

ALASKA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD  
P.O. BOX 21149  
JUNEAU, ALASKA 99802

STATE OF ALASKA, )  
DEPARTMENT OF LABOR, )  
 )  
Complainant, )  
 )  
vs. )  
 )  
STATE OF ALASKA, DEPARTMENT OF )  
MILITARY & VETERANS AFFAIRS, )  
 )  
Contestant. )

Docket No. 87-702  
Inspection No. Ar-3157-149-87

DECISION AND ORDER

I. Factual and Procedural Background

This matter arises from citations and penalties issued by the Alaska Department of Labor ("DOL") to the Alaska Department of Military & Veterans Affairs ("DMVA") following the investigation of an accident on January 21, 1987, involving a DMVA employee at Kulis Air National Guard Base in Anchorage.

Citation #1 alleges three separate violations of the Alaska Hazard Communication (HC) standards. Item #1a alleges that DMVA did not have a written hazard communication program as required by HC 15.0101(e)(2); Item #1b alleges that DMVA failed to maintain or make available material safety data sheets for toxic or hazardous chemicals to which its employees might be exposed, as required by HC 15.0101(g)(8); Item #1c alleges that DMVA failed to provide its employees with safety and health training for hazardous substances used in the workplace, as required by HC 15.0101(i)(1). Because they involved similar or related hazards, the three items were grouped into a single citation which was classified as "serious" and a single penalty of \$420 was assessed.

Citation #2 was dismissed by DOL at the outset of the hearing because the violation alleged therein was already covered by Citation #3, Item #1.

Citation #3 contains three separate items. Item #1 alleges that DMVA violated Alaska Occupational Health & Environmental Code 04.0101(e) by failing to implement adequate

engineering or administrative controls to prevent employees from becoming overexposed to air contaminants. Item #2 alleges that a written respiratory protection program was not in effect as required by Alaska General Safety Code 01.0403(e)(3); Item #3 alleges that DMVA violated AS 18.60.058 by failing to timely report an occupational accident involving one of its employees (Tom Butler) and the subsequent overnight hospitalization of that employee. The violations alleged in Citation #3 were classified as "other" (non-serious) violations and no monetary penalty was assessed.

A timely notice of contest of the citations and penalties was filed by Col. Paul Lindemuth of the Alaska Air National Guard on March 20, 1987. Subsequently several legal memoranda were also submitted by the Staff Judge Advocate for the Alaska National Guard. These memoranda raised legal objections to DOL's enforcement of the citations and penalties on the grounds that DOL allegedly has no safety and health jurisdiction over Kulis Air National Guard Base and that Alaska occupational safety and health standards are preempted in this case by applicable federal laws and regulations.

A hearing was held before the Board in this matter on April 26, 1989, in Anchorage. DOL was represented by Assistant Attorney General Lisa Fitzpatrick. No one appeared on behalf of DMVA. Approximately one week prior to the hearing, the Staff Judge Advocate filed a memorandum indicating he would not be representing DMVA at the hearing. At the same time, DMVA separately requested representation by the Attorney General's Office and also questioned whether it had been given adequate notice of the hearing.

DOL presented evidence at the hearing in the form of witness testimony. The Board's file also contains legal memoranda and exhibits submitted by counsel for DOL and by the Staff Judge Advocate for the Alaska National Guard. DMVA did not submit any evidence with respect to the alleged violations in contest. The record was deemed closed at the conclusion of the hearing.

## II. Findings of Fact

1. Kulis Air National Guard (ANG) Base is a federal military installation in Anchorage. According to the DOL inspection report, there are approximately 250 persons employed at the base. Most of these are uniformed federal military personnel, but approximately 19-21 persons are civilian employees of DMVA, an agency of the State of Alaska. The civilian DMVA employees are primarily engaged in grounds maintenance at the base; they do not wear a military uniform, they are paid by the State of Alaska and their immediate supervisors are also DMVA employees.

2. Tom Butler has been a DMVA civilian maintenance worker at Kulis ANG Base since 1984. He is a member of Public Employees Union Local 71, as are the other 19-21 grounds maintenance workers. He is not in the National Guard nor does he wear a uniform. Much of his work is done in the main shop area of the engineering building at the base.

3. On or about January 21, 1987, Butler was assigned the task of resurfacing some metal grating with a non-slip chemical coating manufactured by 3M Company. He asked his foreman about the proper application of the chemical and was told to "just stir it well" and to allow the coating to cure at a specific temperature range for 6-8 hours. There was no information or warning printed on the container. He was also instructed to cure the coating in the loft of the main shop area, which had no exhaust vent or special device for air circulation and where he felt there was relatively poor ventilation. Butler would have preferred to use one of the two paint rooms which had special intake/exhaust ventilation devices.

4. After giving instructions, the foreman left Butler on his own. Butler was provided with gloves and an apron. There were no respirators available, nor was there a respiratory protection program. Butler stirred the thick chemical substance in the can for about an hour when he began to feel nauseous and ill. He was seen by a doctor, given oxygen and taken to the hospital in a state of narcosis (a deep stupor leading to unconsciousness or blackouts). Because of the lack of information regarding the chemical he had been using, it was difficult to treat his condition promptly and effectively. While in the hospital, Butler called DOL to request material safety data sheet (MSDS) information regarding the chemical he had been using. After the incident, Butler temporarily lost his sense of smell, had blackout episodes, lost his driver's license and, as a result, lost his job for a period of time.

5. On January 23, 1987, following receipt of Butler's call, DOL health compliance officer Kim Arlington was dispatched to conduct an accident investigation and inspection of Butler's workplace at Kulis ANG Base. Her instructions were to limit her inspection to work areas and conditions affecting state civilian employees only. She was given permission to enter the base and no objections were made at that time regarding the state's jurisdiction over the workplace. During the inspection Arlington was accompanied by David Henry (the building maintenance supervisor and a DMVA civilian employee) and Raymond Froembgen (the building maintenance foreman and also a DMVA civilian employee). Arlington also conducted opening and closing conferences with Major T.D. Duff (the base civil engineer and a federal military officer).

6. During the inspection, Arlington noted that there was no written hazard communication program covering the DMVA civilian employees, there were no material safety data sheets for the specific product Butler was using, and there was no safety and health training provided to DMVA maintenance employees. These findings became the basis for DOL's Citation #1.

7. Arlington also found that there were no effective engineering or administrative controls in place regarding the handling of toxic or hazardous chemicals. The main shop area was a large open area with only general, not localized, air ventilation. Moreover, there was no respiratory protection program or equipment available for DMVA employees handling paints, chemicals or other hazardous substances. Arlington also established that DMVA had failed to report Butler's overnight hospitalization within 24 hours after learning of the accident. DOL was thus prevented from taking timely air samples to determine if an overexposure to hazardous substances had occurred. These observations formed the basis of DOL's Citation #3.

8. At the hearing, Ray Jorgensen, chief of the industrial hygiene section at DOL, testified that Citation #1 was classified as a "serious" because of the likelihood of serious bodily harm or death in the event of an accident. He also explained how the proposed monetary penalty was calculated using the guidelines in DOL's compliance manual.

### III. Conclusions of Law

#### A. Objections to Hearing Notice

Approximately one week before the April 26, 1989 hearing, DMVA questioned whether it had been given proper and adequate notice of the hearing. The record discloses that hearing notices had been sent to DMVA's building maintenance superintendent, DMVA's building maintenance foreman, and to four Alaska National Guard personnel at Kulis ANG Base who were involved in either the inspection or the subsequent contest.

We find that DMVA's notice objections are without merit. The original citations and the ensuing hearing notice indicate that the employer cited is the state Department of Military & Veterans Affairs. MSgt. Leahy's letter of April 3, 1987, clarified that the notice of contest filed by Col. Lindemuth sufficed to preserve DMVA's right to contest the citations. Moreover, Staff Judge Advocate Major Gary Bowen's legal memorandum of April 21, 1987, was copied to Charles Borg, the Deputy Commissioner at DMVA. It is clear that DMVA was aware of the citations and pending contest, and that its

interests were being represented by Alaska National Guard officials. Accordingly, we conclude that the hearing notices sent to the officials who had filed the notice of contest and who had been representing DMVA's interests for over two years in this matter gave sufficient notice of the hearing to DMVA.

We also conclude that the hearing notices sent to DMVA's building maintenance superintendent and foreman were equally sufficient to put DMVA on notice of the impending hearing. Both the superintendent and foreman had been actively involved in the matter since the initial accident investigation and it is reasonable to assume (given the quasi-military structure of DMVA) that they kept their superiors informed about the progress of the case.

In addition, we further conclude that DMVA had sufficient actual notice of the hearing that its rights to appear and defend were not prejudiced. It could have easily sent a representative to the hearing to explain to the Board why it was not prepared to proceed. In our view, DMVA's failure to attend the hearing or otherwise explain its non-appearance after vigorous legal objections had been made on its behalf reflects not only a callous disregard for safety and health matters but also flouts the adjudicatory responsibilities of this Board.(1)

B. Jurisdiction and Preemption

Through legal memoranda from the Staff Judge Advocate of the Alaska National Guard, DMVA has asserted that the State of Alaska has no jurisdiction over working conditions at Kulis ANG Base affecting state civilian employees of DMVA. It is also asserted that state safety and health regulations in this matter are preempted by the federal hazard communication standards and by U.S. Air Force safety and health regulations.

---

(1) In his memorandum of April 20, 1989, Staff Judge Advocate Bowen states that his participation was "limited to protecting the federal interests involved" and that since in his view those interests had been vindicated by the Attorney General's Opinion of February 8, 1989, he now became, in his own words, "a bemused observer to what I consider [a] useless churning of the State bureaucracy." We are disturbed by Major Bowen's sudden withdrawal only a week prior to the hearing; neither the contest letter from Col. Lindemuth nor any other materials filed by Alaska National Guard officials indicated that they were not speaking for DMVA or that their participation was limited in any fashion. We also find Major Bowen's comments regarding this adjudicatory process to be inappropriate and unprofessional.

Both of these issues were the subject of a detailed Attorney General's Opinion dated February 8, 1989, by Assistant Attorney General Jan Hart DeYoung and were further discussed in DOL's motion for affirmance of the citations dated April 17, 1989. We have reviewed these memoranda and we adopt their reasoning in its entirety. Accordingly, we reach the following legal conclusions in this matter:

1. The State of Alaska has safety and health jurisdiction over non-federal civilian employees at a federal military installation who are performing work that is not "military-unique."

2. The work performed by DMVA civilian maintenance employees at Kulis ANG Base was not "military-unique."

3. Enforcement of Alaska occupational safety and health laws with respect to DMVA civilian maintenance employees at Kulis ANG Base does not conflict or interfere with federal activities or operations at the base.

4. Neither federal OSHA occupational safety and health standards nor U.S. Air Force safety and health regulations preempt the enforcement of Alaska occupational safety and health laws in this matter.

#### C. Citations and Penalties

The factual evidence presented by DOL regarding the specific safety and health violations has not been disputed or contradicted by DMVA. We are satisfied that each alleged violation has been proved. In addition, we believe that Citation #1 was correctly classified as "serious" and that the accompanying penalty of \$420 is appropriate under the circumstances.

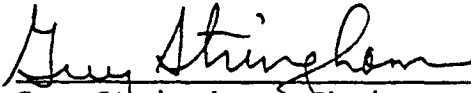
However, we disagree with DOL's classification of Items #1 and #2 of Citation #3 as non-serious. In our opinion, DMVA's failure to implement adequate engineering or administrative controls, together with its failure to establish a respiratory protection program, are serious safety violations which resulted in serious physical harm to DMVA employee Tom Butler. Had DMVA provided adequate ventilation for the handling of the chemical in question, along with proper respiratory equipment and instruction, this accident might not have occurred. Accordingly, we believe that each of these violations should have been classified as "serious" and that each should carry an appropriate penalty of \$750. Finally, we agree that Item #3 of Citation #3 was properly classified as non-serious with no monetary penalty.

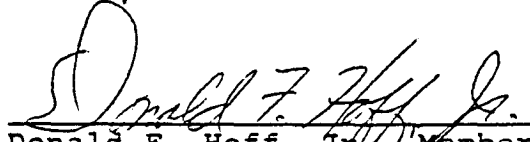
IV. Order

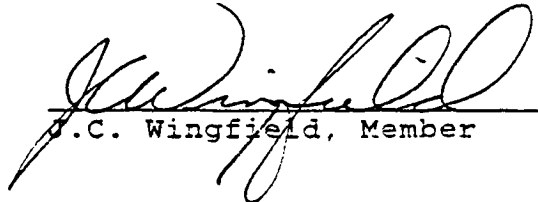
1. Citation #1, Items #1a, #1b and #1c are affirmed as a single "serious" violation with a penalty of \$420.
2. Citation #2 is dismissed.
3. Citation #3, Item #1 is affirmed and reclassified as a "serious" violation with a penalty of \$750.
4. Citation #3, Item #2 is affirmed and reclassified as a "serious" violation with a penalty of \$750.
5. Citation #3, Item #3 is affirmed as an "other" violation with no monetary penalty.

DATED this 11<sup>th</sup> day of July, 1989.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

  
\_\_\_\_\_  
Guy Stringham, Chairman

  
\_\_\_\_\_  
Donald F. Hoff, Jr., Member

  
\_\_\_\_\_  
J.C. Wingfield, Member

