

STATE OF ALASKA

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD

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STATE OF ALASKA
DEPARTMENT OF LABOR,
Complainant,

vs.

GREAT PACIFIC SEAFOODS, INC.,
Contestant.

Docket No. 93-960
Inspection No. Sa-9589-196-92

DECISION AND ORDER

This matter arises from an occupational safety and health inspection conducted by the State of Alaska, Department of Labor (Department) at a workplace under the control of Great Pacific Seafoods, Inc. (Great Pacific) in Whittier, Alaska.

As a result of the inspection, the Department issued six citations to Great Pacific for violations of Alaska occupational safety and health codes. Great Pacific contested each of the Department's citations. Prior to the Board hearing, however, the parties entered into a partial settlement agreement resolving citations 3-6. Accordingly, only citations 1 and 2 were contested at the hearing.

OSH REVIEW BOARD

RECEIVED 8/23/93

Citation 1 alleges that Great Pacific violated Occupational and Industrial Structures (O&IS) Code 02.110(c)(6) by providing air mattresses instead of beds in an apartment rented by the company to house six of its employees. The violation was classified as a "repeat" and a penalty of \$180 was assessed.

Citation 2 alleges that Great Pacific violated O&IS Code 02.110(c)(7) by failing to elevate off the floor the six air mattresses provided as beds to employees and by failing to allow sufficient space between the air mattresses. This violation also was cited as a "repeat" and a penalty of \$180 was assessed. At the Board hearing, however, the Department agreed to reclassify this violation as "other than serious" with no monetary penalty since the underlying facts were not substantially similar to the previous violation on which the "repeat" classification had been based.

The Board hearing was held in Anchorage on June 4, 1993. The Department was represented by Assistant Attorney General Toby N. Steinberger. Great Pacific was represented by Roger D. Stiles, General Manager. The parties submitted witness testimony, documentary evidence and oral argument. Upon consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On September 1, 1992, Department compliance officer Danny Sanchez conducted an occupational safety and health

inspection of a seafood processing plant under the control of Great Pacific at Whittier Street, Whittier, Alaska. Sanchez was accompanied on the inspection by Eric Shortt, the Department's assistant chief of compliance.

2. As part of the inspection, Sanchez and Shortt asked to look at housing provided by the company for its employees at the Begich Towers apartment building in Whittier.

3. One of the apartment units inspected by Sanchez and Shortt was Apartment 603 in the Begich Towers. The apartment was being used to house six of the company's employees. The employees had been transported by the company from Seattle to work at the Whittier plant during the processing season.

4. According to Sanchez and Shortt, the employees housed in Apartment 603 were sleeping on air mattresses placed on the floor and spaced approximately one foot apart. The air mattresses were provided by Great Pacific.

5. During the peak of the fishing season, Great Pacific employed about 70-80 workers at its Whittier plant. Approximately half the employees obtained their own housing or chose to stay at the city campground. The remainder were housed in apartments provided by the company.

6. Great Pacific owns three furnished apartments in the Begich Towers which it uses to house employees. In addition, the company has rented several other unfurnished apartments (including

Apartment 603) on a temporary basis as needed to house additional employees.

7. Apartment 603 of the Begich Towers is owned by the City of Whittier. In a document entitled "Rental Agreement With Option to Purchase" dated August 27, 1992, the City of Whittier agreed to rent Apartment 603 to Great Pacific for \$500 per month. As part of the rental agreement, Great Pacific agreed to pay a security deposit and a monthly condominium fee. Great Pacific also paid for the utilities for the apartment.

8. According to Great Pacific's general manager, Roger Stiles, the company rented Apartment 603 for its employees because housing was scarce in Whittier and many employees were unable to obtain housing on their own. The company charged rent in the amount of \$2 per day to each employee housed in the apartment which was deducted from the employee's paycheck. The rent collected from employees did not entirely defray the company's cost in renting the apartment.

9. Once the employees began living in the apartments, each employee was given his own key and the company retained no control over the use of the apartment.

10. Great Pacific was cited previously for not furnishing proper beds to employees in company-provided housing in Whittier following an inspection on August 11, 1990. Great Pacific did not contest the previous citation and paid the assessed penalty amount in full.

CONCLUSIONS OF LAW

Section 02.100 of the O&IS Code sets forth the scope of the Code as follows:

This subchapter applies to all places of employment involving industrial structures, and also to employment-related housing where employers provide eating, living, and/or sleeping accommodations to their employees.

Section 02.110 of the Code establishes requirements for labor camps. A "labor camp" is defined in section 02.102(a)(4) of the Code as

... any shelter, or shelters, together with the tract of land and appertaining thereto, established for the housing accommodation of persons engaged in any occupation or work for which a work force is maintained in quarters provided by the employer.

Section 02.110(c)(6) of the Code provides:

Each employee shall be furnished with a bed constructed of metal or like material that is impervious to moisture, e.g., wood, which has been varnished or painted. Each bed shall be no less than 36 inches x 78 inches.

Section 02.110(c)(7) of the Code further provides:

Suitable storage facilities such as wall lockers for clothing and personal articles shall be provided in each room for sleeping purposes. The beds shall be spaced not closer than 42 inches laterally and 48 inches end to end and shall be elevated at least 15 inches from the floor to the top of the sleeping surface of the bed. If double-deck bunks are used, they shall be spaced not less than 48 inches laterally and 60 inches end to end. The minimum clear space above each bunk shall be not less than 30 inches. Triple-deck bunks are prohibited. [Emphasis added.]

Great Pacific does not dispute that the air mattresses in Apartment 603 of the Begich Towers violated the Occupational and Industrial Structures Code requirements concerning the provision of beds and the proper spacing and elevation of beds. Nor does the company dispute the classification of the violations or the penalty amount assessed. The basis of Great Pacific's contest is that Apartment 603 and other similarly rented apartments were not "employment-related housing" within the scope of the O&IS Code. The company argues that it merely rented the apartments on behalf of its employees due to the difficulty of securing housing in Whittier; once the employees began living in the apartments, the company did not control their use of the units and therefore should not be responsible for any housing violations. The Department responds that while an employer is not obligated to provide housing for its employees, if it chooses to do so such housing becomes subject to the requirements of the O&IS Code.

From the evidence presented, we conclude that Apartment 603 of the Begich Towers was clearly "employment-related housing" subject to the requirements of the O&IS Code. First, the apartment was directly rented by Great Pacific for the sole purpose of providing housing to its employees. Ownership of the apartment is irrelevant to the question of whether the housing is employment-related; the Code makes no distinction between owned and rented housing. Second, Great Pacific in effect subsidized the cost of housing its employees, since the total rent collected from

employees did not defray the company's cost of renting the apartment. This undermines Great Pacific's argument that it was merely "advancing" the money to rent the apartment on the employees' behalf. Third, Great Pacific provided the air mattresses that are the subject of the contested citations. By voluntarily undertaking to provide the apartment and certain furnishings such as the air mattresses, the company effectively subjected itself to the occupational safety and health requirements governing employment-related housing.

We further conclude that the OSHA standards concerning employment-related housing are not limited to remote work sites. Nothing in the O&IS Code limits its coverage to remote work sites. This conclusion is consistent with a recent decision of the Alaska Supreme Court regarding coverage under the Alaska Workers' Compensation Act. See F. LeSuer-Johnson v. Rollins Burdick Hunter, 808 P.2d 266, 267 (Alaska 1991) (Alaska Workers' Compensation Act provision regarding employer-provided facilities is not limited to remote job sites as the statute is written.)

We also believe our decision in this case is consistent with federal OSHA case law. In the leading federal court decision involving employee housing under the OSH Act, the court adopted a relatively narrow view of whether employer-provided housing was sufficiently related to employment to come within the scope of the OSHA Act. Frank Diehl Farms v. Secretary of Labor, 696 F.2d 1325 (11th Cir. 1983). The court held that "[o]nly if company policy

or practical necessity force workers to live in employer-provided housing is the degree of coercion such that the hazards of apartment living are sufficiently related to employment to come under the scope of the Act." Id. at 1333. In the present case, while employees were not required by company policy to live in employer-provided housing, the evidence is undisputed that the employees living in Apartment 603 would have had little or no chance to obtain housing on their own. "Practical necessity" forced these employees to live in employer-provided housing. Therefore, under the rationale of Frank Diehl Farms such housing was sufficiently employment-related to come within the scope of the OSHA housing standards.

Great Pacific additionally argues that compliance with the OSHA housing standards should be excused in this case because of the allegedly unique housing situation in Whittier. The company, however, could have requested a variance on this basis (as permitted by Alaska OSHA law) yet it did not do so. Under the OSH Act, a variance request is the appropriate way to address an employer's claim of unique circumstances or conditions. Moreover, we do not believe that compliance with OSHA requirements in this case, i.e. providing proper beds for its employees, would impose an undue burden on the company.

The company's final argument against enforcement of the cited code provisions is that employees will be the losers in the long run because the company simply will not provide employee

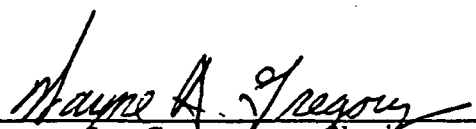
housing in the future. However, this is a policy argument that is outside the scope of our adjudicatory responsibilities. Although we recognize such an outcome is possible, we are nevertheless required to apply OSHA standards as they are currently written. Great Pacific's concerns in this regard are more appropriately directed to the Department in a variance request or, alternatively, as part of a petition to amend the OSHA housing standards as permitted by the Alaska Administrative Procedure Act.

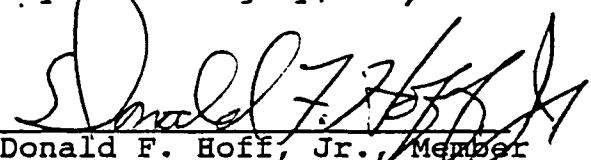
ORDER

1. Citation 1 is affirmed as a "repeat" violation with a penalty of \$180.
2. Citation 2 is affirmed as an "other than serious" violation with no monetary penalty.

DATED this 18 day of AUGUST, 1993.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD


Wayne A. Gregory, Chairman


Donald F. Hoff, Jr., Member

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APPEAL PROCEDURES

A person affected by an order of the OSH Review Board may obtain judicial review by filing a notice of appeal in the Superior Court as provided in the Alaska Rules of Appellate Procedure. The notice of appeal must be filed within 30 days from the date of filing of the order as certified below. After 30 days from the date of filing of the order, the order becomes final and is not subject to review by any court. AS 18.60.097.

CERTIFICATION

I hereby certify that on the 30th day of August, 1993, the foregoing Decision and Order in the matter of the Alaska Department of Labor vs. Great Pacific Seafoods, Inc., Docket No. 93-960, was filed in the office of the OSH Review Board at Juneau, Alaska and that on the same date a true and correct copy was mailed to each party at its address of record.



Kerin E. Geiger