

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 HEALTH AND SOCIAL SERVICES, )  
McLAUGHLIN YOUTH CENTER, )  
 )  
Contestant. )

Docket No. 90-818  
Inspection No. KU-9353-574-89

DECISION AND ORDER

This case arises from a citation issued by the State of Alaska, Department of Labor ("Department"), to the State of Alaska, Department of Health and Social Services, McLaughlin Youth Center ("MYC"), following the investigation of an occupational safety complaint made by an MYC employee.

The citation alleges MYC violated General Safety Code 01.0401(b)(1) by failing to provide employees with two-way radios that were reliable and in good working condition. The alleged violation was classified as "serious" and a monetary penalty of \$600 was assessed.

MYC timely contested the citation, bringing the matter within the Board's jurisdiction. A hearing was held in Anchorage on September 18, 1990. Board members Hoff and Weiss were present

and constituted a quorum. The Department was represented by Dennis Smythe, Chief of Compliance. MYC was represented by its Superintendent, George Buhite. The parties presented witness testimony, documentary exhibits and oral argument to the Board. The record was deemed closed at the conclusion of the hearing. Following are the Board's findings of fact, conclusions of law, and order.

#### FINDINGS OF FACT

1. The McLaughlin Youth Center is a residential correctional facility for juvenile delinquents in Anchorage (see Exhibit F).

2. On or about October 29, 1989, Katherine M. Dodson, an MYC employee, filed a complaint with the Department regarding allegedly unsafe working conditions at MYC (see Exhibit 1). Dodson consented to the release of her name and complaint pursuant to AS 18.60.087(b).

3. The relevant portion of Dodson's complaint states as follows:

The second issue is that McLaughlin is not providing us with a safe system of communication. The radios at McLaughlin are old and frequently do not work. Often times, Detention and the Closed Treatment Unit cannot hear each other on the radio and the two units are side by side in the building. Frequently, Detention or Cottage will not transmit or receive for short distances of under a mile. Radios frequently have so much static that transmission between cottages cannot be understood. Moreover, there needs

to be more than one portable radio on cottage. For example, when staff chasing an escapee leave they take the portable radio and leave the unit understaffed. The staff left on unit is expected to supervise the residents on two wings. In order to supervise the wings, it is necessary to leave the base station radio. If a staff had problems, they could call the 888 number for help, but very probably, there would be no one to help as most units have also sent staff on the chase and are at bare minimum.

4. The complaint was assigned to compliance officer Dick Kukowski, who made an on-site inspection at MYC on December 4, 1989. In the course of his inspection, Kukowski interviewed approximately eight or nine employees working in the four cottages, the Detention Unit, and the Closed Treatment Unit (see Exhibit 3). Most of the employees interviewed indicated that the two-way radios provided by MYC were old, unreliable, and ineffective up to 25 percent of the time. According to the employees, this situation had existed for several years.

5. Kukowski did not actually test the two-way radio system, but was present when the system was used by one of the "rover" employees and appeared to be working properly at that time.

6. Based on the information provided by MYC employees and supervising officials, the Department issued a citation to MYC for failure to provide a two-way radio system that was consistently reliable and effective. The citation was classified as "serious" due to the potential for injury to MYC employees in the event of an altercation with resident inmates where

assistance could not be quickly summoned because the two-way radio system was not working properly.

7. The initial monetary penalty for the violation was \$1,000. This amount was reduced by 30 percent for MYC's good faith in attempting to seek funds to purchase new radios and by an additional 10 percent for no previous history of similar violations, resulting in an assessed penalty of \$600. No reduction was given for employer size since MYC employs over 100 persons.

8. At the hearing, MYC officials stated the two-way radios were a backup communication system in the event of an emergency. The primary emergency communications system was the "888" telephone number to call for help from other units (see Exhibit A). The 888 telephone system has been in operation for approximately eight years and has never failed.

9. The two-way radio system at MYC has been used for approximately 20 years. The system is used mainly when staff are alone patrolling areas away from where the telephones are located. Usually there are three to four employees on duty in each unit during the day. However, during the graveyard shift between midnight and 8:00 a.m., there is normally only one employee in each unit. The radio system is regularly used and relied upon by employees, particularly when they are working alone at night.

10. MYC officials conceded the radios were old and problematic but insisted they were sufficiently reliable that they did not constitute a safety hazard. The radios were checked on a regular basis; MYC's log of radio checks for the period five months prior to the inspection reportedly showed only three occasions when the radio system malfunctioned due to high static. It was conceded, however, that there was a problem with the reception range of the radios, particularly in off-campus areas in the event of an escape.

11. MYC officials also described their efforts to obtain funding for a new radio system (see Exhibit B). After several years of funding requests for new radios, funding was finally approved in 1989 and a purchase requisition was prepared on October 31, 1989. It is not clear whether the timing of MYC's purchase requisition for the new radios was affected by the filing of the employee complaint but the two events occurred within days of each other. The estimated cost of the new radio system was \$43,994.89.

12. MYC contested the Department's classification of the violation as "serious," arguing there was only a low probability of death or serious physical injury from not having properly working radios. MYC officials contend that because MYC is a correctional facility, there is an inherent security risk to employees that must be accepted as part of their employment. To reduce that risk as much as possible, MYC provides training to

employees in dealing with juvenile offenders housed at the facility. Employees are authorized to use physical force to control residents and prevent escape. During the past 16 years, there have been three attacks on employees during the graveyard shift, but only one of these resulted in a significant injury (see Exhibit E).

#### CONCLUSIONS OF LAW

General Safety Code 01.0401(b)(1) provides as follows:

Other personal safety equipment or clothing, such as rubber gloves, rubber boots, leggings, aprons, hand pads, safety belts, lifelines, buoyant vests, shall be furnished to the employees who are exposed to hazards where such devices may be expected to prevent injury.

There is little dispute that the two-way radios provided to MYC employees were old, unreliable and frequently ineffective. Several employees located in different areas at MYC complained that the radios did not function properly up to 25 percent of the time. The fact that there were few documented complaints or incidents involving the radios does not diminish the fact that the radios were a clear source of ongoing concern for MYC employees.

We give little weight to MYC's assertion that the radios were merely a backup system for the primary 888 telephone system. More significant is the fact that the radios have been provided to MYC employees for over 20 years and have been

consistently relied upon by them as a means of securing emergency assistance when working alone or patrolling areas away from the telephone, particularly during the graveyard shift. When an employer undertakes to provide equipment affecting employee safety such as two-way radios, it has an obligation to make sure that the equipment is effective, reliable and in good working condition. Based on the information provided by employees, we conclude that MYC's radio system failed to meet this test.

Moreover, MYC management was aware of the problem for several years. The matter should have been taken care of long before it became necessary for employees to file a formal complaint. Because the radio system affects employee safety, MYC should have made the acquisition of new radios a higher funding priority than was given. Lack of funds is not a valid defense to an OSHA citation unless it is shown that the employer's financial survival is at stake. See Faultless Division, Bliss & Laughlin Industries, Inc. v. Secretary of Labor, 674 F.2d 1177, 1190 (7th Cir. 1982). This is not the case here. Additionally, under the Alaska OSHA law, a public employer is held to the same standards of compliance as a private employer. See AS 18.60.105(a)(5).

We also find MYC management failed to explore other alternatives to the faulty radio system, such as leasing new radios until additional funds could be obtained or changing staffing patterns so that employees would not have to work alone at night. Employment at a correctional facility such as MYC may

indeed involve certain occupational hazards, but this does not excuse management from making every reasonable effort to minimize the safety risks by providing effective and reliable safety equipment. By any reasonable measure, 20 years is simply too long a period of time to wait before replacing emergency safety equipment.

Further, we disagree with MYC's contention that this violation should not be classified as "serious." While past history may reveal only isolated incidents of assaults on MYC employees, it is not necessary to establish a record of prior injuries before a violation may be classified as serious. It is only necessary to prove that an accident is possible and that death or serious physical injury could result. See Rothstein, Occupational Safety and Health Law § 313 (3d ed. 1990). We conclude the Department has met this burden. We believe that in the event of an escape or altercation, there is a significant chance of injury for an employee working alone if the two-way radio system fails to operate properly to summon assistance.

With respect to the penalty amount, we note that MYC was given the maximum reduction for good faith in ordering new radios and no prior history of violations. MYC does not qualify for any additional reductions under the Department's penalty calculation guidelines. We find no reason to change the Department's penalty assessment.



ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED as follows:

1. The citation in this matter is affirmed as a "serious" violation.
2. The assessed penalty of \$600 is also affirmed.

DATED this 21<sup>st</sup> day of December, 1990.

ALASKA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

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

  
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Lawrence D. Weiss, Member

OCCUPATIONAL SAFETY & HEALTH REVIEW BOARD  
P.O. BOX 21149  
JUNEAU, ALASKA 99802-1149

NOTICE TO ALL PARTIES

A person affected by an Order of the OSH Review Board may obtain a review of the Order by filing a complaint challenging the Order in Superior Court. The affected person must file the complaint within 30 days from the date of the issuance of the Order by the OSH Review Board. After 30 days from the date of the issuance of the Order, the order becomes final and is not subject to review by any court. AS 18.60.097(a).

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Alaska Department of Labor vs. State of Alaska-Department of Health and Social Services, Docket No. 90-818, filed in the office of the OSH Review Board at Juneau, Alaska, this 21st day of December, 1990.

  
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Mary Jean Smith  
OSH Review Board

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