operations in the recycling facility at USP Atwater without fully implementing the safety measures prescribed by Mr. Smith and without his written authorization. BOP Program Statement 1600.08(1)(D) authorizes safety managers to suspend operations in a "place of employment" where conditions "could reasonably be expected to cause ... serious physical harm" and makes "[r]eactivation of the work ... contingent upon the Safety Manager's reinspection and written approval," by management personnel. The agency maintained, however, that this provision of its Program Statement did not apply to the safety hazards at issue in the recycling facility because exposure to toxic metals at levels above OSHA's PEL and AL limits presented "no imminent hazard" that would trigger the safety manager's authority. According to the agency, the lead and cadmium exposure documented at USP Atwater "presented conditions where exposed workers may experience chronic health effects as a result of exposure over time. These exposures did not, however, rise to the level of being imminently dangerous, as no immediate threat of death or serious physical harm occurred" Consequently, the agency found that BOP and FPI officials did not abuse their authority when they repeatedly ordered reactivation of glass-breaking operations.

The agency did find credible Mr. Smith's allegation that Warden Schultz made comments to him discouraging him from contacting OSHA. Specifically, Mr. Smith alleged that Warden Schultz ordered him not to contact OSHA saying, "you are not going to call OSHA or anyone else for that matter." While the agency discounted Mr. Smith's contention that the Warden specifically ordered him not to contact OSHA, it did determine that "the evidence suggests" that the Warden did make a comment to the effect described by Mr. Smith. The agency found that regardless of the Warden's intentions, his comment was inappropriate, and it accordingly recommended that the Warden be "counseled by his immediate supervisor."²

Dangers to Safety at Other Recycling Facilities

The agency's Initial Report contains a brief discussion of conditions in FPI recycling facilities located at other BOP institutions, including FCI Elkton, FCI Texarkana, and FCI La Tuna. In the course of its discussion of operations at these facilities, the agency noted that "site visits to [these facilities] did not occur during [its] investigation; rather interviews of relevant FPI and Safety staff were used to determine" conditions at those facilities."

² The agency also found that a "management official communicated with Mr. Smith about unrelated matters in an unprofessional manner," and recommended discipline for that official. The agency's Supplemental Report later indicated that the management official subject to proposed discipline was Warden Schultz.

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With respect to the recycling facility located at FCI Elkton, the agency found operations began in May 1997 with glass-breaking occurring in warehouses outside the factory. FPI learned the method it used for breaking CRTs at FCI Elkton from a non-governmental recycling company and a glass processing company. According to the agency, neither company expressed concern to FPI or BOP officials about hazardous metals released when breaking CRTs. Later, in March of 1998, FPI solicited the opinion of an outside consultant, who advised that CRT waste did not fall within the Resource Conservation and Recovery Act. The agency further found that wipe and air samples collected at FCI Elkton in August 2001 showed no significant exposure to toxic metals.

Also in August 2001, FPI moved its glass-breaking operation at FCI Elkton out of its warehouses and into the recycling factory. The agency reported in its Initial Report that "[s]hortly after this relocation," the Factory Manager and inmate workers "complained of silvery dust accumulations," prompting an effort to isolate glass-breaking operations in a paint booth that would exhaust particulate mater outside the factory. This paint booth was upgraded in April 2003, but personal air samples taken in May 2003 revealed cadmium levels above OSHA's PEL and AL limits.

With respect to the recycling facility located at FCI Texarkana, the agency found operations began in October 2001. Workers engaged in glass-breaking were fit tested with HEPA respirators in August 2002, and in October 2002, an environmental consultant advised FPI that the levels of toxic metals it detected in the glass-breaking area did not "pose an immediate health threat" because the workers engaged in glass-breaking "[were] wearing appropriate personal protective equipment." In April 2004, FPI upgraded its glass-breaking operations at FCI Texarkana with the installation of a new glass-breaking booth. Personal air samples taken in September 2004 revealed cadmium levels exceeding OSHA's AL limit. Yet, when the factory manager advised the FPI Program Manger overseeing computer recycling that this test result would put the recycling facility at FCI Texarkana in violation of Standard Operating Procedures (SOPs) issued by FPI in June 2003, he was directed "to continue production and to make progress toward the SOP goals."

The agency concluded in its Initial Report that workers at both FCI Elkton and FCI Texarkana were exposed to cadmium at levels exceeding OSHA limits in the months following the installation of glass-breaking booths. The agency also acknowledged that "[i]t is reasonable to conclude" that workers at both facilities suffered some level of exposure prior to the installation of these booths. Nevertheless, the agency found that FPI managers at both facilities did not "intentionally ... place[] CRT workers in harm's way" but rather approached glass-breaking operations with a "learn as you go" attitude. Indeed, with respect to operations at FCI Elkton and FCI Texarkana, the agency only recommended disciplinary action against one management official, namely, the FPI Program Manager who directed the facility at FCI Elkton to "continue production" in violation of FPI's SOPs.

With respect to FCI La Tuna, the agency determined that FPI operated a recycling program there for four months in 2004 but no glass-breaking occurred.

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contaminants was not a cooperative one in which FPI and BOP management worked together with local safety staff to protect inmate workers and FPI staff. Rather, it was one in which the local safety staff lead by Mr. Smith continually struggled to overcome the resistance of FPI and BOP management in order to implement required safety measures, meeting with, at best, mixed success.

Exposure Outside the Glass-Breaking Area

In his comments, Mr. Smith also contested the agency's findings with respect to operations outside the glass-breaking area in the recycling facility at USP Atwater. Specifically, he maintained that despite the fact that wipe samples taken from the hands of workers in the factory showed the presence of "high levels" of barium, beryllium, lead, and cadmium, FPI refused to take additional steps to determine the scope of the danger to which workers were being exposed.⁴ See Exhibit J. Mr. Smith concedes that the limited blood testing performed on workers outside the glass-breaking area showed levels of toxic metals below occupational exposure limits, but he insisted that these tests did show low-level exposure that warranted concern. Yet, according to Mr. Smith, he participated in an August 2004 telephone conference with FPI and BOP management officials who insisted that evidence of continuous low-level exposure of workers on the factory floor did not warrant additional measures to protect workers. See Exhibit K. Finally, Mr. Smith observed that with respect to operations outside the glass-breaking area at USP Atwater, FPI resisted even the safety recommendations made by BOP's Industrial Hygienist, ignoring some recommended safety measures altogether.

The Food Service Area

In his comments, Mr. Smith disputed the agency's contention that the hazardous metals must exceed OSHA's PEL and AL limits before they constitute "toxic material" within the meaning of 29 C.F.R. § 1910.141. He observed that wipe samples taken from surfaces in the food service area identified various levels of lead, cadmium, barium, and beryllium, and reported that BOP's own Industrial Hygienist had expressed concern that the presence of these materials "could pose a cross-contamination exposure potential to workers through ingestion." See also Exhibit J (recommending the isolation of the food service area because low levels of "toxic materials" were present). Mr. Smith also observed that FPI and BOP management officials ignored his concerns about situating the food service area in a factory where toxic materials were present when he first raised them before the food service area was built.

Repeated Abuses of Authority

Mr. Smith disputed the agency's finding that FPI and BOP management personnel did not abuse their authority when they resisted the suspension of glass-breaking operations and repeatedly ordered reactivation of operations without fully implementing the safety measures he prescribed and without his written authorization. The agency maintained that the excessive levels of toxic metals present in the glass-breaking area presented "no immediate threat of death or serious physical harm"

⁴ According to Mr. Smith, personal air sampling performed outside the glass-breaking area occurred during periods when cable boxes, and not CRTs, were being recycled, thereby reducing the likelihood that the samples collected would contain high levels of the toxic materials released in the process of recycling CRTs.

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that would trigger the safety manager's authority. Mr. Smith, on the other hand, quoted the text of Program Statement 1600.08(1)(D), which makes the safety manager's authority to suspend operations dependant on his determination that conditions "could reasonably be expected to cause death or serious physical harm." Thus, Mr. Smith contended that regardless of the immediacy of the harm that would result from exposure to excessive levels of toxic materials, he had the authority to suspend operations where serious harm could reasonably be foreseen. According to Mr. Smith FPI and BOP management abused their own authority when they repeatedly disregarded his directions to suspend operations and neglected to implement the safety measures he prescribed.

In addition, Mr. Smith disputed the agency's finding that Warden Schultz did not "inten[d] to issue a specific order to not contact OSHA." Mr. Smith attached to his comments a memorandum dated September 30, 2004, in which he reported Warden Schultz's statement. Mr. Smith also made available to OSC and agency investigators a contemporaneous memorandum recording the Warden statement and the context within which it occurred. According to Mr. Smith, the phrasing and context of the Warden's statement, as evidenced in these documents, make it clear that the Warden intended to issue an order. Mr. Smith has consistently maintained that this order constituted an abuse of authority warranting discipline. Mr. Smith added in his comments that Associate Warden Richard T. Luna should also be subject to discipline for his failure to report and active concealment of the abuse in question.

Dangers to Safety at Other Recycling Facilities

Mr. Smith's comments also call into question the adequacy of the agency's investigation into the conditions in other FPI recycling facilities. He observed that the agency failed to conduct site visits to these other facilities during its investigation and asserted that "[FPI] staff ... should [have] been given the opportunity to be interviewed." Indeed, Mr. Smith stated that he has been contacted by staff members who worked at FCI Elkton and FCI Marianna. According to Mr. Smith, these staff members complained about the hazardous conditions at those facilities, and some reported health problems they believed to be linked to their exposure to toxic materials. Moreover, Mr. Smith contended that the agency ignored extensive documentary evidence supporting his allegations that workers in recycling facilities at FCI Elkton, FCI La Tuna, FCI Marianna, and FCI Texarkana were exposed to toxic materials without proper protection. Mr. Smith attached much of this evidence as exhibits to his comments.

With respect to FCI La Tuna, Mr. Smith asserted that agency investigators unreasonably discounted evidence of potential hazardous conditions. Specifically, Mr. Smith asserts that when he was interviewed by investigators in the presence of a number of FPI and BOP representatives, BOP's own Industrial Hygienist confirmed that FCI La Tuna had briefly conducted glass-breaking operations. The agency's report, however, stated that no glass-breaking occurred at La Tuna. Mr. Smith further observed that the agency's Initial Report did not address conditions in the recycling facility at FCI Marianna even though he raised concerns about this facility in his interview with investigators. In short, Mr. Smith maintained in his comments that the agency's Initial Report deliberately ignored evidence of agency wrongdoing and potentially hazardous conditions in recycling facilities operated at BOP institutions other than USP Atwater.

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The Whistleblower's Conclusions

On the basis of the numerous defects that Mr. Smith identified in the agency's findings, he concluded that the BOP's investigation into his allegations was neither impartial nor comprehensive. According to Mr. Smith, witnesses willing to testify before an impartial investigative authority and readily available documentary evidence support the conclusion that "FPI management officials knowingly and willfully continued to violate OSHA guidelines," exposing "staff, inmates, and staff families" to "environmental and health risks" in order to "maintain[] production and mak[e] profit." In light of what Mr. Smith characterizes as BOP's "obstruction" and "concealment," he has recommended an independent investigation by the Office of Inspector General for the U.S. Attorney General as well as congressional hearings. Only with such a high degree of scrutiny, he suggested, will BOP management officials be forced to address the continuing health and safety issues connected with FPI's computer recycling program.

Conclusion

Based on the representations made in the agency's reports and as stated above, I have determined that these reports contain all of the information required by statute, but I am unable to conclude that the agency's findings are reasonable. More specifically, the agency's account of events surrounding the activation and modification of operations in the recycling facility at USP Atwater appears to be inconsistent with documentary evidence that Mr. Smith made available to both OSC and BOP investigators. Contrary to the agency's findings, these documents suggest that FPI officials, with the knowledge and approval of Warden Schultz, rarely if ever suspended glass-breaking operations in response to adverse test results and routinely neglected to implement the recommendations of both the safety staff and BOP's own Industrial Hygienist.⁵ These documents also suggest that when made aware of the potential safety hazards associated with computer recycling, FPI and BOP officials impeded steps to determine the scope of these hazards and refused to implement recommended precautionary measures. The documents do not reflect active engagement of local and national FPI and BOP staff in a cooperative effort to address the safety concerns associated with CRT recycling, as the agency maintained in its reports. Yet, the agency's reports made little effort to explain why this documentary evidence is unreliable or how this evidence can be reconciled with the conclusions of its investigation. This failure to address and explain the extensive body of countervailing evidence would alone make the agency's report unreasonable within the meaning of 5 U.S.C. § 1213(e).

There are, however, additional defects in the agency's Initial and Supplemental Reports that further compel me to find deficient the agency's response to Mr. Smith's disclosure. These defects include the following:

- The agency's investigation into Mr. Smith's allegation that hazardous conditions existed in recycling facilities located at BOP institutions other than USP Atwater appears to have

⁵ Indeed, according to Mr. Smith, FPI and BOP have yet to make proper hygiene facilities available to inmate workers despite the fact that such facilities were first recommended by Mr. Smith and BOP's Industrial Hygienist as early as July 8, 2002. See Exhibit E and I.