



U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

January 20, 2010

The Honorable William E. Reukauf
Associate Special Counsel
Office of the Special Counsel
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

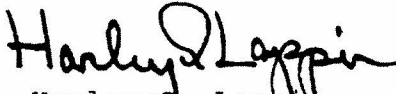
Re: OSC File No. DI-09-3604; ALLEGED VIOLATION OF THE
FEDERAL STATUTE BY BUREAU OF PRISONS EMPLOYEES
ENGAGING IN CONDUCT WHICH MAY VIOLATE LAWS, RULES
AND REGULATIONS, GROSS MISMANAGEMENT, AND A
SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC SAFETY.

Dear Mr. Reukauf:

I am in receipt of your correspondence wherein you conclude that allegations raised by an employee of the United States Department of Justice, Federal Bureau of Prisons, constitute a substantial likelihood that a violation of law, rule, or regulation has occurred. Specifically, a federal employee at the Federal Correctional Institution (FCI) Fort Worth, TX, Senior Officer James Bertzyk, alleged that FCI Fort Worth officials purchased and placed industrial sized fans in the inmate housing areas which, due to their size and position, impeded the safe and efficient movement of inmates through the facility. In addition, Officer Bertzyk maintained that the presence of these fans poses a potential impediment to the safe evacuation of inmates and officers in the event of an emergency.

The Office of Special Counsel requested an investigation and report on the allegations. Please accept this correspondence as a summary of our investigation and findings. It should be noted that the Attorney General has delegated to me authority to review and sign the report, in accordance with 5 U.S.C. § 1213 (d).

Sincerely,


Harley G. Lappin
Director

Report of Investigation

OIA Case No. 2009-04471

OSC Case No. DI-09-3604

Subject: ALLEGED VIOLATION OF THE FEDERAL STATUTE BY BUREAU OF PRISONS EMPLOYEES ENGAGING IN CONDUCT WHICH MAY VIOLATE LAWS, RULES AND REGULATIONS, GROSS MISMANAGEMENT, AND A SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC SAFETY.

(1) Summary of the Information with Respect to Which the Investigation was Initiated

This investigation was initiated based upon a whistleblower disclosure that Bureau of Prisons (BOP) employees at the Federal Correctional Institution (FCI), Fort Worth, TX, purchased and placed industrial sized fans in the inmate housing unit areas which, due to their size and position, impeded the safe and efficient movement of inmates through the facility. In addition, the whistleblower maintained that the presence of these fans posed a potential impediment to the safe evacuation of inmates and officers in the event of an emergency.

The whistleblower, Senior Officer James Bertzyk, alleged that in the summer of 2008, FCI Fort Worth officials purchased and permitted the use of industrial sized, free standing fans (see Attachment #1) for what are commonly referred to at the facility as the "hot halls"¹ of FCI Ft. Worth's Building #4 (see Attachment #2). According to Officer Bertzyk, doorways located in the middle of each of these halls serve as the sole means of ingress and egress for the approximately 1000 inmates housed in this structure. FCI Fort Worth is a low security facility and, as a result, the inmates are permitted to move throughout the facility on an hourly basis between 8:00 a.m. and 4:00 p.m. The fans, according to Officer Bertzyk, which were initially randomly situated in these corridors in an effort to direct a constant airflow up and down the hallways in an effort to cool the halls and inmate cells, were often maneuvered around by the inmates themselves in an effort to direct the airflow of the fans directly into their individual cells. Because of the size and placement of the fans, Officer Bertzyk alleged that the fans

¹ The first three floors of the center section of this building are referred to as the "hot halls" because of a lack of air conditioning in the hallways and inmate cells.

occupied unacceptable amounts of space in the halls and obstructed the safe and efficient movement of inmates and officers through the facility on a daily basis.

Further, according to Officer Bertzyk, the positioning of the fans had the potential to impede the ability of the inmates and officers to safely and efficiently evacuate the building in the event of an emergency. To illustrate these points, Officer Bertzyk explained that in one of the three halls, the fans were paired back to back resulting in only 13 inches of useable floor space. In the other two halls, the fans were staggered on either side of the hall forcing anyone attempting to navigate the hall to weave from side to side to avoid the fans.

Officer Bertzyk argued that the placement of the fans violates BOP Program Statement 1600.09, entitled, "Occupational Safety, Environmental Compliance, and Fire Protection." Section A of Chapter 4 of the policy entitled, "Staff Responsibilities," requires the Warden to ensure compliance with all federal, state and local fire protection regulations and to promptly abate any unsafe conditions. This chapter also requires employees to "report fire hazards to their supervisors." Finally, Section E of Chapter 4 entitled, "Building Egress," mandates that "[e]xit access aisles are sized to accommodate the maximum anticipated occupant load of the area" and that aisles in housing units are at least 48 inches wide and are kept "clear and unobstructed." The placement of the fans may also constitute violations of Occupational Safety & Health Administration regulations which mandate that emergency exit routes remain "free and unobstructed" and that "[n]o materials or equipment may be placed, either permanently or temporarily, within the exit route." (29 C.F.R. § 1910.37(a)(3))

Officer Bertzyk had repeatedly complained to FCI Fort Worth management about the placement of the fans and the danger the placement of the fans poses to both the inmates and the housing unit officers. Between July 22, 2009, and September 2, 2009, Officer Bertzyk communicated his concerns regarding the fans on at least two occasions to Warden Rebecca Tamez, Executive Assistant Manuel Ocasio, Safety Manager Darryl Gray, Assistant Safety Officer Carl Adams, Operations Lieutenant Michael Merk, Unit Manager Jan Wood, Captain Miguel Gonzalez, and to his supervising Lieutenants. Officer Bertzyk received a response to one of his complaints from Safety Manager Gray who stated only that the fans could not be placed inside the cells. Another response from Unit Manager Wood stated that the fans would be removed prior to an American Correctional Association (ACA) audit scheduled for September, 2009. Officer Bertzyk alleged that despite their awareness of this continuing risk to public safety,

FCI Fort Worth officials took no action to address the problem. Officer Bertzyk claimed that, as a result of this lack of oversight, the approximately 1000 inmates living in the facility and the officers working in the facility were, on a daily basis, potentially exposed to a significant safety risk.

Officer Bertzyk is to be commended for his research and study of applicable policies and statutes regarding this matter, and for his efforts to raise management's awareness of potential "Life Safety" issues at FCI Fort Worth, TX.

(2) Conduct of the Investigation

This investigation commenced in October 2009, upon receipt of an Office of Special Counsel (OSC) letter tasking the Attorney General to conduct an investigation pursuant to 5 USC § 1213. An investigation was conducted by the Department of Justice (DOJ), BOP, Office of Internal Affairs (OIA), at FCI Fort Worth, TX, during the week of October 26, 2009. The OIA conducted six interviews of BOP employees, collected and examined various memoranda, E-mail, and other records pertaining to the related events, observed the areas and equipment in question, and researched applicable agency rules and regulations.

(3) Summary of Evidence Obtained from the Investigation

FCI Fort Worth, TX, is a low security correctional institution which houses male inmates. There are approximately 275 staff members actively employed at the facility, and approximately 1750 inmates housed there. The institution has two, two-story buildings and one four-story building on the main compound. These three buildings are divided into five housing units, all wheelchair accessible. The facility contains single rooms, two-man rooms, multi-man rooms, and wheelchair accessible rooms. Building #4, the housing unit where Bertzyk was assigned, is a four story, "H" shaped structure which was built in the 1930's. While the vertical wings of the structure have been renovated to include air conditioning, the horizontal portions of the structure, with the exception of the fourth floor, are not air conditioned. The fans were brought into the housing unit to provide relief to those inmates housed in the first three floors of the horizontal portions of the structure (referred as the "hot halls") during the summer months when temperatures at the facility, according to Officer Bertzyk, can reach the upper nineties to the lower one hundreds.

Our investigation revealed that in early 2007, the Safety Manager at FCI Fort Worth, Darryl Gray, made entries in his Monthly Housing Unit Inspection report for the first three floors of Building #4 that, "Fans in the hallway are too numerous, thus making this a life safety issue by blocking the hallway." This report was addressed to the Unit Manager of these locations, Janice Wood, and was copied and initialed by the Warden, Associate Warden (Programs), and the Executive Assistant. The response to these entries, submitted by the Unit Manager in writing, essentially was the same in each case, indicating the fans had been moved. Safety Manager Gray said fans had been placed in the "hot halls" since around 1997 or 1998. Gray said that initially, pedestal fans were placed in the hallways to move air, but later "swamp coolers"² were used. Gray said the "swamp coolers" were only used for a short time because the moisture generated from the usage of these devices caused rusting in areas of the building. Gray said that when large pedestal fans were used in Building #4, he reported the fans as a "Life Safety" issue. Gray said that he reported the issues for the first two or three months of usage each year (usually from June to September), but then would no longer report the issue because he knew "nothing would be done." Gray said the fans, although a possible "Life Safety" issue, were used to keep inmates from becoming disruptive because of the heat in the hallways. Gray said he knew the temperature was very warm in the halls, but did not take temperature measurements. Gray said his primary concern with the fans was that they blocked the hallways to an extent, and there was not an unobstructed "means of egress" in the case of an emergency. Gray said that in June of 2009, he raised the issue of the fans to Jason Stiles and Jamie Haight, Program Review Division, Central Office, when they were at FCI Fort Worth conducting a Pre-ACA audit. After discussing the matter with Stiles and Haight, the decision was made to remove the fans.

Senior Officer James Bertzyk said he became aware fans were being used in the hallways of Building #4 when he was assigned there in July 2009. Bertzyk said the safety issues were not apparent to him until a small fire occurred in the unit on July 16, 2009. Bertzyk said an evacuation was initiated at this time, and he was advised by officers working in the unit that the fans in the hallways were "in the way" and impeding the evacuation. Bertzyk said the evacuation only involved about 70 to 75 inmates

² An evaporative cooler, also known as a "desert cooler," or a "wet air cooler." This type of cooling device cools air through the evaporation of water.

because the fire was quickly contained. Bertzyk said this occurrence made him realize the seriousness of the situation as well as the importance of having an unobstructed means of egress from the housing unit in the case of an emergency. Bertzyk said he contacted Safety Manager Gray who advised him that the large fans could not be placed in the inmate cells. Bertzyk said he then contacted Unit Manager Wood about the situation and advised her of the potential safety issues presented by the fans in the hallways. Bertzyk said Wood told him he should issue Incident Reports³ to inmates who moved the fans to positions blocking the hallways. Bertzyk said that on August 26, 2009, all of the fans were moved to different positions in the hallway by inmates and, because no inmate would admit to moving them, he wrote Incident Reports to 16 inmates. Bertzyk said none of these reports were processed because he was unable to "specifically identify who had moved the fans."

Bertzyk said he received no other guidance about how to deal with the situation, so he began removing the fans from the units if the inmates moved them. However, Bertzyk said that when his shift ended, the next shift staff members would return the fans to the hallways. Bertzyk said he finally resorted to "hiding the fans" in the basement of the building so they couldn't be returned. Bertzyk said that when he "wouldn't give them back," Unit Manager Wood purchased new fans for the unit, but advised him "the fans would be gone by the time of the ACA audit." Bertzyk said that because the safety issues were being ignored, on September 2, 2009, he sent an email to the Warden, Executive Assistant, Captain, and other staff, citing the policy regarding this issue. Bertzyk said that on September 3, 2009, he received a response from Safety Manager Gray indicating "the issues had been identified and a plan was being developed to put air conditioning in the units."

Bertzyk said that because of his concerns for "Life Safety" issues, he took measurements of the fans in the hallways. Bertzyk said if the fans were positioned to blow directly into the inmate cells (the position the fans were moved to by the inmates), there was a clearance of 13 inches at the base, and a maximum clearance of 30 inches from motor to motor (see Attachment #3). (The inmate cells are directly across from each other on each side of the hallways.) Bertzyk said that policy

³ An Incident Report is a BOP form utilized to record specific information about an inmate or inmates involved in prohibited behaviors.

requires a clearance of at least 48 inches in correctional facility housing units.⁴ Bertzyk said the fans are supposed to be positioned in a "staggered" pattern, with two to three fans on each side of the hallway, blowing air up and down the hall (see Attachment #4) . Bertzyk said placing the fans in this manner would enable staff and inmates a means of egress in the case of emergency.⁵ Bertzyk said that when he began to remove the fans from the Unit, Wood purchased more fans, that enabled all inmates to have a fan blowing directly into their room, resulting in a 13 inch passage at the base of the fans and a 30 inch clearance from motor to motor(see Attachment #5).

Bertzyk said the solution to the problem offered by the Administration was, "We're working on getting air conditioning in the areas," but said "nothing was ever done." Bertzyk said that his primary concern with the situation was that the safety issues were not being addressed. Bertzyk said if someone would have responded to him about possible solutions to the issues, the situation could have been handled differently.

Unit Manager Janice Wood said fans have been utilized in the "hot halls" of Building #4 since she began her career with the Bureau of Prisons in 1990. Wood said fans are placed in the hallways during the late spring/summer/and early fall to move air around during periods of high heat. Wood said that in early 2008, she learned the fans were considered to be a "Life Safety" issue when she received an inspection report from Safety Manager Gray. (Copies of the inspection reports supplied by Mr. Gray reveal Wood received the first report noting this issue in May, 2007.) Wood said she spoke to Gray about the issue, who advised her "he had to write the fans up, but he could understand why I was doing it." Wood said that after she learned that Gray considered the fans a safety issue, she spoke with an Associate Warden (she could not specifically recall which Associate Warden she spoke with) and the decision was made to leave the fans in the hallway because of the high heat levels. Wood said she was

⁴ The National Fire Protection Association (NFPA) requires a 36 inch width means of egress for existing structures.

⁵ Peter Collins, National Fire Protection Program Manager for the Bureau of Prisons, indicated that the placement of the fans in this arrangement "may or may not" constitute a "Life Safety" issue. Although staff and inmates would have to navigate the fans in the hallway, as long as minimum clearance standards were adhered to, egress would not be blocked.

concerned that removing the fans would cause inmates to become ill, and possibly disruptive. Wood said that in the summer of 2009, she received several emails from Bertzyk complaining about the inmates re-positioning the fans to blow directly into their cells, but made no mention about being concerned for safety issues. Wood said the fans were supposed to be aimed "down the halls to circulate the air, but sometimes inmates would turn the fans so they would blow into their cells." Wood said that when staff would discover the fans had been moved they would either move the fans or require the inmates to move the fans to the original positions. Wood said that in September 2009, while preparing for an ACA audit, she was advised that a staff member had written (ACA) about the fans in the hallways, and she was ordered to "remove them, asap." Wood said the decision was made that (1) the fans would be removed from the secure perimeter and (2) providing small, personal fans for each inmate would be pursued.

Warden Rebecca Tamez said she was aware that fans were placed in the hallways of Building #4 during the summer months (June through September) to provide air circulation. Tamez said she does not know the width of the hallways, and did not know the distance between the fans, but said, "I know that there was sufficient room for inmates and staff to pass between the fans in single file."

Tamez said she received an email from Bertzyk on September 2, 2009, stating the fans in the hallways were creating a "Life Safety" issue, and recalls that Bertzyk cited policy specific to the issue. Tamez said she was on extended leave due to medical issues at the time, and did not respond to Bertzyk. Tamez said she later learned that the fans were a safety issue when preparing for an ACA audit in September of 2009. Tamez said that after receiving this information, she ordered the fans removed. Tamez said that prior to the removal, staff met with the affected inmates to advise them they were removing the fans. Tamez said they did this to prevent disruptive behavior on the part of the inmates. Tamez said the reason the fans were utilized in the hallways was to counter the heat caused by poor ventilation in the hallways and inmate cells. Tamez said she does not know specifically how warm it was in the hallways, but recalled that it was like "walking into an oven." Tamez said that housing inmates in these conditions without providing a means of air circulation could potentially cause disruptive situations and impact the safety and security of the institution. Tamez said the fans were removed from the building prior to the ACA audit, but said the fans were removed because of the safety issues and not in an effort to conceal the usage from ACA auditors.

Tamez said that when she became aware of the safety issues, she tasked Facilities Manager Raphael Ramos to look into the installation of air conditioning for the unit. Tamez said Ramos provided information to South Central Regional Facilities Administrator Jose Montoya, who arranged for an engineering firm to assess the situation.

Tamez said she reviews the monthly Safety Manager reports but does not recall any of the reports addressing the fans as an issue. Tamez said she does not review the entire report, but only the summaries prior to forwarding the report to the Associate Wardens.

Executive Assistant Manuel Ocasio said that on September 2, 2009, he was one of several recipients of an email from Bertzyk regarding the placement of fans in Building #4. Ocasio said Bertzyk was concerned that the placement of the fans hindered the egress from the building in the case of emergency. Ocasio said that when Warden Tamez returned to the facility (after an extended absence) on September 8, 2009, the matter was discussed and the decision was made to remove the fans from the building. Ocasio said he recalled that, on at least one occasion, there were six to eight fans in each hallway. Ocasio said the fans were removed and stored inside a warehouse outside of the institution. Ocasio said the fans will not be returned to the unit. Ocasio said that after he learned the fans could constitute a safety issue, he contacted Jason Stiles, ACA Accreditation Coordinator, requesting guidance regarding the fans. Ocasio said he later learned that Stiles had consulted with National Safety Administrator Ron Day and Fire Protection Program Manager Pete Collins about the issue on September 11, 2009. Ocasio said that he learned Collins had concluded that the extreme temperatures inside the unit was not a "Life Safety" issue, but the placement of the fans, if blocking egress to a safe area, could be. Ocasio said Collins determined that whether or not the fans would actually constitute a safety issue would depend on the placement. Ocasio said all fans were removed from the Building #4 on September 16, 2009.

(4) Violation or Apparent Violation of Law, Rule or Regulation

The BOP violated the Code of Federal Regulations (CFR) by allowing large pedestal fans, moved from their original positioning by inmates, to remain positioned for unspecified periods of time in such a manner as to effectively obstruct egress in the case of an emergency before placing them back in a "staggered" manner. Pursuant to 29 CFR 1910.37(a)(3), "Exit

routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, with the exit route." When fans were placed in a "staggered" manner, egress, although minimized, was presumably not obstructed and may have been in compliance with the "Life Safety" codes, although it was impossible to determine if the required 36 inch width of egress was always met even when fans were "staggered." Regardless, it is apparent staff consistently allowed the fans to remain in locations determined by the inmates for unknown periods of time before moving them back to a "staggered" arrangement, which effectively limited the width requirements for egress as established by OSHA and NFPA. It appears that Officer Bertzyk was the only employee who took immediate corrective action each time he observed the fans to have been moved by inmates.

The BOP also violated its own policy when the fans were positioned by inmates and allowed to remain in a manner that severely restricted egress. Specifically, Program Statement 1600.09, Occupational Safety, Environmental Compliance, and Fire Protection states in pertinent part:

8. **Aisles.** Exit access aisles are sized to accommodate the maximum anticipated occupant load of the area. Aisles are at least 44 inches wide (48 inches in housing units and warehouse areas).

Aisles are kept clear and unobstructed, and may not be used for storage. Exit access aisles in storage and industrial occupancies are permanently marked with paint or similar material. Aisle accessways are provided and maintained per the Life Safety Code.

(5) Action Taken or Planned as a Result of the Investigation

Facilities Manager Raphael Ramos said that after a determination had been made that the fans in Building #4 constituted a possible life safety issue, he was tasked by Warden Tamez to look into installing air conditioning into the units. Ramos said he contacted Regional Facilities Administrator Jose Montoya and provided an estimate to install air conditioning. On November 17, 2009, FCI Fort Worth requested monies in the amount of \$280,000.00 for the purpose of installing air conditioning in Building #4. The request was approved and a total of \$150,000.00 was allocated to commence the project in-house. When the project reaches a point at which more funds are needed, the South Central Regional Office will make additional allocations.

FCI Fort Worth Warden Becky Tamez has indicated that it is her intent to begin this project in February 2010. During the initial stages of the project inmates currently housed in the affected areas will be relocated to other areas of the institution.

A training session will be held specifically for the institution executive staff and department heads to emphasize their responsibilities relating to the Occupational Safety, Environmental Compliance, and Fire Protection Program.

The training program will include:

- 1) Defining the role of the Safety Manager as advisor of the Warden on occupational safety, environmental compliance, and fire protection.
- 2) Outlining the role of the Warden in the following areas:
 - Committing top management support to injury/illness reduction and personally monitoring the effectiveness of the program;
 - Ensuring compliance with OSHA, EPA, and NFPA requirements and state and local regulations;
 - Ensuring periodic inspections of workplaces by technically competent personnel;
 - Ensuring prompt abatement of unsafe or unhealthful working conditions;
 - Ensuring that employees are not subject to restraint, interference, coercion, discrimination, or reprisal for exercising their rights under Executive Order 12196, 29 CFR 1960, or for participating in the Bureau's Occupational Safety, Environmental Compliance, and Fire Protection Program;
 - Ensuring that adequate occupational safety, environmental compliance, and fire protection training is provided to management, supervisory, and safety personnel, as well as all other institution personnel.
- 3) Reviewing the Detail Supervisor's responsibility for:
 - Ensuring safety practices are followed and corrective actions are implemented;
 - Training inmates in safe practices;
 - Familiarizing themselves with hazards in particular jobs or the physical surroundings of employees;
 - Instituting training on accident prevention, fire prevention, and environmental compliance.

Special emphasis will be placed on procedures for reporting, correcting, and putting in place controls to prevent recurrence of Life Safety violations.

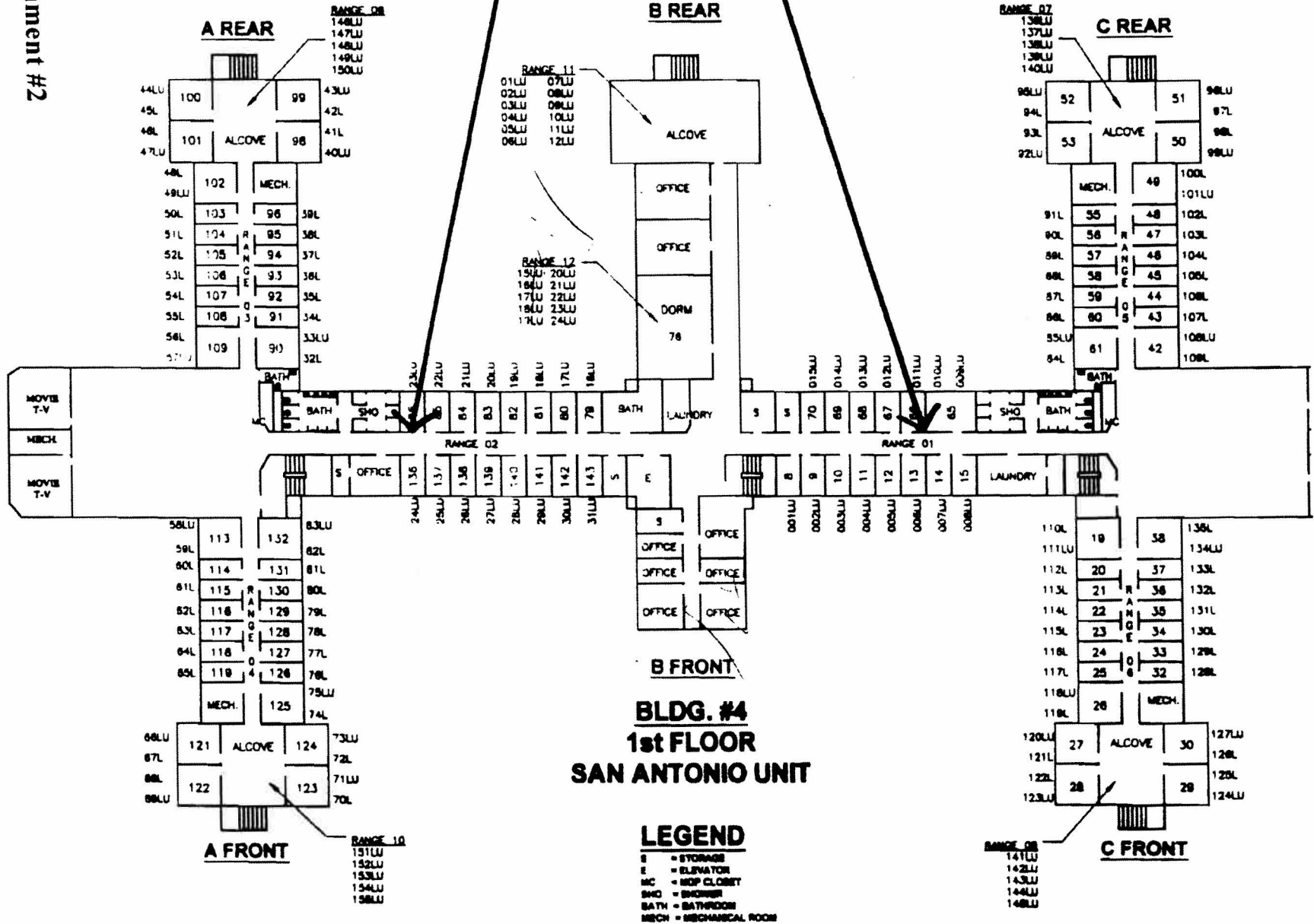
Attachments



Attachment # 1

"HOT HALLS"

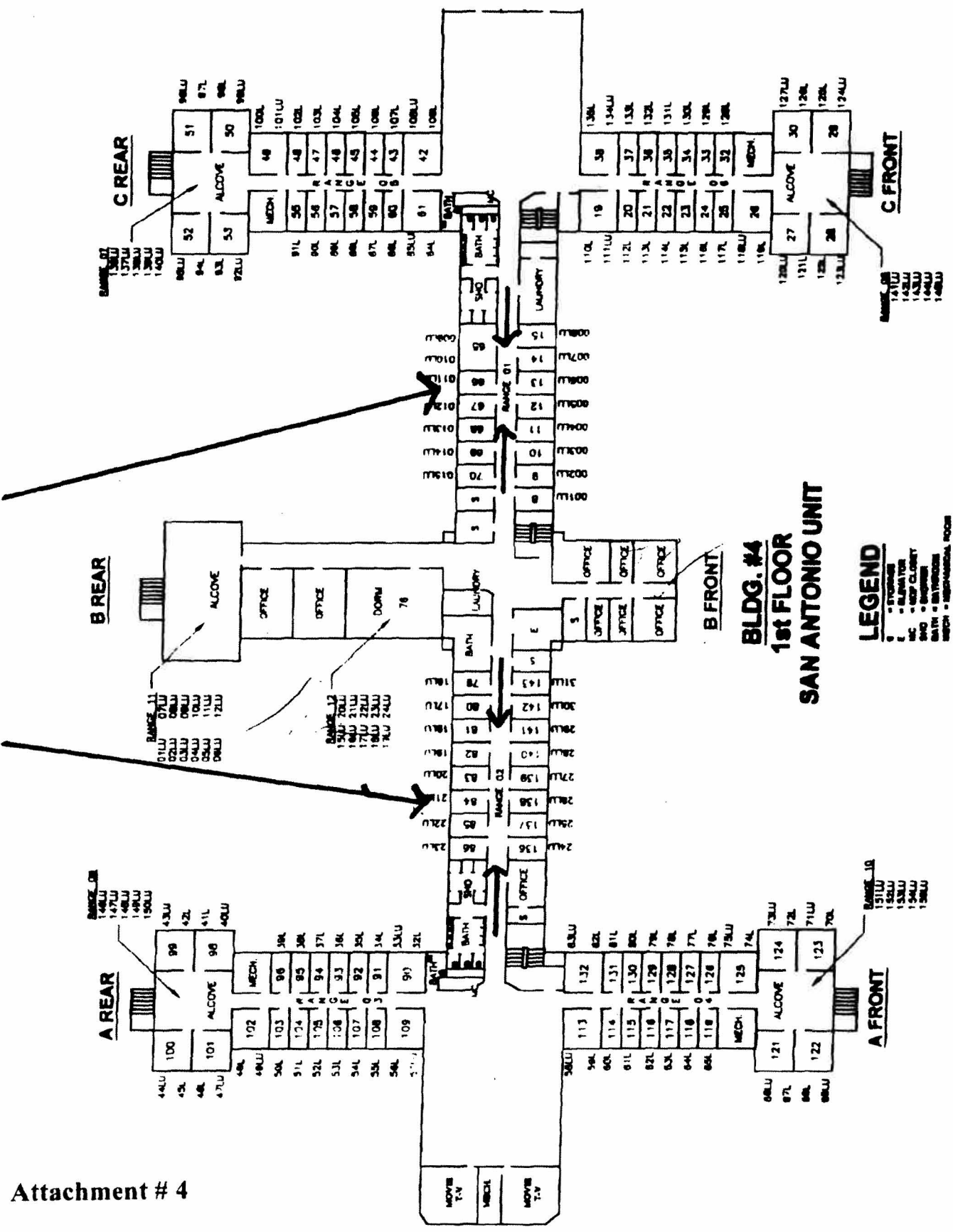
Attachment #2





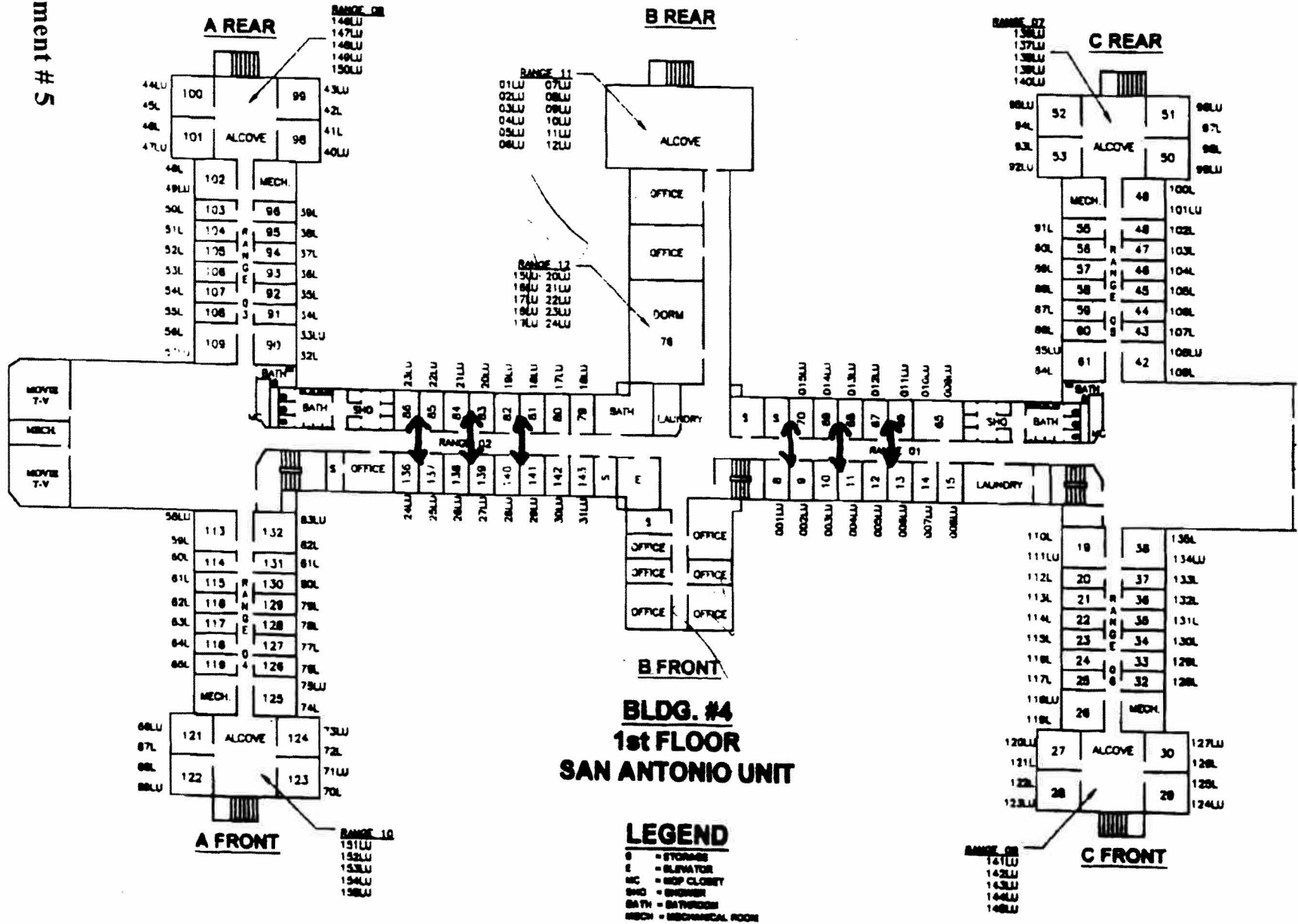
Attachment # 3

FAN PLACEMENT (STAFF)



FAN PLACEMENT (INMATES)

Attachment # 5





U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

Washington, DC 20534

September 29, 2009

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: *Sub - Counsel* 10/10/09
THE DEPUTY ATTORNEY GENERAL

FROM: *Harley G. Lappin*
Harley G. Lappin
Director

SUBJECT: Delegation of Authority

PURPOSE: To obtain a delegation of authority pursuant to 5 U.S.C. §1213 (d) in order to provide response to request for investigation by the Office of Special Counsel

TIMETABLE: Immediately

SYNOPSIS: The Office of Special Counsel (OSC) has requested the Attorney General to investigate allegations that employees at the Federal Correctional Institution in Fort Worth, Texas, have engaged in conduct which may violate laws, rules, and regulation; gross mismanagement; and a substantial and specific danger to public safety.

DISCUSSION: In order to respond to the OSC request for investigation, the Director of the Bureau of Prisons must receive delegation of authority from the Attorney General.

RECOMMENDATION: Written approval of delegation of authority.

APPROVE: *ED* 10-14-09

DISAPPROVE: _____

OTHER: _____

Attachment