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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	:	
CHESTER-UPLAND SCHOOL DISTRICT	:	Docket No. TSCA-III-163
Respondent	:	

Toxic Substances Control Act - "Asbestos-in-Schools Rule," 40 CFR §763.100 ff.

Penalty of $1,500.00 assessed for violation of notification and recordkeeping requirements is appropriate where, as here, the respondent had expended in excess of $1 million for removal of asbestos-containing materials, had complied with the regulations before the date of the hearing, and had made good faith efforts to comply before the date of the EPA inspection.

For the Complainant: Robert J. Smolski, Esquire, Office of Regional Counsel, U. S. Environmental Protection Agency, 841 Chestnut Building, Philadelphia, Pennsylvania 19107

For the Respondent: Leo A. Hackett, Esquire, Fronefield and DeFuria, 107 West Third Street, Media, Pennsylvania 19063

Before: J. F. Greene, Administrative Law Judge
October 30, 1987

INITIAL DECISION

This matter arises under 15 U.S.C. §2615(a)(1), Section 16(a)(1) of the Toxic Substances Control Act, 15 U.S.C. §2601 et seq., hereafter "the Act," and regulations relating to friable asbestos-containing materials in schools 1/ issued pursuant to authority contained therein 2/ at 40 CFR sections §763.100 through §763.119 (Subpart F). In this civil action, the United States Environmental Protection Agency, whose Director, Environmental Services Division, Region III, is the complainant herein, seeks assessment of civil penalties against the respondent pursuant to 15 U.S.C. §2615(a)(1) and 2(B) for alleged violations of the Act and the Friable Asbestos-Containing materials in Schools regulations (hereafter "the Rule").

Specifically the complaint alleges that the respondent school district violated recordkeeping and notification requirements contained in the Rule by failing to develop and maintain certain records in the central administration office and in three schools, and by failing to warn employees in the same three schools of the location of friable asbestos-containing materials. The complaint further charged that parent-teacher associations had not been notified of the results of inspections, as required by the Rule. The penalty sought by the complainant for these violations is $19,300.00. The respondent denied violating the various provisions of the Rule and requested a hearing on the matter.

1/ The "asbestos in school rule".

2/ See Section 6(e)(1), 15 U.S.C. 2605(e)(1).

The record discloses that at the time of the November 1, 1985 inspection, respondent was not maintaining in the files of its central administrative office a list of the schools under its authority showing which schools had been inspected and whether they contained friable materials, TR 30,62. Therefore, respondent was in violation of the regulations, 40 CFR §763.114(b).

On November 1, 1985, when the E. P. A. inspected the Wetherill Elementary school, it was closed due to a student boycott because of the presence of asbestos in the school, TR 30. Representatives from the school district told E. P. A. inspectors that before the school was reopened the following week the asbestos would be removed from the school boiler room, TR 44, 84-85. In addition, E. P. A. inspectors located friable materials in the school boiler room (TR 31-35, 144-46) and documents prepared by respondent reported the existence of asbestos in the boiler room, (CX 5). The presence of friable asbestos materials in school buildings triggers a number of warning, notification and recordkeeping requirements contained in the regulations. Complainant contends, and respondent had admitted, that the required notice to school employees was not provided, posted or put in the school file until after the November inspection, TR 241-43. This failure constitutes a violation of the regulation, 40 CFR §763.111 (a), (b), (c).

Complainant also contends that respondent violated 40 CFR §763.111 (d), which requires notification to the PTA or parents of Wetherill students of the presence of friable asbestos material. The record shows that the respondent met with about 15 parents in October, 1985 and informed them that asbestos had been removed from three classrooms during the summer of 1985. Respondent also told the parents that tests had located asbestos in the school boiler room and that the asbestos would be removed the following summer. At the time, respondent did not think that the asbestos was friable. The parents did not accept the school board's plan and refused to send their children to school. To appease the parents, respondent closed the Wetherill school, and, shortly after the E. P. A. inspection, removed the asbestos from the boiler room and had air samples analyzed, TR 197-202. It is clear that, contrary to complainant's contentions, the parents of Wetherill students were appraised of the asbestos situation and the steps respondent was taking to remedy it. Accordingly, the record is insufficient to establish that 40 CFR §763.114(d) was violated.

On November 15, 1985, E. P. A. inspectors located friable materials in the boiler room of the William Penn Elementary School. One of the inspectors dislodged a piece of the material and it crumbled in his hand. (TR 49, 118) Records supplied by the respondent confirmed the existence of friable asbestos in the school's boiler room. E. P. A. inspectors reported that the required notice to school employees was

neither posted nor found in the school files (TR 54-55). Respondent concedes that the notice to school employees was not provided or posted in the school until after the November inspection (TR 217). Therefore, respondent failed to comply with the recordkeeping and notification regulations.

Complainant also contends that respondent failed to notify the PTA or parents of the students of the William Penn School of the presence of friable asbestos-containing materials in violation of the regulations. The record indicates that in June, 1985, respondent reported both the school's completed and proposed asbestos removal projects at an open school board meeting. In addition, in the fall of 1985 a parental asbestos committee was formed and was provided with all of the reports in the school district's possession regarding asbestos in the school (TR 206-08). Contrary to complainant's assertions, therefore, the parents of William Penn Elementary school students and representatives of the PTA were informed of the existing asbestos situation. Inasmuch as the regulation does not specify the exact means to be used to notify, 40 CFR §763.111(d), no violation will be found here.

On November 15, 1985 the E. P. A. also inspected the Stetser Elementary school. At that time the inspectors dislodged a piece of the material, crumbled it in his hand and informed respondent that it was "the real McCoy", TR 116-17. Records in the possession of respondent confirmed the existence of asbestos in the school boiler room, TR 58-59. Respondent admits that neither the school employees nor the parents or PTA of the Stetser school were notified of the presence of asbestos materials in the school. Failure to post and provide the required notification to both the school employees and the PTA constituting a violation of the regulations.

After careful deliberation and review of all the evidence, it is concluded that the proposed penalty should be substantially reduced owing to (a) the amount of money expended by the respondent to reduce or remove asbestos-containing friable materials from the schools, (b) good faith efforts of the respondent to comply with state and federal government regulations, and (c) the fact that respondent had complied with the regulations by the time of the hearing.

In 1984 the school district hired Lancaster Laboratories to inspect and test for friable asbestos in the school system. As a result of their report, asbestos removal work was undertaken in three schools during the summer of 1984 (TR 191-93). Between 1984 and September of 1985 respondent spent $250,000 to have asbestos materials removed (TR 193-95, 202-04). In December 1985 respondent hired Kaselaan & D'Angelo, asbestos abatement consultants, to inspect all of the schools for asbestos (TR 206-09), spending $100,000. Finally, respondent attached to its reply brief copies of the contracts for asbestos abatement removal in the Chester-Upland School District conducted during the summer of 1986. The contracts show that respondent spent a total of $661,322.00 during that period for the removal of asbestos in several of the district's schools. 3/ Respondent has therefore expended over $1 million between 1984 and 1987 in dealing with its asbestos problem.

3/ Respondent's Reply Brief, Ex. A, B, C, D, E, F, and G. These documents have been made a part of the record as Respondent's exhibits 22-27.

The record shows that since 1979, when the Commonwealth of Pennsylvania first began asbestos testing, respondent has consistently tried to comply with state and federal government regulations. In 1979, after performing a visual inspection of its schools, respondent had the Pennsylvania Department of Environmental Resources test materials found. The asbestos that was discovered was encapsulated, TR 188-91. Prior to 1984 respondent continued to visually inspect the schools, calling in asbestos consultants whenever they suspected friable material. In 1984 respondent hired a consultant to perform samplings and testing. As a result, asbestos was removed from several of the schools. In June, 1985, respondent reported at an open school board meeting upon both the completed and proposed asbestos removal projects, TR 202-04. By September, 1985, respondent believed that all of the asbestos had been removed from student accessible areas, TR 226-30. That fall, in response to parental protests, the school district administration agreed to the formation of a parental asbestos committee which continues to meet monthly with school district officials to discuss the asbestos problem. In December, 1985, respondent hired asbestos consultants to inspect of all of the schools and assist the school district in preparing specifications for a bid for an asbestos removal project in the summer of 1986. Finally, respondent spent over $600,000 during the summer of 1986 on asbestos removal.

Since the E. P. A. inspections of November, 1985, respondent had posted and filed the required notice to employees in all three schools, TR 217, 241-42, 244-45. Respondent also sent a letter to the parents of each school on November 15, 1985 informing them of the location of asbestos and the district's plan for removal, (RX 4).

Although these factors are considered sufficient to reduce the penalty to the level assessed, respondent did violate the notice and recordkeeping provisions of the Rule. While the Rule is not a model of clarity in all respects, respondent should have been able to comprehend the nature and extent of its responsibilities thereunder, and, accordingly, a penalty of $1500 will be assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent, Chester-Upland School District, is a non-profit, public service institution which owns or operates 13 schools in and around Chester, Pennsylvania.

2. Respondent is a local education agency as defined at 40 CFR §763.103(e), subject to the Act and to the requirements of the Rule, i.e. regulations known as the asbestos in schools rule, 40 CFR §763.100 ff.

3. As of November 1, 1985, the date of the first E. P. A. inspection, respondent had not compiled and maintained records as required by 40 CFR §763.114(b) with respect to the Chester-Upland central administrative office. With respect to the Wetherill Elementary School, where friable asbestos-containing materials were found in the boiler room, as of November 1, 1985, respondent had failed to warn and notify employees as required by 40 CFR §763.111(a), (b), and (c), and had

failed to compile and maintain records as required by 40 CFR §763.114(a)(3). Parents were directly notified, however, TR 197-202. There is insufficient evidence to establish that this notice did not satisfy the requirements of 40 CFR §763.111(d), even though the notice was made directly to parents rather than to the PTA.

4. As of November 15, 1985, the date of the second E. P. A. inspection, with respect to the William Penn Elementary School where friable asbestos-containing materials were found in the boiler room, respondent had failed to compile and maintain records as required by 40 CFR §763.114(a)(3). An special asbestos committee of parents and PTA representatives were notified, TR 204-206. As of that same date, with respect to the Stetser Elementary School where friable asbestos-containing materials were found in the boiler room, respondent had failed to warn and notify as required by 40 CFR §763.111(a), (b), and (d) and had failed to compile and maintain records as required by 40 CFR §763.114(a)(3).

5. It is concluded that the respondent violated Section 15(1)(c) of the Act, 15 USC §2615, by failing to comply with the provisions of the 40 CFR §763.100 ff noted above.

6. It is concluded that a civil penalty of $1,500 is an appropriate penalty in this matter, based upon the significant amount that respondent has spent to detect and remove, or encapsulate, friable asbestos-containing materials from its schools; based upon the good faith efforts of the respondent to comply with the federal requirements; and based upon the fact that the violations had been abated as of the date of the trial of this matter.

ORDER

Pursuant to section 16(a)(1) of the Toxic Substances Control Act, 15 U.S.C. §2615(a)(1), a civil penaly of $1,500.00 is hereby assessed against respondent Chester-Upland School District for the violations of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order by submitting a certified or cashier's check payable to the

Environmental Protection Agency
Region 3
(Regional Hearing Clerk)
P. O. Box 360515M
Pittsburgh, PA 15251

J. F. Greene
Administrative Law Judge