Department of Environmental Protection

Charlie Crist
Governor

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Michael Sole
Secretary

January 3, 2007

Mr. Thomas White
2094 Southeast Lafayette Street
Stuart, Florida 34997

Dear Mr. White:

This is official notification that the Department of Environmental Protection (DEP) intends to take disciplinary action against you, up to and including dismissal from your Chemist III position. This action will be taken in accordance with Rule 60L-36.005, Florida Administrative Code (Attachment A); Section 110.227(1) and (5)(a), Florida Statutes (Attachment B); DEP Directive 435 (Attachment C); and the Employee Handbook Standards of Conduct (Attachment D). The bases for this action are Violation of law or agency rules To Wit: Falsification of Official Document(s) or Recording what would be described as "Data Fraud" and Negligence.

Violation of law or agency rules – is defined in DEP Directive 435 in part as: Employees shall abide by the law and applicable rules and policies and procedures including those of the employing agency and the rules of the State Personnel System. All employees are subject to Part III of Chapter 112, Florida Statutes, governing standards of conduct, which agencies shall make available to employees.....

Negligence – is defined in DEP Directive 435 as: Employees shall exercise due care and reasonable diligence in the performance of job duties.

On October 31, 2006, you were placed on administrative leave **(Attachment E)**, pending an investigation by the Office of Inspector General. On that day, Major Roy Dickey (Dickey) of the Inspector General's Office placed you under oath and interviewed you in order to clarify concerns that had arisen from the audit of the Port St. Lucie Lab, which had been completed in August 2006. The findings of the investigation sustained allegations of misconduct and are fully contained in the Internal Investigation #II-01-18-2006-066 **(Attachment F)**, which is attached to and incorporated into this notice by reference. The investigation sustained Violation of law or agency rule to wit: Falsification of Official Document(s) or Recording; what would be described as "Data Fraud."

The results of the audit completed in August 2006, "by the central lab had caused some very broad concerns relating to the possibility of data fraud being an ongoing practice in the Port St. Lucie Lab. The primary source of concern was what was described as a significantly low number of "Data Qualifiers" being recorded in the data audited. The audit had reviewed 55,883 data points uploaded by the Southeast District (SED) into STORET (the storage and retrieval data-base for program use). The dates covered by the survey were 1/21/01 - 7/7/05. Of the data points 25,406

were generated by the SED lab for water samples. The observations of the audit team were that the number of Data Qualifiers that had been recorded was statistically very low and that this was indicative of very questionable practices in the lab."

To put this in perspective, the audit team specified the following results that stood out as statistically unlikely, if not impossible:

- Only 63 results were qualified with a "Q",
- 11 results were qualified with a "J",
- 918 results were qualified with a "U",
- 287 results were qualified with an "I",
- 21 results were qualified with an "A", and
- 5 results were qualified with an "L"

These data qualifiers are identified and defined in the Florida Administrative Code Chapter 62-160.700 as follows:

- **"Q"**-Sample held beyond the accepted holding time. This code shall be used if the value is derived from a sample that was prepared or analyzed after the approved holding time restrictions for sample preparation or analysis.
- **"J"**- Estimated value; value may not be accurate. This code shall be used in the following instances:
  1. Surrogate recovery limits have been exceeded;
  2. No known quality control criteria exist for the component;
  3. the reported value failed to meet the established quality control criteria for either precision or accuracy
  4. the sample matrix interfered with the ability to make any accurate determination; or
  5. The data are questionable because of improper laboratory or field protocols (e.g., composite sample was collected instead of a grab sample).

  Note: a "J" value shall be accompanied by justification for its use.
  A "J" value shall not be used if another code applies (e.g., K,L,M,T,V,Y,I).
- "U"- Indicates that the compound was analyzed for but not detected. This symbol shall be used to indicate that the specified component was not detected. The value associated with the qualifier shall be the laboratory method detection limit. Unless requested by the client, less than the method detection limit values shall not be reported (see "I" below).
- "I"- The reported value is between the laboratory method detection limit and the laboratory practical quantitation limit.
- "A"- Value reported is the arithmetic mean (average) of two or more determinations. This code shall be used if the results of two or more discrete and separate samples are averaged. These samples shall have been processed and analyzed (e.g., laboratory replicate samples, field duplicate, etc.) independently. Do not use this code if the data are the result of replicate analysis on the same sample aliquot, extract ore digestate. Under most conditions, replicate values shall be reported as individual analyses.

- "L"- Off-scale high. Actual value known to be greater than value given. To be used when the concentration of the analyte is above the acceptable level for quantitation. (exceeds the linear range of highest calibration standard) and the calibration curve is known to exhibit a negative deflection.

Other information reviewed prior to this investigation and impacting on the findings are:

- Chapter 62-160, F.A.C.
  - o 62-160.300(1)- Requires DOH ELCP
  - o 62-160.300(6)- Requires QA program consistent with National Environmental Laboratory Accreditation Conference (NELAC) quality systems
  - o 62-160.340(2)- Requires the use of DEP qualifiers
- Chapter 64E-1, FAC
  - o 64E-1.0015- Requires the June 5, 2003 NELAC Standards
- NELAC Standards
  - o Chapter 5.4.1.5(i)- Defines the Quality Manager
  - o Chapter 5.5.2.7- Discusses the data integrity training requirements

In addition to the above reference citations, the information was also evaluated against published procedures established by National Environmental Laboratory Accreditation Conference and the program that implements the NELAC standards that is known as "NELAP". Documents referring to the above standards and procedures can also be found in the exhibits file for this investigation.

During your interview with Dickey, you were advised that you were being interviewed as the subject of the investigation because of your level of importance as the Lab Manager and the Quality Assurance (QA) Officer. According to your testimony, the primary reasons for District labs are availability, quick turnover, emergency response to things such as breaks in wastewater lines and accessibility to the public. When asked to summarize your role as the Quality Manager, you responded, "The QA Officer is in charge of implementing and maintaining QA in the Lab." This would involve "insuring that duplicates and spikes are included in the runs and that they meet within the acceptance limits and the holding times are being met and that methods are being followed per the SOP, (Standard Operations Procedures). You also mentioned that your duties included Quality Control (QC) which involved you looking at the Quality Control data as the run was going and then you would make some corrective action based on your observation. After that you did not review that data again. You stated that the most important aspects of the local lab's function is to avoid sampling going beyond the accepted holding times and the sample having to be redone.

During your interview, you mentioned that the lab served the following program areas: CERP (Comprehensive Everglades Restoration Plan) programs, TMDL (Total Maximum Daily Loads) groups, domestic and industrial waste, and occasionally verifications from the South Florida Water Management District for turbidity. You added that the TMDL program generates 90% of the lab's work at this time.

Dickey asked you to give the importance of the use of "data qualifiers" and their use in the lab. You responded that data qualifiers are "basically sort of like an explanation of an insight on the quality of the data, and an example of that would be if it was done past holding time, it would receive a 'Q' which means that the data could still be good but it is questionable due to it being past its set holding time… Another data qualifier would be a 'J' which would mean it was an estimate." When asked for your understanding of the role and importance of data qualifiers to the end users of the data, you stated that one of your other duties was to inspect other laboratories and one of the things that you had to impress on laboratories was to use data qualifiers. You were also asked if the program areas that use the data are conscious of the data qualifiers and take them into consideration when they are making decisions. According to you, almost all of the data that was created in-house does not go anywhere else, but is for our own use.

When asked about the usefulness of data qualifiers and what is the usefulness of data if data qualifiers are not used properly or if they are stripped, you responded: "I guess it would depend on the qualifier because there are different qualifiers for different types of data. In other words, data qualifiers that are used for microbiology wouldn't apply to data for nutrients. They're fairly specific. I basically was told not to use data qualifiers because there was an understanding that if data qualifiers were used, the data would be rejected for use in the TMDL project." You added that your former supervisor had given you those instructions.

However, you mentioned that some data qualifiers were used. You stated, "If something was below detection limits, that data qualifier would be there and usually if something was 'past hold' I would use a 'J'. I would just record it as an estimate, rather than a 'Q'. That was my discretionary use of a data qualifier."

You also stated in your interview with Dickey that there have been a few incidents where a data qualifier should have been applied and maybe it was not. You further explained that you were not instructed to "fudge" any data and you did not create false data. You also stated that the lab was not creating false data; however, they were just simply not using qualifiers. According to you, the use of qualifiers would be the only thing we did not do. You added that the lab would use 'Q's and 'I's, but you stated that you did not use 'I's'. Therefore, the lab was inconsistent when using the data qualifiers.

During your interview with Dickey, you made statements that served to minimize the importance of data qualifiers to the actual lab results. However, the NELAC standards and Chapter 62-160, F.A.C. do not give any level of discretion to use or not use the qualifiers as an individual sees fit. These standards state clearly that their use is mandatory and even prescribe how and when they will and will not be used.

Chapter 62-160.110 F.A.C. states in part: "(1) The purpose of this chapter is to assure that chemical, physical, biological, microbiological and toxicological data used by the Department are appropriate and reliable, and are collected and analyzed by scientifically sound procedures."

NELAC standards 5.4.1.5 i), states: "appoint a member of staff as quality manager (however named) who, irrespective of other duties and responsibilities, shall have defined responsibility and authority for ensuring that the quality system is implemented and followed at all times. The quality manager shall have direct access to the highest level of management at which decisions are made on laboratory policy or resources;
Where staffing is limited, the quality manager may also be the technical director or deputy technical director;

The quality manager (and/or his/her designees) shall:
1) serve as the focal point for QA/QC and be responsible for the oversight and/or review of quality control data;
2) have functions independent from laboratory operations for which they have quality assurance oversight;
3) be able to evaluate data objectively and perform assessments without outside (e.g., managerial) influence;
4) have documented training and/or experience in QA/QC procedures and be knowledgeable in the quality system as defined under NELAC;
5) have a general knowledge of the analytical test methods for which data review is performed;
6) arrange for or conduct internal audits as per 5.4.13 annually; and,
7) notify laboratory management of deficiencies in the quality system and monitor corrective action."

Because of the laboratory audit team's observation that the low level of usage is almost statistically impossible, the only conclusion that can be drawn is that the Port St. Lucie lab has been generating and reporting deceptive or fraudulent lab results and releasing them in published data-bases for a lengthy period of time.

According to the investigation, you were inconsistent on some of your recollections about timing of certain practices and when they started or ended or why. You did admit that you were both Lab Manager and Quality Assurance Officer since the lab's NELAC certification in 2004. Therefore, you knew or should have known the importance of your position and that the operation and functions of the lab is your responsibility.

As Lab Manager and QA officer you are responsible for adhering to all policies and procedures. According to the NELAC standards, you clearly had the authority to go over your former supervisor and report any and all discrepancies to a higher-level authority. However, you never told or attempted to tell anyone about the problems with the lab data being recorded incorrectly or fraudulently.

Management has counseled you and taken disciplinary action against you in the past. On March 31, 2006, you received a written reprimand for Conduct Unbecoming a Public Employee-Improper Use of Email (**Attachment G**); on February 12, 2003, you received an oral reprimand for Poor Performance and Inefficiency (**Attachment H**); on February 5, 1999, you received an oral reprimand for Failure to Follow Instructions (**Attachment I**); on July 11, 1995, you received a written reprimand for Threatening and/or Abusive Language (**Attachment J**); and on July 23,

1992, you received an oral reprimand for Unauthorized Absence from Work Station and Failure to Follow Instructions (**Attachment K**).

You acknowledged receiving a copy of the employee handbook (**Attachment L**) on May 12, 2005 and January 30, 1998, which explains the policies and procedures of the Department. Due to past disciplinary actions, your latest incident leads me to believe that you knew or should have known that your behavior was negligent and counterproductive. The behavior exhibited by you as mentioned above cannot be tolerated. You have been with the Department since April 1987 and should be focused on enforcing the Department's mission and goals. However, your behavior has disrupted the lab's day-to-day operations and has affected the Department's ability to carry out its mission.

If you wish to request a predetermination conference, you may, within five (5) workdays of receipt of this notice, submit a written request. You may submit a statement, orally and/or in writing to the Department, which refutes the bases upon which this action is being taken. To request and arrange a date and time for the conference, please contact:

Mr. Kevin R. Neal, Director
Southeast District
400 N. Congress Avenue, Suite 200
West Palm Beach, Florida 33401
Telephone #: (561) 681-6600
Fax #: (561) 681-6755

The conference will be informal and will not be in the nature of an evidentiary hearing. You may bring an attorney or qualified representative to assist you; however, discovery, cross-examination and similar legal proceedings are not permissible. Should you decide not to request a conference or should you fail to appear if one is requested, we shall proceed on the basis of the information available to us.

The Department of Environmental Protection is sincere in its desire to reduce error in taking unwarranted action against any employee based on untrue or erroneous information. In order to avoid taking any wrongful action against you, we are sincerely interested in reviewing and considering your response. No final action will be taken until after your predetermination conference or your election to waive that opportunity.

Sincerely,

Kevin R. Neal

Kevin R. Neal, Director
Southeast District

KRN/vbw

CERTIFIED MAIL –OVERNIGHT

Attachments A) Rule 60L-36.005, Florida Administrative Code
B) Section 110.227(1) and (5)(a), Florida Statutes
C) DEP Directive 435, Conduct of Employees
D) Employee Handbook Standards of Conduct
E) Administrative Leave letter dated October 31, 2006
F) Internal Investigation Report No. II-01-18-2006-066
G) Written reprimand dated March 31, 2006 for Conduct Unbecoming a Public Employee- Improper Use of Email
H) Oral reprimand dated February 12, 2003 for Poor Performance and Inefficiency,
I) Oral reprimand dated February 3, 1999 for Failure to Follow Instructions
J) Written reprimand dated July 11, 1995 for Threatening and/or Abusive Language
K) Oral reprimand dated July 23, 1992 for Unauthorized Absence from Work Station and Failure to Follow Instructions
L) Acknowledgment of receipt of employee handbooks signed on May 12, 2005 and January 30, 1998

cc: Mary Murphy, Environmental Administrator
Southeast District Branch Office
Betty J. Clark, Chief
Bureau of Personnel Services
Roy Dickey, Major
Office of Inspector General
Marshall Wiseheart, Senior Attorney
Office of General Counsel