

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. OSAB 2002-15
)	OSHCO ID N2974
DIRECTOR, DEPARTMENT OF LABOR)	INSPECTION NO. 304212228
AND INDUSTRIAL RELATIONS,)	
)	DECISION NO. 1
Complainant,)	
)	FINDINGS OF FACT, CONCLUSIONS
vs.)	OF LAW, AND ORDER
)	
RAINBOW REHABILITATION SERVICES,)	
INC.,)	
)	
Respondent.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Occupational Safety and Health case comes before the Hawaii Labor Relations Board (Board) pursuant to a written notice of contest from a Citation and Notification of Penalty issued against RAINBOW REHABILITATION SERVICES, INC. (RAINBOW or Respondent), by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Hawaii Division of Occupational Safety and Health (HIOSH) on March 4, 2002.

On May 21, 2002, the Director filed a motion for partial summary judgment and a hearing on both the Motion for Partial Summary Judgment and the underlying citation was held on June 7, 2002. The hearing on RAINBOW's contest addressed the following issues:

Whether RAINBOW violated standard § 12-205.1 (29 CFR 1910.1030(f)(2)(i) and (iv); (h)(i)(ii)(B) as described in Citation 1, Item 1.

- a. If so, whether Respondent can be fined without having been given a specified time to cure the alleged violation or deficiency?
- b. If so, whether the filing of a notice of contest precludes an Informal Conference?

- c. Whether the imposition and amount of the \$375 proposed penalty is appropriate?

Having reviewed the record and provided all parties a full and fair opportunity to be heard, the Board issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. On January 28, 2002, Noelani Nakasone (Nakasone), a HIOSH Safety Compliance Officer inspected the work site of Respondent RAINBOW at its administrative offices at 1441 Kapiolani Blvd. #813, Honolulu, Hawaii. Thereafter, on February 13, 2002, Nakasone conducted a followup inspection of RAINBOW's residential educational facility, Rainbow House, located in Kahaluu, Oahu.
2. Rainbow House is a residential facility for children with behavioral management and emotional control problems. Residential staff includes three employees who are required to be trained in CPR and first aid certified.
3. In the course of her inspection Nakasone was provided, and reviewed, a document labeled "Rainbow House Policy and Procedure" which was entitled "Safety Management." The Policy provided for the establishment of a safety team and safety manager who would be responsible for program safety. Part II, entitled "Infection/Disease Control Plan," identified steps to be taken to avoid exposure to blood and fluid borne pathogens. Another document, "Infection Controls: Universal Precautions" identified specific procedures for the handling of bodily fluids to avoid blood borne pathogens. Director's Exhibit D. Nakasone additionally interviewed three Rainbow House employees who affirmed that they were required to respond to medical emergencies which may include exposure to blood borne pathogens.
4. On February 28, 2002, Nakasone conducted a closing conference with RAINBOW's president, Dr. Robert Speers (Speers). Nakasone advised Speers that a citation would be issued and that the violations were deemed serious and could result in the imposition of penalties. Methods of abatement were also discussed.
5. On March 4, 2002, the Director issued a Citation and Notification of Penalty (Citation) to RAINBOW.

6. The citations stem from the failure of RAINBOW to make Hepatitis B vaccinations available to those employees of Rainbow House who are designated first responders to medical emergencies.
7. Specific citations state, in part, as follows:

Citation 1 Item 1a Type of Violation: Serious
...Rainbow House employees who are designated emergency responders were not offered the Hepatitis B vaccination series.

* * *

Proposed Penalty: \$ 375.00

Citation 1 Item 1b Type of Violation: Serious
...It was not ensured that employees who declined to accept hepatitis B vaccination offered by the employer signed a statement in Appendix A, "Hepatitis B Vaccine Declination."

* * *

Citation 1 Item 1c Type of Violation: Serious
...The medical record for an employee with occupational exposure did not include a copy of the employee's hepatitis B vaccination status, including the dates of all the hepatitis B vaccinations or any medical records relative to the employee's ability to receive vaccination as required by 29 CFR 1910.1030(f)(2).

* * *

Citation 2 Item 1a Type of Violation: Other
...the company's Infection/Disease Control Plan & Infection Control: Universal Precautions procedures were missing elements of paragraphs (d), (f), (g), and (h) of 29 CFR 1910.1030.

* * *

Citation 2 Item 1b Type of Violation: Other
...The exposure determination did not include a list of all tasks and procedures or groups of closely related tasks and procedures

in which occupational exposure occurs and that are performed by employees in job classifications listed in 29 CFR 1910.1030(c)(2)(i)(B); ...

* * *

Citation 2 Item 2. Type of Violation: Other

... Employee training records for blood borne pathogens were not maintained for 3 years from the date on which the training occurred;

8. On March 21, 2002, RAINBOW filed a written contest of all violations and penalties identified in the Citation.
9. On or about March 22, 2002, Speers called HIOSH offices to attempt to schedule an informal conference to discuss adjustment of the Citation or penalty. Speers was advised by receptionist Mary Ann Chun that an informal conference could not be scheduled because Speers had contested the Citation. Chun further advised Speers that if he would withdraw the contest, HIOSH would make an attempt to conduct the informal conference before the expiration of the mandatory 20-day period during which a contest must be filed. Speers could then refile the contest.
10. Speers elected not to withdraw his letter of contest because there remained only a few days within which to contest and he did not want to risk forfeiting his right to contest simply because an informal conference might be held.
11. At the initial conference conducted by the Board in this matter, Speers did not contest the existence of a violative condition but instead contested the imposition of the penalty on the grounds that, 1) no warning, permitting correction of any dangerous condition, had been issued prior to the imposition of the penalty, and 2) HIOSH policy had deprived RAINBOW of its right to an informal conference.
12. At the evidentiary hearing, Speers, with the Board's approval, expanded the issues under contest to include, 1) whether RAINBOW had the requisite knowledge of the violative condition, and 2) whether the characterization of "serious" was appropriate.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant contest pursuant to HRS § 396-11.

Absence of a Warning

2. Relying upon what Speers identifies as a “common law right of cure as an implied contract,” Speers alleges that HIOSH erred in imposing a penalty without first issuing a warning and providing RAINBOW with an opportunity to cure any defect. He testified that other regulatory agencies routinely issued such warnings and that small businesses, such as RAINBOW, would be subject to unfair and burdensome treatment if they were held strictly liable for all violations of the myriad of regulatory constraints placed upon them.
3. HIOSH’s duty to impose penalties upon the finding of a serious violation is identified in Hawaii Revised Statutes (HRS) § 396-10(b), which provides that:

(b) Any employer who has received an order or citation for a serious violation of any standard or rule adopted pursuant to this chapter shall be assessed a civil penalty of not more than \$7,000 for each violation. (Emphasis added).

4. The Board concludes that the legislature’s use of the mandatory (“shall be assessed”) evinces an intent to deprive HIOSH of discretion in the issuance of a penalty for serious violations. This is supported by the use of discretionary language (“may be assessed”) with reference to “other than serious” violations. HRS § 396-10(c). See, In Re Fasi, 63 Haw. 624, 627, 634 P.2d 98 (1981) (proximity of the contrasting verbs “may” and “shall” requires a mandatory effect for “shall.”)
5. Accordingly the Board concludes that the Director did not err by imposing a penalty without first issuing a warning and providing an opportunity for cure.

Informal Conference

6. Hawaii Administrative Rules (HAR) § 12-51-21 states:

At the request of an affected employer, employee, or their respective designated representative, the director may hold an informal conference for the purpose of discussing any issues

raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest.

7. RAINBOW alleges that the instant citation and penalty should be vacated because HIOSH denied RAINBOW the opportunity to request or receive an informal conference.
8. HIOSH argues that it did not err in denying RAINBOW an informal conference because RAINBOW had previously filed a notice of contest. HIOSH asserts that the filing of the notice of contest effectively transferred jurisdiction over the Citation to the Board, thereby depriving HIOSH of any power to vacate, adjust or otherwise modify the Citation. It argues that the loss of this power makes it impossible to schedule an informal conference once a notice of contest is filed.
9. The Board does not concur with HIOSH's position. First, the holding of an informal conference is not contingent upon HIOSH's power to vacate, modify or adjust a citation. By the terms of the applicable rule the purpose of the informal conference is "for the purpose of discussing any issues raised." Even if a notice of contest deprives HIOSH of jurisdiction, it does not render them mute.
10. Second, again by its own terms, the rule appears to contemplate the holding of informal conferences after the filing of a notice of contest. Among the issues identified as available for discussion are those "raised by ... [a] notice of intention to contest." While the rule does not specifically refer to any such notice having already been filed, since the other issues identified in the rule refer to acts which have already occurred, it is reasonable to conclude, as the Board hereby does, that the filing of the notice may have similarly occurred.
11. And third, it is simply unfair to require that a business effectively choose between a formal contest and informal conference prior to having had the opportunity to discuss the matter with someone in authority at HIOSH. The intention to provide such an opportunity is clearly reflected in HAR § 12-51-21 and the interpretation adopted by HIOSH requires that businesses forfeit the opportunity for informal resolution if a formal contest is filed. The Board is of the view that this problem would be avoided simply by tolling the time requirement of the notice of contest when an informal conference is requested until HIOSH has either declined or provided the conference. This issue, however, is not presented in the instant proceeding so a conclusion need not be reached on the matter here.

12. Notwithstanding our conclusion that HIOSH erred in failing to permit RAINBOW an opportunity to request an informal conference, neither the citation nor fine will be amended on this ground. We conclude, infra, that RAINBOW did not contest the Citation, and have concluded, supra, that a fine was mandatory. HIOSH vigorously and effectively opposed RAINBOW's substantive grounds for amending or vacating the Citation. Accordingly, the Board cannot identify any prejudice to RAINBOW which resulted from the wrongful denial of an informal conference and therefore will not amend the citation or penalty on this basis.
13. To establish a violation of a standard, the Director must prove: "(1) the standard applies, (2) there was a failure to comply with the cited standard, (3) an employee had access to the violative condition, and (4) the employer knew or should have known of the condition with the exercise of due diligence." Director v. Honolulu Shirt Shop, OSAB 93-073 at 8 (Jan. 31, 1996).
14. At prehearing, RAINBOW stipulated to the violation of the applicable standard. However, at the evidentiary hearing, Speers, proceeding pro se, while conceding the applicability of the standard, employee exposure and failure to comply, sought to contest whether the employer knew or should have known of the violative condition. He also sought to contest the characterization of "serious." In light of his pro se status, Speers was permitted to contest these elements.
15. Speers argued that RAINBOW did not have the requisite knowledge because neither he nor his employees were aware of the requirements of the applicable regulation. The Director argues that a violation only requires employer knowledge of the condition itself.
16. As argued by the Director, the knowledge element is directed not to the requirements of the law but to the conditions that constitute a violation of the standard. Southwestern Acoustics & Specialty, Inc., 5 OSHC 1091 (1977); Shaw Construction, Inc., 6 OSHC 1341 (1978).
17. There is no question that Speers had knowledge that his employees were not offered the Hepatitis B vaccination series. Accordingly, the knowledge element was satisfied and violation established.
18. Speers further argues that the characterization of the violation as "serious" was incorrect because as an educational institution, the possibility of employees contracting Hepatitis B through blood borne pathogens was minimal. The

Director argues that the characterization of “serious” refers not to probability of injury but rather to the nature of injury that is likely to result from a violation.

19. As argued by the Director, “serious” refers only to the probability that any resultant injury would involve death or serious bodily harm. Bethlehem Steel Corp., 607 F.2d 1069 (3rd Cir. 1979).
20. It is uncontested that the probable consequences of contracting Hepatitis B is likely to involve death or serious bodily harm. Consequently, the violation is correctly characterized as serious.

ORDER

The Board hereby affirms the Citation.

Dated: Honolulu, Hawaii, September 6, 2002.

HAWAII LABOR RELATIONS BOARD


BRIAN K. NAKAMURA, Chair


CHESTER C. KUNITAKE, Member


KATHLEEN RACUYA-MARKRICH, Member

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