

STATE OF ALASKA

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

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AUG 10 1992

Law Offices of Robert W. Landau

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
v.)
)
STATE OF ALASKA,)
DEPARTMENT OF CORRECTIONS,)
)
Contestant.)

Docket No. 91-908
Inspection No. Ma-9066-116-91

DECISION AND ORDER

The State of Alaska, Department of Corrections (DOC) contests a "failure to abate" notice issued by the State of Alaska, Department of Labor (DOL) after an occupational safety and health inspection at the Cook Inlet Pre-Trial Facility (CIPTF) in Anchorage on October 10, 1991.

The failure to abate notice alleges that DOC failed to correct a citation issued after an earlier inspection at CIPTF on July 3, 1991. The citation alleged that DOC's Infection Control Program was inadequate to protect correctional officers and other employees from exposure to bloodborne pathogens such as the human immunodeficiency virus (HIV) and the hepatitis B virus (HBV). The citation further alleged that DOC failed to provide HBV

vaccinations to all employees at risk. DOL alleged that DOC's failure to protect all of its employees from such risks violates AS 18.60.075(a)(4) which requires an employer to do "everything necessary to protect the life, health and safety of employees."

As part of the failure to abate notice, DOL assessed a monetary penalty of \$8,000.

Pursuant to DOC's contest of the failure to abate notice, a hearing was held before the full Board in Anchorage on June 24, 1992. DOL was represented by Dennis Smythe, Chief of Compliance. DOC was represented by Richard Bentson, Director of Statewide Programs, and Dr. C. W. Townsend, Medical Director. Both parties presented witness testimony, documentary evidence and oral arguments. Upon review and consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. On July 3, 1991, DOL Compliance Officer Krystyna Markiewicz conducted an occupational safety and health inspection at DOC's Cook Inlet Pre-Trial Facility, 1300 East Fourth Avenue, Anchorage.

2. The inspection was prompted by a formal complaint from a DOC correctional officer. According to DOL records, the complainant alleged that:

1. Approximately 84 correctional officers who work during four work shifts are potentially exposed to HIV/HBV positive inmates, especially during combative, assaultive situations (i.e.

breaking up fights, treating minor injuries) or during the performance of emergency medical procedures (i.e. CPR) involving inmates.

2. Correctional officers are not provided with the identity of known HIV/HBV positive inmates.

3. There are no procedures developed, implemented or provided to correctional officers regarding the handling of HIV/HBV positive inmates during combative/assaultive situations where bloodborne body fluids may consequently be exchanged.

(DOL Exhibit 1).

3. According to her inspection notes, Compliance Officer Markiewicz made the following observations during the inspection:

CIPTF's Infection Control Program is in compliance with CDC [Center for Disease Control] recommendations, but only medical and dental staff is covered.

....

Correctional officers are not included in the IC Program. CO's are not exposed to body fluids as often as health care staff, however CO's are exposed to a range of assaultive and disruptive behavior during which they may potentially become exposed to blood or other body fluids containing blood. It is impossible to predict how often.

Behaviors of particular concern are biting attacks resulting in blood exposure and attacks with sharp objects. Such behavior may occur in a range of law enforcement situations including lock-up operations, searching prisoners or their cells for hypodermic needles or weapons, or when subduing violent and combative inmates.

In fact, there are some HIV/HBV positive tested inmates in CIPTF, some of them very aggressive. In 1989 five correctional officers were involved in an incident with an HIV/HBV positive tested inmate in which blood was

exchanged. These employees received confidential medical evaluations and were offered counselling. However, there are no written procedures which would mandate use of personal protective equipment in such cases.

...

The HBV vaccination has not been offered to correctional officers. Their training did not include familiarization with CIPTF's Infection Control Program.

(DOL Exhibit 1).

4. Markiewicz determined that there were approximately 135 exposed employees at CIPTF who were not covered by the Infection Control Program. These include correctional officers who have regular contact with inmates, and laundry workers who might come into contact with bloody clothes from HIV/HBV-positive inmates.

5. DOC acknowledges that CIPTF has or has had inmates who are HIV- or HBV-positive. However, due to federal confidentiality requirements, their identities are not released to correctional officers or other DOC employees who may be exposed to body fluids from such inmates.

6. A single exposure can be sufficient to transmit either HIV or HBV. However, there is no evidence that any employee at CIPTF has actually contracted HIV or HBV from a work-related exposure.

7. In the event that HIV or HBV were transmitted to unprotected employees, HIV could ultimately result in death from AIDS, while HBV could result in a serious illness such as cancer

of the liver. Alaska has one of the highest rates of HBV infection in the world, particularly among the Native population.

8. At the time of the original inspection in this case, DOL's enforcement guidelines for occupational exposure to HIV/HBV were contained in OSH Program Directive 90-9. (DOL Exhibit 5). Although Program Directive 90-9 is primarily directed at health care workers, the definition of "health care workers" broadly includes "laundry workers" and "others whose work involves contact with body fluids." The Program Directive incorporates CDC guidelines for the prevention of transmission of HIV/HBV and other bloodborne pathogens.

9. CDC's "Guidelines for the Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Health Care and Public Safety Workers" were published in the June 23, 1989 issues of Morbidity and Mortality Weekly Report (MMWR). (DOL Exhibit 6). According to DOC's medical director, Dr. Townsend, DOC has routinely received the MMWR for several years.

10. Because at the time of the inspection there was no regulatory provision specifically addressing occupational exposure to HIV/HBV in correctional facilities, Program Directive 90-9 provided that such hazards should be cited under the "general duty clause" in AS 18.60.075(a)(4). Permission to use the general duty clause in this case was requested by DOL staff and was approved by Commissioner Nancy Bear Usera on August 12, 1991. (DOL Exhibit 1).

11. DOL's original citation in this matter was issued on or about September 11, 1991. The citation was classified as "serious" and included a monetary penalty of \$600. The abatement date specified in the citation for correction of the violation was October 2, 1991, approximately 20 days later.

12. DOC did not contest the original citation and paid the \$600 penalty.

13. DOC did not request any extension of the October 2, 1991 abatement date as permitted by law. The procedure for requesting an extension or modification of the abatement date was explained on Page 2 of DOL's citation.

14. On or about October 9, 1991, a representative of the Alaska State Employee's Association notified DOL that there had been no corrective action taken with respect to the citation issued to DOC. Nor had DOC returned the Notice of Corrective Action form enclosed with the citation. Accordingly, Compliance Officer Markiewicz was dispatched to conduct a follow-up inspection at CIPTF on October 10, 1991.

15. During the follow-up inspection, Compliance Officer Markiewicz determined that no corrective action had been taken by DOC to abate the cited violation.

16. On October 22, 1991, DOL issued the "failure to abate" notice that is the subject of this contest. The notice assessed an additional penalty of \$8,000, representing a fine of

\$1,000 per day for 8 days of noncompliance between October 2-10, 1991.

17. DOC contested the "failure to abate" notice by memorandum dated October 30, 1991.

18. DOC subsequently amended its Infection Control Program to cover all employees potentially exposed to HIV/HBV positive inmates. As of the date of the hearing, however, DOC had not yet provided HBV vaccinations to correctional officers and other exposed employees, purportedly because of a national shortage of HBV vaccine as well as the substantial cost and time required to inoculate exposed DOC personnel on a department-wide basis (approximately 900 employees). DOC plans to begin a comprehensive HBV immunization program as soon as the necessary vaccine can be obtained.

19. According to DOL's chief of compliance, Dennis Smythe, the Municipality of Anchorage has recently provided HBV vaccinations to all its correctional employees and emergency medical technicians (EMT's), indicating the availability of the HBV vaccine.

CONCLUSIONS OF LAW

Background

State agencies, such as the Department of Corrections, are covered by the Alaska Occupational Safety and Health (OSH) Act and are subject to the enforcement jurisdiction of the Department

of Labor. See AS 18.60.105(a)(5); see also Attorney General's Opinion, File No. J-66-010-79 (March 27, 1980).

At the time of the initial inspection in this matter, there was no specific regulatory standard regarding occupational exposure to bloodborne pathogens such as HIV and HBV.¹ Therefore, DOL cited DOC under the general duty clause in the Alaska OSH Act, AS 18.60.075. Upon reinspection, DOL issued the failure to abate notice as authorized by AS 18.60.093(a) and imposed an additional penalty as authorized by AS 18.60.095(d). Since the failure to abate notice is based on the earlier general duty clause violation, we must decide (1) whether the general duty clause violation was justified; (2) whether DOC unjustifiably failed to abate the general duty clause violation; and (3) whether the additional penalty of \$8,000 for failure to abate is appropriate.²

¹ On December 6, 1991, federal OSHA promulgated a comprehensive regulatory standard regarding occupational exposure to bloodborne pathogens such as HIV and HBV. See 29 C.F.R. Part 1910.1030. As a participating state in the national OSHA program, Alaska was required to adopt substantially the same standard under state law, which the Department of Labor did effective July 6, 1992.

² When an employer contests a failure to abate notice, it may challenge the validity of the original citation even if the original citation was not contested. See York Metal Finishing Co., 1 OSHC 1655, 1973-74 OSHD ¶ 17,633 (OSHRC 1974). If the original citation is found to be invalid, this would invalidate the subsequent failure to abate notice. However, the uncontested original citation would not be affected since it had previously become final by operation of law. See AS 18.60.093(a).

General Duty Clause

AS 18.60.075(a)(4) provides:

An employer shall do everything necessary to protect the life, health and safety of employees including, but not limited to:

...

(4) furnishing to each of his employees employment and a place of employment which are free from recognized hazards which, in the opinion of the commissioner, are causing or are likely to cause death or serious physical harm to his employees.

There is little doubt that occupational exposure to bloodborne diseases such as HIV and HBV has become a recognized hazard for law enforcement agencies and correctional facilities nationwide. DOC itself recognized this hazard by developing an Infection Control Program in 1989 to protect its health care staff. However, DOC failed to extend this protection to correctional officers and other employees even though it knew or should have known that they were potentially exposed to HIV/HBV positive inmates. Moreover, DOC medical staff, through the weekly MMWR reports, either was aware or should have been aware of the CDC guidelines for the prevention of transmission of HIV and HBV to correctional facility employees.

Furthermore, there is little doubt that employees who contract HIV or HBV as a result of occupational exposure are likely to suffer serious physical harm or death, such as liver cancer caused by hepatitis B or death as a result of AIDS. In recognition of these serious risks and in accordance with the statutory

language of AS 18.60.075(a)(4), the DOL commissioner personally approved the use of the general duty clause in this case. We conclude that in the absence of a specific standard covering occupational exposure to bloodborne diseases, DOL properly cited DOC under the general duty clause and that the elements of a general duty clause violation have been established by the evidence presented.³

Failure to Abate

We next consider whether the failure to abate notice was justified. Under OSHA law, to establish a failure to abate violation, DOL must show that (1) the original citation has become final; and (2) that the same violative condition was found on reinspection. See Rothstein, Occupational Safety and Health Law, § 294 at 321. We find that these requirements have been satisfied in this case. First, the original general duty clause violation was not contested by DOC and thus became final by operation of law.

Second, the DOL compliance officer on reinspection found that DOC had taken no steps to correct the violation or request additional time to comply. Thus we conclude that DOL has established a prima facia case of failure to abate.⁴

³ For a discussion of the general duty clause, see generally Rothstein, Occupational Safety and Health Law, §§ 141-152 (3rd ed. 1990).

⁴ For a discussion of abatement under OSHA law, see generally Rothstein, Occupational Safety and Health Law, §§ 291-99.

In defense to the failure to abate citation, DOC makes a number of objections.⁵ DOC argues that the approximately 20-day abatement period for compliance was unreasonable given the large number of correctional officers and other employees who must be vaccinated against HBV. DOC also cites the national shortage of the HBV vaccine which allegedly made it difficult if not impossible to correct the violation in a timely manner. DOC further notes the substantial cost of compliance with the CDC guidelines, including the cost of providing HBV vaccinations to each potentially exposed employee.⁶

We find that DOC's objections are without merit. Regarding the reasonableness of the abatement period, there is no reason DOC could not have at least taken the initial steps toward abatement within the prescribed 20 days, such as (1) amending its written policies to cover all exposed employees at CIPTF; and (2) ordering the HBV vaccine for already-exposed employees. DOC also could have requested an extension of the abatement date if more time was needed for compliance, yet it failed to do so. See 8 AAC 61.135. We further note that DOC had a medical director on staff who presumably was available to implement and supervise abatement.

⁵ DOC bears the burden of proof as to any affirmative defenses to the failure to abate notice.

⁶ Much of DOC's defense is premised on the difficulty of compliance on a department-wide basis. However, the citation and failure to abate notice apply only to CIPTF. Thus, DOC's arguments with respect to its other facilities are beyond the scope of this proceeding.

In sum, we find DOC's total inaction during the abatement period to be unreasonable and unjustified.

Similarly, we cannot accept DOC's argument with respect to the availability of the HBV vaccine. Testimony at the hearing revealed that the Municipality of Anchorage has offered HBV vaccinations to its correctional employees and EMT's, indicating that the vaccine has in fact been available. There was no evidence that DOC even attempted to order the HBV vaccine during the abatement period. Even if sufficient vaccine was not available to inoculate all potentially-exposed DOC employees on a department-wide basis, DOC could have made some effort to obtain vaccine for the smaller number of employees at CIPTF who already had been exposed to HBV-positive inmates.

Moreover, we cannot accept DOC's objection regarding the cost of compliance. Under OSHA law, an employer asserting a defense of "economic infeasibility" must prove that (1) compliance is extremely costly, and (2) the employer cannot absorb or pass on the cost. Economic infeasibility is established only when the employer's existence as an entity is financially imperiled by compliance. Faultless Division, Bliss and Laughlin Industries, Inc. v. Secretary of Labor, 674 F.2d 1177, 1190 (7th Cir. 1982). While we recognize that the cost of compliance in this case may be substantial, there has been no showing that DOC's existence is financially threatened. Accordingly, we must reject economic infeasibility as a defense.

Penalty

Finally, we consider the appropriateness of the \$8,000 penalty. AS 18.60.095 (d) states:

An employer who fails to correct a violation within the period permitted for its correction for which a citation has been issued may be assessed by the commissioner a civil penalty of not more than \$1,000 for each day during which the failure to correct the violation continues.

DOL assessed the maximum penalty of \$1,000 for each day between the October 2, 1991 abatement date and the October 10, 1991 reinspection date.⁷

Upon consideration, we believe DOL's penalty assessment for the failure to abate is justified for the following reasons: (1) DOC failed to take any action at all to correct the violation within the prescribed abatement period; (2) DOC failed to request a modification of the abatement period as permitted by law; (3) DOC management knew or should have known that certain inmates at CIPTF were HIV- or HBV-positive and that there was a present risk of transmission to correctional officers and other employees; (4) the citation was prompted by a formal employee complaint; and (5) the violation is of serious gravity given the significant risk of serious illness or death in the event of contracting HBV or HIV. We believe the maximum penalty provided in the OSH Act for failure to abate violations is justified when an employer has taken no

⁷ Under recently-enacted legislation (HB 33), the maximum penalty for failure to abate violations has been increased from \$1,000 to \$7,000 for each day of violation.

action whatsoever to abate the hazard. The fact that the employer in this case is a large government bureaucracy with a long chain of command in no way excuses its failure to promptly respond to the violation. Accordingly, we find no basis to modify the assessed penalty.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered as follows:

1. The failure to abate violation issued by DOL as a result of its inspection at CIPTF on October 10, 1991, is AFFIRMED.

2. The \$8,000 penalty assessed by DOL for failure to abate is AFFIRMED.

3. Within 15 days of the date of this decision, DOC shall notify DOL of the status of its abatement efforts at CIPTF. If abatement has not yet been completed, DOC may petition for a modification of the abatement period pursuant to 8 AAC 61.135.

4. DOL shall conduct such follow-up inspection as deemed necessary to verify DOC's abatement.

DATED this 6th day of August, 1992.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

By: Wayne A. Gregory
Wayne A. Gregory, Chairman

By: Donald F. Hoff, Jr.
Donald F. Hoff, Jr., Member

By: Lawrence D. Weiss
Lawrence D. Weiss, Member