

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

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
vs.)
)
QUEST ENVIRONMENTAL INC.,)
)
Contestant.)

Docket No. 88-733
Inspection No. Ti-5704-005A-88

DECISION AND ORDER

This matter came before the Board for a hearing on March 16, 1989, in Anchorage, Alaska. The State of Alaska, Department of Labor (hereinafter "the Department") was represented by Assistant Attorney General Lisa Fitzpatrick. Quest Environmental Inc. (hereinafter "the Contestant") was represented by its owner, John Johnston. Both parties submitted evidence in the form of witness testimony and documentary exhibits, and the record was deemed closed at the conclusion of the hearing.

This case arose from a citation issued by the Department following a health compliance inspection of Contestant's worksite at Ft. Wainwright near Fairbanks from January 15 through March 2, 1988. The Department's amended citation, dated February 24, 1989, contains three separate items. At the hearing, the Department notified the Board that

it wished to dismiss Item #1 (relating to an asbestos abatement plan). Remaining in contest before the Board, therefore, are Items #2 and #3. Item #2 of the citation alleges that Contestant violated Alaska General Safety Code 01.0403(a)(2) by failing to establish and maintain an adequate written respiratory protection program. Item #3 of the citation alleges that Contestant violated Alaska Hazard Communication Code 15.0101(e)(2) by failing to develop and implement an adequate written hazard communication program. Each of the two items was classified as an "other" (i.e. non-serious) violation and no monetary penalty was assessed.

Summary of the Evidence

Compliance officer Nathan Tibbs testified that on January 15, 1988, he began a health compliance inspection of Contestant's worksite at a major demolition/asbestos removal project at Ft. Wainwright near Fairbanks. Contestant was performing environmental monitoring in support of the asbestos removal contractor. The inspection had been prompted by a complaint of asbestos overexposure against the removal contractor. Under the Department's guidelines, the inspection was expanded to include Contestant since it was a subcontractor on the project.

Tibbs further explained that at the time of the inspection, Contestant was working with the Department's voluntary compliance section to put together its respiratory

and hazard communication programs but the task had not yet been completed. Because the inspection was triggered by a complaint (even though the complaint was not specifically against Contestant), the Department's guidelines required that the health compliance function take precedence over the voluntary compliance function; if the inspection had been a "programmed" (i.e. randomly scheduled) one, the health compliance section would have deferred to the voluntary compliance unit and no citations would have been issued.

With respect to the alleged violations themselves, Tibbs testified that Contestant did have rudimentary written programs for respiratory protection and hazard communication but that these were inadequate and insufficient under the applicable codes. The hazard communication program posted by Contestant was merely a blank sample from the Department; none of the specific information had been filled in. Moreover, Contestant's respiratory protection program was nothing more than a generic guide that failed to prescribe the specific equipment or procedures for the work at hand. Finally, Tibbs noted that both items were cited as "non-serious" because Contestant did have some elements of the written programs in place and no actual overexposure to asbestos was found at the worksite.

John Johnston testified for Contestant. He explained that Contestant was working with the Department's voluntary compliance section to put together the required written

programs for hazard communication and respiratory protection but that the effort was halted when the health compliance enforcement unit got involved. He stated that the company did have some basic materials available for employees concerning respiratory protection and hazard communication. He acknowledged that these materials were insufficient under the code and said that it would have taken several more months to complete adequate written programs. Contestant was willing to continue working with voluntary compliance to complete the written programs.

Findings of Fact and Conclusions of Law

We have examined the materials on respiratory protection and hazard communication put together by Contestant. Although these materials cover some of the elements of an adequate written program as described in the applicable codes, we find Contestant's materials are incomplete and insufficient under the technical requirements of those codes.

However, we also find that Contestant was making a good faith effort to comply with the code requirements, as evidenced by its cooperation with the voluntary compliance section. There is every reason to believe that given sufficient time, Contestant would have completed adequate written programs in compliance with the code. As a result of its efforts to comply, we believe that Contestant was fulfilling the spirit if not the letter of the law. Moreover, there is no

evidence that Contestant's employees were ever exposed to any actual health hazard. We think these factors should have been taken into consideration by the Department and that this matter could easily have been settled at the informal conference stage. When an employer is making a good faith effort to work with voluntary compliance, we have serious reservations about the enforcement section overriding such cooperative activity. We feel that to enforce a technical violation of the codes under these circumstances would promote disrespect for the OSHA law and would run contrary to its spirit and legislative intent. Accordingly, we conclude that the alleged violations should be denied and dismissed.

Order

1. Items #2 and #3 of the citation are dismissed.

DATED this ____ day of _____, 1989, at
Juneau, Alaska.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

Guy Stringham, Chairman

Donald F. Hoff, Jr., Member

J.C. Wingfield, Member

