UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of	)	
	)	
Fremont City Schools,	)	Docket No. TSCA-V-C-264
	)	
Respondent	)	

Toxic Substances Control Act - Friable Asbestos - Containing Materials in Schools - Substantial Compliance - Determination of Penalty - Where evidence indicated that purpose of asbestos-in-schools rule (40 CFR Part 763, Subpart F) had been substantially served, penalty determined in accordance with TSCA Civil Penalty System (45 FR 59770) and guidance thereunder was determined to be inappropriate and independent determination of penalty was made.

Appearance for Complainant: James M. Thunder, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
Chicago, Illinois

Appearance for Respondent: Thomas G. Dent, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
Chicago, Illinois

Initial Decision

This proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)) was commenced by the issuance on September 11, 1984, of a complaint by the Director, Waste Management Division, U.S. EPA, Region V, Chicago, Illinois, charging Respondent, Fremont City Schools, Fremont, Ohio with violations of § 15 of the Act (15 U.S.C. 2614) and regulations promulgated thereunder, 40 CFR Part 763, Subpart F.[1/] Specifically, Respondent was charged with failure to maintain records required by 40 CFR § 763.117(a)(3) and § 763.114, and failure to comply with the warning and notification provisions of § 763.111(a) and (d). A penalty of $1,300 for each of five separate counts was proposed for a total of $6,500.

Respondent answered, alleging, inter alia, that "we" considered Respondent was in full compliance with the regulations because of a workshop conducted by the Ohio Department of Education and EPA personnel, that the term "administrative office" in the regulations was interpreted as the school

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1/ Section 15, Prohibited Acts, of the Act (15 U.S.C. § 2614) provides in pertinent part:

It shall be unlawful for any person to--

(1) fail or refuse to comply with (A) any rule promulgated or order issued under section 4, (B) any requirement prescribed by section 5 or 6, or (C) any rule promulgated or order issued under section 5 or 6;

* * *.

The rules here concerned were promulgated under Section 6.

system's Central Office and that when these matters were brought to its attention by the inspection, Respondent immediately proceeded to comply prior to receipt of the complaint (letter with enclosures from Kent R. Watkins, Superintendent of Schools, dated September 27, 1984). Respondent requested that the proposed penalty be waived as that sum would be helpful in the purchase of textbooks and other necessary educational supplies.

By letter, dated January 25, 1985, counsel for Respondent informed the ALJ that the parties were unable to resolve the matter and that Respondent admitted there were technical reporting violations of the Act. The letter stated, however, that these violations were due to misinformation or insufficient information received by Respondent's representative at a state-run seminar and argued that the steps Fremont had taken were equivalent to those technically required and amounted to substantial compliance with the Act. Counsel stated that Respondent considered the fine proposed in the complaint and in Complainant's final settlement offer excessive and that Respondent wished to contest it. The letter requested that the review (decision) be based upon documention and written memoranda as Respondent was without available funds to pursue this matter at a hearing.

By letter, dated March 5, 1985, the ALJ allowed the parties until April 5, 1985, to submit any additional evidence, such as affidavits or other documents, which they contended should be considered in determining the amount of the penalty and any arguments the parties wished to make in that regard. Complainant submitted documents and argument under date of April 4, 1985, while counsel for Respondent confined itself to argument

(letter, dated April 10, 1985). Complainant availed itself of the right to file a reply memorandum (letter, dated April 17, 1985), but Respondent has elected to stand on the arguments and documents previously submitted.

Based on the entire record including the arguments of the parties, I find that the following facts are established:

Findings of Fact

1. Respondent, Fremont City Schools, Fremont, Ohio, is a Local Education Agency (LEA) as defined in 40 CFR § 763.103(e).
2. On July 18, 1984, Respondent's facilities were inspected by an authorized representative of the U.S. EPA to determine compliance with regulations concerning Friable Asbestos-Containing Materials in Schools (40 CFR Part 763, Subpart F). The LEA presented EPA Form 7730-1 "Inspection for Friable Asbestos-Containing Materials," signed by its Supervisor of Buildings and Grounds on June 15, 1983, as a summary of its compliance efforts. This document reflects, inter alia, that nine schools have been inspected for friable materials in accordance with 40 CFR § 763.105, and that two schools have friable asbestos materials totaling 100,300 square feet.
3. The inspection revealed that at Fremont Junior High and Stamm Elementary Schools, Respondent did not have on file at each school a certified statement indicating the absence of friable asbestos materials as required by 40 CFR § 763.117(a)(3) (Inspection Report, Complainant's Exh 1).

4. At Atkinson Elementary, Fremont Ross High and Washington Elementary Schools, LEA records indicated the presence of friable materials. The friable materials at Atkinson Elementary School contained less than 1% asbestos and were not asbestos-containing materials as defined by 40 CFR § 763.103(c). The inspection revealed that laboratory reports of analyses of these materials, including, inter alia, an estimate of the percent of asbestos content, and a diagram, blueprint or written description identifying the locations and approximate areas in square feet of friable materials and other records were not maintained at Ross High and Washington Elementary Schools as required by 40 CFR § 763.114(a)(1)-(6).

5. The inspection further revealed that Respondent had failed to post in the primary administrative and custodial offices and faculty common rooms at Fremont Ross High School and Washington Elementary School the "Notice to School Employees" (EPA Form 7730-3) as required by 40 CFR § 763.111(a). Respondent had also failed to directly notify parents of its pupils of the results of inspections and analyses of friable absestos materials at Fremont Ross High School as required by 40 CFR § 763.111(d).

6. A newspaper, the Fremont News Messenger, published articles concerning the presence of asbestos in Fremont schools on September 9, 1980, April 29, 1981 and September 2, 1982 (Exhs G, Y-1 and Y-2). At Fremont Ross High and Washington Elementary Schools a "Notice to Employees

and Parent-Teacher Associations" of the presence of asbestos, dated June 16, 1983, and a "Guide for Reducing Asbestos Exposure" (EPA Form 7730-2) were distributed to employees with paychecks on June 17, 1983 (Exhs M and N). There is no parent-teacher association (PTA) at Fremont Ross High School. A school calendar indicating the presence of asbestos was distributed to every family having students in Fremont Ross High School at a date not certain from the record (Exh H). A "Notice to School Employees" (EPA Form 7730-3) was posted in the entrance to this school at the time of the inspection. A November 1984 Ross High School newsletter (Exh BB) informed students and parents that all ceilings at this school, except the gym, industrial arts, ag shop and kitchen are constructed of material containing 35% asbestos fibers.

7. At the Washington Elementary School, the parent-teachers association (PTA) was notified in writing of the presence and location of friable asbestos-containing materials on June 21, 1983 (Exh W). Memoranda from Respondent's Supervisor of Buildings and Grounds (Exhs Z and AA) reflect that he was of the opinion the deadline for compliance with the EPA asbestos in schools regulation was June 27 or 28, 1983.2/ A "Notice to School Employees" (EPA Form 7730-3) was posted in the lobby at the time of the inspection (Inspection Report at 4).

2/ The regulation was issued on May 27, 1982 (47 FR 23360) and required compliance with all portions of the rule by May 27, 1983. It is noted, however, that the guidance on penalties, "Assessing An Administrative Penalty" (Complainant's Exh 3), refers to a deduction from the amount of the penalty for expenditures in abating or controlling friable asbestos materials and states in pertinent part: The deduction should not exceed 80% of the penalty if the LEA has not notified the PTA (or parents) and school staff of any asbestos hazard remaining in the school after June 28, 1983. (An SWC could allow remission of the remaining 20% when the proper persons are notified.)

8. Following the inspection, Respondent proceeded immediately to file certificates to the effect that Fremont Junior High and Stamm Elementary Schools had been inspected and did not have any friable materials containing 2% or greater asbestos.[3/]

9. The undated certificate for Atkinson Elementary School is to the effect that this school has friable materials containing less than 1% asbestos (Exh C-1). Samples and analyses upon which this determination is based were taken and conducted in June 1983 (Exhs D-2-D-4). Following the EPA inspection, Respondent filed in the administrative office of this school a sketch showing the extent of and percent of friable materials (Exh D-1) and an undated certificate to the effect that the requirements of the regulation relative to "Asbestos Containing Materials in Schools Identification and Notification" had been satisfied at this school (Exh E).

10. Samples taken from the reading room and a classroom at Washington Elementary School and from Classroom Nos. 18 and 74 and the center hallway near the cafeteria at Fremont Ross High School revealed 35% asbestos (Microbac

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3/ Respondent's undated Exhibits A-1 and A-2, B-1 and B-2. While the certificates indicate the schools do not have any friable materials containing 2% or greater asbestos, the regulation defines "asbestos-containing material" as any material which contains more than 1 percent asbestos by weight (40 CFR § 763.103(c)). A memorandum from Respondent's Supervisor of Buildings and Grounds, dated June 13, 1983, indicates that he was informed at a workshop conducted by the Ohio Department of Education in Toledo on May 26 not to worry about EPA regulations if laboratory results show under 2% asbestos (Exh AA). The Interim Method of the Determination Of Asbestos In Bulk Samples (Polarized Light Microscopy) (40 CFR 763, Subpart F, Appendix A) indicates that no data for measuring accuracy and precision are currently available and that in determining percent asbestos "values reported should be round to the nearest percent.

Laboratories' Certificate of Analysis, dated June 20, 1983). The undated certificate for Fremont Ross High School (Exh J-1) indicates that friable asbestos is in ceilings at all areas except industrial arts, gymnasium and agriculture shop. Following the EPA inspection, Respondent proceeded to post the Notice to School Employees (EPA Form 7730-3), which previously had been posted only in the lobbies or entrance of these schools, in the administrative offices, faculty lounges, custodial offices and boiler rooms at Fremont Ross High and Washington Elementary Schools.

11. Following the EPA inspection, Respondent proceeded to file in the administrative offices at Fremont Ross High and Washington Elementary Schools sketches showing extent and percent of friable asbestos materials (Exhs J-3 and S). Respondent also proceeded to establish and maintain in the administrative offices at these schools "A Guide for Reducing Asbestos Exposure" (EPA Form 7730-2), a copy of "Asbestos-Containing Materials in School Buildings," Parts 1 and 2 (EPA No. 000090) and statements that the requirements of the rule have been satisfied (Exhs N, O, V, W and X)

12. It appears that the Sandusky County Health Department made a survey of Ross High School for the presence of asbestos on July 17, 1980 (memorandum, dated September 10, 1982, Exh Z) and that Respondent made additional inspections of other buildings in July and August of 1980. These surveys resulted in a finding of asbestos in the South Wing of Atkinson School, in the reading room and one classroom at Washington School and in all

areas of Ross High School except industrial arts, gymnasium and agriculture shop. Additional samples were taken from Atkinson and Washington Elementary Schools and Fremont Ross High School on June 20, 1983, resulting in the asbestos content determinations previously mentioned (finding 10). Respondent appears to have had a program for the prompt repair of damaged areas containing asbestos since the summer of 1980.4/ Respondent also appears to have been informed by the State Department of Education and the local Board of Health that "(s)o long as no damage [to areas containing asbestos] occurs, no harm from asbestos fiber can occur" (Exhs Z and AA). The latter exhibit indicates that in addition to the information previously described as having been imparted at the workshop in Toledo conducted by the Ohio Department of Education (note 3, supra) attendees were instructed that "the only action we must take to comply with EPA regulations is to identify buildings having friable building materials. (Friable means - 'easily

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4/ Memoranda, dated September 10, 1982 and June 13, 1983, Exhs Z and AA. The former exhibit states that two restroom ceilings in the Atkinson School were replaced in the summer of 1980 and that a portion of the south hallway ceiling was repainted in 1978. The memorandum further states that all asbestos ceilings at Ross High were repainted in 1977 and that these buildings are inspected each summer and damaged areas immediately repaired. The memorandum of June 13, 1983, referring to Atkinson, Washington and Ross High Schools, states that to date we have repaired any damaged areas and all ceilings have been painted during the past five years. The newspaper article of April 29, 1981 (Exh y-2), reports that $798 was spent in replastering restroom ceilings at Atkinson and that asbestos in ceilings was removed prior to the plastering.

crushable by hand pressure' -- even if surface coated with paint.) We must also notify the employees and P.T.A. or parents by June 27, 1983."5/

13. On March 26, 1984, Microbac Laboratories made an air test for possible asbestos fibers at Ross High and Washington Elementary Schools (memorandum, dated March 26, 1984, Exh BB). The samples were conducted while school was in session and resulted in a determination of 0.024 fibers per cubic centimeter (main office area) at Ross High and 0.029 fibers per cubic centimeter (reading room) at Washington Elementary School. The cited memorandum indicates that most of the fibers appeared to be cellulose and that under present standards, EPA believes that air is safe up to 2.0 fibers per cubic centimeter.

5/ Describing further steps intended for compliance, the cited memorandum provides:

> We plan to take the following action in order to comply with the EPA regulations before the June 27, 1983 deadline:
>
> - To post the EPA Form 7730-3 Notice to School Employees in Atkinson, Washington and Ross High School. (See Copy A attached.)
> - Also, distribute the EPA Form 7730-2, A Guide for Reducing Asbestos Exposure to all employees in buildings involved. (See Copy C attached.)
> - Notice mailed to parent-teacher association. (See Copy C attached.)
> - Complete the necessary forms and file as required with the EPA and the State Department of Education.

14. The proposed penalty was determined in accordance with the TSCA Civil Penalty System (45 FR 59770, September 10, 1980) and guidance issued as to the application of the policy to the asbestos in school regulation (Complainant's Exhs 2 and 3). In applying the matrix in the penalty policy (45 FR at 59771), the guidance indicates that the "extent of the violation," i.e., amount of potential risk to human health for all violations of the asbestos in school regulation, is in the significant category. Complainant determined that the circumstances of the violation," or the probability that the violation has impaired the ability of the Agency and the public to assess the health hazard involved, was low range or Level 6. Level 6 violations are those where the LEA has made a good faith effort to comply with the rule, but has fallen short of full compliance. Application of these principles and the matrix system resulted in a proposed penalty of $1,300 for each of the five counts in the complaint.

5/ (contd)

In addition, we plan to do the following:

- To instruct maintenance personnel with important points when working in these buildings.
- Continue to monitor all ceilings in these buildings for physical damage and repair any damaged area as soon as possible.
- Continue to cooperate with the EPA and local Board of Health.
- Continue to paint these ceilings with latex paint when decorating or after any repair.
- Continue to inform the Board, Superintendent, employees and P.T.A. of any changes in regulations and procedures.

Conclusions

1. The record reveals that the purpose of the asbestos-in-schools rule (40 CFR Part 763, Subpart F), i.e., notification of those exposed to asbestos, has been substantially served.
2. The penalty calculated by Complainant in accordance with the guidance on Assessing An Administrative Penalty appears to make no allowance for the foregoing conclusion and is inappropriate.
3. An appropriate penalty for the violations herein found is the sum of $1,600.

Discussion

The findings support, and Respondent concedes, that there were violations of the Act and regulations (40 CFR Part 763, Subpart F). Accordingly, the only matter for determination is the amount of an appropriate penalty. In making this determination, I am required to consider, but am not bound by civil penalty guidelines issued under the Act (40 CFR § 22.27(b)).

The proposed penalty appears to have been calculated in accordance with the TSCA Civil Penalty System (45 FR 59770, September 10, 1980) and guidance for "Assessing An Administrative Penalty" (note 2, supra). The guidance indicates that all violations of the asbestos-in-schools rule are placed in the significant category for the purpose of determining the extent of the violation, i.e., amount of potential risk to human health, and applying the matrix in the TSCA Civil Penalty System (45 FR 59771). Because of this fact and the fact that all violations were placed in the low range (Circumstances

Level 6), the result is that an identical penalty ($1,300) is being assessed for the violations at each school. The inescapable conclusion is that the penalty for the more serious violations (Fremont Ross High School) is too low or that for the least serious violations (Fremont Junior High and Stamm Elementary Schools) is too high. Because the purpose of the rule, i.e., notification of those exposed to asbestos has been substantially served, it is my conclusion that a penalty determined in accordance with the guidance is inappropriate.

Among the factors § 16(a)(2)(B) of the Act requires the Administrator to consider in determining the amount of the penalty are the "nature, circumstances, extent and gravity of the violation or violations." The purpose of the asbestos-in-schools rule is that persons be notified of exposure to asbestos so as to avoid or reduce the risk of such exposure. The most serious violation from the point of view of gravity is the failure to notify the parents of pupils directly of the results of inspections and analyses of friable materials at Ross High School, there being no parent-teacher organization at this school. The reason, of course, is that such failure makes it more likely that the purpose of the rule, notification of asbestos exposure, will be frustrated. The extent of asbestos-containing material at Ross High School makes it unlikely that one could attend or work at this school without exposure to areas containing asbestos. Consequently, the failure to have on file at the administrative office of this school the laboratory reports and a diagram or blueprint showing asbestos and sampling areas is unlikely to

have increased the potential risk to human health. Likewise, "Notice to School Employees" (EPA Form 7730-3) was posted in the entrance to this school and a similar form "Notice To Employees and Parent-Teacher Associations" distributed to each employee. Also distributed to each employee was a "Guide for Reducing Asbestos Exposure" (EPA Form 7730-2). Accordingly, it is highly unlikely that failure to post "Notice to School Employees" in the common rooms of this school denied any employee knowledge of the presence of asbestos, which after all is the purpose of the posting requirement. Under all the circumstances, an initial gravity based penalty of $1,200 for the violations at Ross High School is appropriate.

At Washington Elementary School, the PTA was notified of the presence of asbestos and a "Notice To School Employees" was posted in the lobby. Additionally, as at Ross High School, a very similar form "Notice To School Employees and Parent-Teacher Associations" and a "Guide for Reducing Asbestos Exposure" were distributed to each employee. Under the circumstances, the violations at this school, i.e., failure to post "Notice to School Employees" in the common rooms, failure to maintain in the administrative office laboratory reports of analyses of asbestos, correspondence relating thereto and a diagram or blueprint showing asbestos and sampling areas, is not likely to have appreciably increased the potential risk to human health. A gravity based penalty of $500 is considered appropriate.

Friable asbestos materials were not present at Atkinson Elementary School and the violations consisted in the failure to maintain in the administrative office the blueprint or diagram showing areas of friable materials,

areas where samples were taken and a copy of all laboratory reports and correspondence concerning analysis of samples as required by 40 CFR § 763.114(a)(4) and a certification that the requirements of the rule have been satisfied as required by § 763.114(a)(6). Violations at Fremont Junior High and Stamm Elementary Schools consisted of failure to file the certification required by § 763.114(a)(6), friable materials not being present at either of these schools. An appropriate penalty for the violations at Fremont Junior High and Stamm Elementary Schools is $100 each and for the violations at Atkinson Elementary an appropriate penalty is $200.

This brings us to the "violator" portion of TSCA § 16(a)(2)(B), which requires consideration of, inter alia, ability to pay, degree of culpability and such other matters as justice may require. The record reveals that Respondent was aware of the rule and made a good faith effort to comply. Even as to the violation considered most egregious, i.e., failure to directly notify all parents having students in Ross High School of the results of inspection and analysis of friable asbestos materials, the record shows substantial compliance, a calendar showing the presence of asbestos having been distributed to each family having students in the school. In this connection, it is worthy of note that the summary of actions Respondent intends to take in order to comply with the regulations (note 5, supra), which reflects a fair understanding of the regulation, does not mention notifying parents of students at Ross High School of the presence of asbestos. While an affidavit from an attendee of the workshop conducted by the Ohio Department of Education would have been hopeful, it may well be that

Respondent was misled as to the requirements for strict compliance with the rule by statements made at the workshop. Such an event would be among "other matters as justice may require" warranting a substantial downward adjustment in the amount of the gravity based penalty. Moreover, although Respondent may not have been responsible therefor, the record reflects a substantial amount of newspaper publicity concerning asbestos problems in Fremont schools, making it unlikely many parents would be unaware of that fact. When the omissions were called to its attention, Respondent proceeded promptly to comply. Under the circumstances, a downward adjustment of $500 is appropriate in the gravity based penalty determined for violations at Ross High School.

The remainder of the gravity based penalties are sufficiently nominal that no downward adjustment is considered to be appropriate. A total penalty of $1,600 will be assessed against Respondent, Fremont Ross High School, for the violations of the Act herein found.6/

Order

Having violated § 15 of the Toxic Substances Control Act (15 U.S.C. 2614) and regulations promulgated thereunder (40 CFR Part 763, Subpart F) as charged in the complaint, a penalty of $1,600 is assessed against Respondent, Fremont City Schools, in accordance with § 16(a) of the Act (15 U.S.C. 2615). Payment

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6/ The civil penalty guidance reflects that sums spent on asbestos abatement and control may be credited against the penalty (note 2, supra) and invoices or vouchers detailing amounts expended for this purpose may well have resulted in a substantial reduction in the penalty proposed by Complainant.

will be made by sending a certified or cashier's check in the amount of $1,600 payable to the Treasurer of the United States to EPA Region V (Regional Hearing Clerk), P. O. Box 70753, Chicago, Illinois 60673, within 60 days of receipt of this order.7/

Dated this 26th day of June 1985.

Spencer T. Nissen
Administrative Law Judge

7/ Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision will become the final order of the Administrator in accordance with 40 CFR 22.27(c).