July 19, 2010

Draft response to Employee Concern Case EC10-039, Mark Siciliano, Rev 5

Mark,

On April 29, you raised the following concerns with [redacted]. Your issues were transferred to the Employee Concerns Program for investigation and resolution.

I believe that modifying an official government form and implementing it, especially when it requires employees to sign it and admit guilt even when they are not the responsible person is an illegal act and an abuse of authority. I believe an investigation is warranted and I would like to know:

1. Why is BEA not using the official form that they are supposed to be using?
2. Do they have the authority to modify an official government form and use it?
3. Who specifically is responsible for modifying the form and what is the corrective action (if warranted)?
4. Why wasn't this discovered months ago when BEA supposedly did their own internal investigation?
5. What purpose did it serve to use a modified DOE form and use procedures that forced personnel who were investigated for security incidents to sign it as "individual responsible for incident" before investigations were complete?
6. This issue was raised a year ago and to this date, nothing has been done except an apparent validation of the status quo. Who is the responsible BEA manager for this and what is their position?

There has been significant impact to me personally and professionally as a result of this event, not to mention the other employees who also have been negatively impacted. I have personally been investigated (harassment/intimidation) for bringing up employee concerns about this specific issue, despite the fact that I was not an employee at the time of the security incident. To this date, there has been no accountability that I am aware of for this action and I still have no answer as to why [redacted] investigated me, but did not investigate the actual manager at the time ([redacted]). I believe events like this have led to a collapse in a healthy reporting security and employee concern culture. As always, I will give BEA first opportunity to fix this before pursuing other avenues. I look forward to your feedback.

Your harassment/intimidation concern is the subject of an ongoing Part 708 complaint, so we cannot pursue that portion of your concern at this time – it will be resolved through the Part 708 investigation and adjudication process. We have investigated the security incident inquiry process and, specifically, the use or misuse of the form you cite in your first paragraph. Our answers to your specific six questions are provided below along with an overall conclusion.

To investigate the issues that you raised related to the security forms, we compared the current version being used by Security to the official form obtained from DOE. This was done to determine the extent of the changes. We then interviewed BEA and DOE staff to determine the history behind the changes and whether those making the changes had the authority to do so. We also reviewed the nature of the changes to determine what impact, positive or negative, the changes would make to the process, and we reviewed pertinent sections of the DOE guidance documentation that governs security investigations (DOE N 471.3). In addition, we discussed the legality of modifying DOE forms with our Legal department.

In general, we identified that the DOE documentation governing security investigations does not require the contractor to use the official DOE form, but rather allows use of a form "comparable in content." Also, per our discussion with DOE and BEA security personnel, when BEA's investigators perform inquiries into security incidents, they do so under the direction of the DOE and as an arm of DOE Security. We talked to the DOE Security office and identified that the DOE provides continuous surveillance of BEA's performance of security incident inquiries. DOE further indicated that the work being done by the Security Investigators meets their expectation and that the process they use is approved and supported by the DOE.

Based on the DOE Notice and our discussions with DOE personnel, the changes to the form are clearly acceptable. We agree, however, that the wording of the current form may cause some people to interpret that filling out the form is requiring them to admit guilt. We also can see how confusion might exist over whether the form is the official DOE form or a contractor form "comparable in content." We have addressed these issues and our suggestions below.

Specifically in response to your questions 1 through 6 above, we provide the following:

Question 1 – Why is BEA not using the official form that they are supposed to be using?

BEA is using a revised version of the form because of perceived shortcomings in the official DOE version. You have already raised part of these shortcomings with the DOE Employee Concerns Program Manager – that the form requires people to sign as the "person responsible for…" Based on our review of Part II of the form, we identified three substantive deviations between the official DOE form and the revision being used by BEA Security. The changes that were made to the BEA version are improvements to the form and tend to reduce its harshness. These changes should help alleviate some of the objections to the DOE form and Security's inquiry process in general. The changes include:

1. Part II, Block 2, the word "infraction" has been changed to "incident" to indicate that the person filling out the form is not being charged with an infraction until the inquiry is completed and only if it is determined that there is an infraction. This is consistent with the cover letter that is distributed with the form that in part reads:

> Please be advised that this form is your opportunity to explain your version of the incident. It also provides you the opportunity to explain your roles and responsibilities as it (sic) relates to this incident. Please feel free to explain what actions you took or alternatively did not take that may or may not have contributed to this incident. Though the form requires your signature, it does **not** constitute an automatic infraction at this point in time, and no distribution other than to you is made until your response is received and a determination of whether an infraction is charged is made.

2. Part II, Block 5, in the signature block, the word "infraction" has also been changed to "incident" for the reason described in #1 above.

3. Part II, Block 3, the use of the Social Security number (SSN) has been discontinued. The revised form asks for the employee's ID number. This is a positive change because it prevents an employee's SSN from being distributed to people who don't have a need to know. It also eliminates the need for classifying the forms as containing personally identifiable information (PII).

Question 2 – Do they have the authority to modify an official government form and use it?

The DOE document governing the performance of security inquiries, DOE N 471.3 *Reporting Incidents of Security Concern*, specifically allows contractor personnel to use forms with content that are similar to, but not the same as, the official DOE form. (See Attachment 1, *Contractor Requirement Document*, Section 2.e(3)(e)) The Notice reads as follows:

> ...a copy of any DOE F 5639.3, *Report of Security Incident/Infraction*, **or a form comparable in content**, issued as a result of the inquiry, must also be submitted once it is completed. (bold type face added)

Based on this, it appears that the contractor has the option of deviating from the official DOE form. However, to alleviate confusion, we are suggesting to Security that they consider renaming, if possible, the revised form using a BEA name and numbering convention rather than continuing to call the form a DOE F 5639.3.

Question 3 – Who specifically is responsible for modifying the form and what is the corrective action (if warranted)?

The people responsible for modifying the form and creating the version currently in use were former contractor employees (BEA or Bechtel), and the modifications were done before the current BEA security staff was in place. The former employee who made the modifications to blocks 2, 3, and 5 discussed in the answer to your first question now works for the DOE, and he is currently the person who oversees the BEA Security investigation organization. When I discussed the use of the revised form with him, he indicated that he supports using the form as it currently exists, and he had previously indicated in writing to Security that he is supportive of the revisions to the form.

Question 4 – Why wasn't this discovered months ago when BEA supposedly did their own internal investigation?

Your fourth question implies "why didn't Internal Audit previously catch the change in the form?" When Internal Audit did its review, it was looking at the issues you raised in your 708 complaint, and the differences in the forms were not brought up by you until after its review was completed. The forms being used were determined by Internal Audit to be the standard form in

use by the BEA security investigators, and they were consistent between each of the employees sampled. Even if someone had noted that there were a few minor changes between the official DOE form and the one being used by BEA Security, because the changes were positive and to the benefit of the employee being interviewed, as noted above, there is little likelihood that anyone would have called attention to it absent a law that prohibits modification of official government forms.

Question 5 – What purpose did it serve to use a modified DOE form and use procedures that forced personnel who were investigated for security incidents to sign it as "individual responsible for incident" before investigations were complete?

As discussed above under the answer to Question 1, why the official version of the form is not being used, the original form implies that the person being required to sign the form is admitting to responsibility for an *infraction*, which is much stronger language than being responsible for an *incident*. An incident merely reflects that something adverse has occurred while an infraction implies culpability and the need for disciplinary action. Also, as stated above, the instructions in the cover letter were meant to clarify that filling out the form is a fact-finding endeavor, and no infraction is implied until the inquiry is complete and a final determination has been made. In the case of your staff, an incident had occurred. As a result of the inquiry into the incident, it was determined that there had not been an infraction, and no disciplinary actions were taken.

However, we also understand your contention that the current format of both the official DOE form and the comparable version being used by BEA might be perceived by those filling out the forms as assigning blame and responsibility even though they are merely witnesses providing information. We are suggesting to Security that they further modify their instructions and Section II of the form, Blocks 2 and 5, to indicate that the person might be signing only as a witness and not someone necessarily responsible for causing the incident.

Question 6 – This issue was raised a year ago and to this date, nothing has been done except an apparent validation of the status quo. Who is the responsible BEA manager for this and what is their position?

Relative to taking corrective actions, there are several managers that share responsibility. Evaluation and implementation of recommendations generally belongs to the business unit management. We understand from Jan Ogilvie, DOE Employee Concerns Program Manager, that many of your security recommendations have now been implemented. As a result of your reporting the foreign travel incident, corrective actions in the foreign travel authorization process were identified and have been implemented. As discussed above, we are suggesting some changes in the security incident inquiry process that hopefully would further alleviate concerns about the fairness and objectivity of the process. Other corrective actions deemed appropriate are being taken by management.

Conclusion

We found no laws or regulations prohibiting revision of the form, which rules out any question of the changes to the form being illegal or a crime. Absent a law against an action, there can be no substantiation of illegality. To the contrary, the regulations allow for the contractor to use a form that deviates from the official DOE form. Based on this, we are unable to substantiate that using the modified form is an illegal act. Our review of the inquiry process, the forms, and the cover letter instructions supports management's assertion that the changes to the form improve the process, so we cannot substantiate that the use of the forms is an abuse of authority. However, as identified above, we have suggested some opportunities for Security to further improve the forms and its inquiry process.

Relative to your statement that you "still have no answer as to why [redacted] investigated me, but did not investigate the actual manager at the time ([redacted])," it was reported that [redacted] briefed you on this issue. According to the record of discussion in the Internal Audit files, Internal Audit informed you that the Director of Security and Emergency Services was concerned about your attitude towards security and the message portrayed to your staff because of comments made on the security incident reporting forms submitted by your staff. This, coupled with the high number of security incidents in National and Homeland Security, were his reasons for having you complete the form.

Please feel free to contact me if you need further information.

[redacted]