

TONY KNOWLES, GOVERNOR

P.O. BOX 21149
JUNEAU, ALASKA 99802-1149
PHONE: (907) 465-5980
FAX: (907) 465-2107

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

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ROBERT W. LANDAU, HEARING OFFICER

STATE OF ALASKA,)
DEPARTMENT OF LABOR,)
)
Complainant,)
)
vs.)
)
ANCHORAGE COMMUNITY YMCA,)
)
Contestant.)
_____)

Docket No. 94-1046

DECISION AND ORDER

This matter arises from an occupational safety and health citation issued by the State of Alaska, Department of Labor (Department) to the Anchorage Community YMCA (YMCA) following a workplace inspection on February 11, 1994.

Item 1 was classified as "serious" and consists of 5 alleged violations grouped together. Item 1a alleges a violation of General Safety Code 01.0403(b)(1) for failure to have written procedures governing the selection and use of respirators. Item 1b alleges a violation of General Safety Code 01.0403(b)(2) for providing respirators that were approved only for protection against organic vapors and not against inorganic vapors such as chlorine gas. Item 1c alleges a violation of General Safety Code 01.0403(b)(3) for failure to instruct and train employees in the proper use of respirators. Item 1d alleges a violation of General Safety Code 01.0403(b)(10) for

failure to periodically review the medical status of employees using respirators. Item 1e alleges a violation of General Safety Code 01.0403(e)(5) for failure to follow proper fit testing procedures to assure safe respirator use. A monetary penalty of \$700 was assessed for the violations alleged in Item 1.

Item 2 alleges a violation of General Safety Code 01.0501(e) for failure to provide an emergency eye wash station in the immediate area where employees were handling hazardous chemicals. This violation was classified as "serious" and a penalty of \$700 was assessed.

Item 3 alleges a violation of Hazard Communication Code 15.0101(f)(4) for failure to assure that containers of hazardous chemicals were properly labeled and marked. This violation was classified as "serious" and a penalty of \$700 was assessed.

The YMCA filed a timely notice of contest challenging only the proposed penalties. A hearing was held before the Board in Anchorage on December 7, 1994. The Department was represented by Assistant Attorney General Toby Steinberger. The YMCA was represented by Executive Director Ed Slater. At the hearing the Department agreed to reclassify Item 2 as an "other than serious" violation with no monetary penalty. Therefore the scope of the hearing was limited to the appropriateness of the penalties assessed for Items 1 and 3. The parties presented 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 in this matter.

FINDINGS OF FACT

1. On December 16, 1993, a YMCA employee working as a pool lifeguard accidentally mixed sodium hypochlorite solution from one container with muriatic acid from another container, releasing chlorine vapors. The employee apparently assumed both containers contained the same chemical because the containers were the same color. One of the containers was missing its label.

2. Despite wearing a respirator, the employee experienced severe coughing and had difficulty breathing. A doctor who happened to be at the scene sent him for x-rays. Other than his initial reaction to the chlorine vapors, the employee apparently suffered no lasting injury or illness.

3. The incident was reported to the Alaska Department of Environmental Conservation (DEC). DEC in turn referred the matter to the Department.

4. On February 11, 1994, Department compliance officer Krystyna Markiewicz conducted an occupational safety and health inspection related to the chlorine incident. Upon investigation, Markiewicz determined that the following occupational safety and health code violations had occurred: the YMCA did not have written procedures governing the use of respirators and had not trained its employees in the proper use of respirators; the respirators provided to employees were approved only for protection against organic vapors and not inorganic vapors such as chlorine gas; the YMCA did not periodically review the medical condition of employees using respirators; the employees using respirators had not received fit testing to assure that the respirators were properly fitted; there was no emergency eye wash station in the

immediate area where hazardous chemicals were used; and one container of sodium hypochlorite solution was not marked or labeled.

5. Based on the Material Safety Data Sheet for the sodium hypochlorite solution, Markiewicz determined that the combination of the sodium hypochlorite and muriatic acid could cause severe injury or illness. Accordingly, she classified the alleged code violations as "serious."

6. Compliance officer Markiewicz estimated that the probability of injury resulting from the violations was low and that the severity of injury was moderate. Under the Department's penalty guidelines, the initial unadjusted penalty for each violation was \$2,000. The following adjustment factors were then applied to reduce the penalties: 40% for employer size; 15% for good faith; and 10% for no history of prior violations. After application of the adjustment factors, the proposed penalty for each item was reduced by 65% from \$2,000 to \$700.

7. After receiving the citations, the YMCA promptly abated and corrected each of the cited violations. The YMCA presented documentation showing that it had spent approximately \$3,700 to comply with the Department's respiratory protection and hazard communication requirements. In addition, the YMCA upgraded the responsibility for safety and health compliance to a higher position within its organization.

8. The YMCA also presented evidence of its current financial condition. For the period 7/1/93 - 6/30/94, the YMCA had a net deficit of \$39,464. For the period 7/1/94 - 10/31/94, the YMCA had a deficit of \$38,149. As a nonprofit

organization, the YMCA has experienced recent financial difficulties and has been in default with the Federal Deposit Insurance Corporation.

9. In August 1993, prior to the chlorine incident, the YMCA had requested and had received a voluntary compliance inspection of its workplace conducted by the Department's consultation section. The YMCA implemented most if not all of the recommendations made as a result of the voluntary compliance inspection.

CONCLUSIONS OF LAW

Since the YMCA does not contest the violations alleged by the Department, the only issue before the Board is the appropriateness of the proposed penalties assessed for Items 1 (\$700) and 3 (\$700). Item 2 was reduced by the Department to an "other than serious" violation with no monetary penalty.

AS 18.60.093(c) provides that the Board may affirm, modify or vacate a proposed penalty. In reviewing a proposed penalty, the Board is not required to follow or apply the Department's penalty calculation guidelines. *See* Mark A. Rothstein, *Occupational Safety and Health Law*, § 332 at 357 (3rd ed. 1990) (hereinafter Rothstein). Rather, the Board makes an independent determination of the penalty based on the particular circumstances of each case. Consideration may be given to a variety of factors, including the size of the business, the gravity of the violation, the good faith of the employer, and the history of previous violations. *See* AS 18.60.095(h). The Board may also consider other factors such as the financial condition of the employer. *See* Rothstein, § 337 at 363-64.

We believe there are several factors that justify a significant reduction in the proposed penalties. First, the YMCA took immediate steps to correct and abate the cited hazards. Second, it upgraded the responsibility for safety and health compliance within its organizational hierarchy. Third, the YMCA requested and received a voluntary compliance inspection not long before the chlorine incident occurred, and had implemented most if not all of the recommendations made. Fourth, we are persuaded that the YMCA has acted in good faith throughout and has demonstrated a genuine concern for the safety and health of its employees. Fifth, after reviewing the YMCA's most recent financial statements, we are persuaded that this nonprofit organization is experiencing financial difficulties and that payment of the proposed penalties in full would impose a significant financial hardship.

In consideration of the foregoing factors, we conclude that it is appropriate to reduce the proposed penalties to \$163.67 each for Items 1 and 3, for a total penalty of \$327.34.

ORDER

1. Items 1, 2 and 3 are affirmed as "serious" violations.
2. Item 2 is reduced to an "other than serious" violation with no monetary penalty.
3. The proposed penalties for Items 1 and 3 are reduced to \$163.67 each, for a total penalty of \$327.34.

DATED this 22 day of MARCH, 1995.

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: James J. Ginnaty
James J. Ginnaty, Member