

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the Amended
Administrative Penalty Order
to Westling Manufacturing,
Inc., Princeton, Minnesota

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge from the Minnesota Office of Administrative Hearings, in Minneapolis, Minnesota on April 21 and 22 and May 25, 1988.

Appearances: William Sierks, Special Assistant Attorney General, Suite 0, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Minnesota Pollution Control Agency (Agency or PCA); and Frank B. Wolfe III, Nichols, Wolfe, Stamper, Nally & Fallis, Inc., Attorneys at Law, Suite 400, 100 City Hall Building, 124 East Fourth Street, Tulsa, Oklahoma 74103, appeared on behalf of Westling Manufacturing, Inc. (Westling, Company or Respondent).

The record herein closed on August 25, 1988, with the receipt by the Administrative Law Judge of the final post-hearing memorandum of counsel. The time for submission of briefs stated in Minn. Stat. sec. 116.072 (1987 Supp.) was waived by counsel.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. S 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to the party to whom the Order was issued to comment to the Commissioner within that five-day period on the recommendation. Parties should contact Gerald L. Willett, Commissioner, Minnesota Pollution Control Agency, 500 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for providing comment on the recommendation herein contained.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether Westling violated Minnesota Rules Part 7045.0292, subp. 1H and/or 7045.0558, subps. 1, 3 and 6, as charged in the Amended Administrative Penalty Order, and, if so, whether the proposed sanction is unreasonable.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Westling Manufacturing, Inc., (Westling, Company or Respondent) is a rebuilder and remanufacturer of automobile parts, including starters, alternators and water pumps. In the course of its remanufacturing process, it generates hazardous waste which, at various times has included stoddard solvent (0001), tetrachloroethylene (FO01) and methyl ethyl ketone (FO05). Respondent employs about 100 people at its Princeton, Minnesota facility.

2. In 1982, the Minnesota Pollution Control Agency (PCA) was cooperating with the United States Environmental Protection Agency (EPA) in carrying out the provisions of Public Law 94-580. To enforce that statute and the applicable EPA regulations, PCA personnel inspected facilities in Minnesota that generated, transported, stored, treated or disposed of hazardous waste materials.

3. Hazardous waste materials are defined both by federal and state law and it is stipulated that the waste solvents generated by Westling are hazardous waste materials.

4. On June 16, 1982, PCA inspectors visited the Westling facility at Princeton, Minnesota. On that date, one of the inspectors, Michael J. Tibbetts, observed a number of sealed 55-gallon drums stored on site. He was told they contained perchloroethylene (FO01), methyl ethyl ketone (FO05) and stoddard solvent (0001). The containers did not include labels showing the date of placement as required by the federal regulations. If all of the drums contained hazardous waste, more than 2,000 pounds or 1,000 kilograms of hazardous waste were in storage on the property at the time of the inspection. If the amount in excess of 1,000 kilograms had been stored on the site for more than 90 days, a permit for continued storage and compliance with the generator hazardous waste management rules would have been required. The lack of labeling prevented Mr. Tibbetts from determining the quantity of hazardous waste that had been accumulated on site for more than 90 days.

5. Based upon the inspection in 1982, Mr. Tibbetts concluded that Westling was a large generator of hazardous waste within the meaning of the applicable federal hazardous waste generator regulations, 40 C.F.R., pts. 262 - 265, and hence, the Company was subject to all of the federal hazardous waste management regulations, including personnel training.

6. By letter dated July 16, 1982, Mr. Tibbetts officially notified

Westling of the asserted violations of the federal Hazardous Waste Act and

requested that the Respondent submit a written response addressing the asserted violations within 30 days of the receipt of the certified letter.

PCA Ex. 6. Based on his conclusion that Westling was a large quantity generator, he found, inter alia, that the Company had not complied with the

personnel training and training documentation requirements of the federal regulations. Mr. Tibbetts invited Westling to obtain the services of an environmental consultant to ensure compliance with the applicable regulations. Mr. Tibbetts provided Westling with a list of qualified environmental consultants. PCA Ex. 6.

7. The hazardous wastes found by Mr. Tibbetts at the Westling facility in 1982 were not generated in a single month but were accumulated over a period of time. Prior to the summer of 1982, Westling's hazardous Wastes were

transported from the site by a private contractor. That service was discontinued as a result of the Company's anticipated startup of a model LS-15 solvent still. Westling installed the still on July 1, 1982, and began reducing the amount of accumulated hazardous waste. At the time of the 1982 inspection, Westling had not reported its hazardous waste generator activity to the state or federal authorities.

B. By letter dated August 23, 1982, Nichols & Wolfe, Inc., Attorneys at Caw, advised Mr. Tibbetts of the circumstances under which he found the amount of hazardous waste on the Company's premises in 1982, as described in Finding 7, supra. Westling Ex. A. That letter denied that Westling was a large quantity generator subject to the personnel training requirements of the federal regulations. It asserted that the normal operations of the Company did not generate hazardous waste materials in quantities that would equal or exceed 1,000 kilograms during any calendar month. That same letter indicated that the Company had contacted "a few of the environmental consultants on the list you provided to the Company, in an effort to ensure that there are no future violations of the applicable regulations by the Company." Westling Ex. A, 4. The letter from Respondent's counsel in 1982 concluded with the statement, "Unless we hear from you to the contrary, we will consider the issues raised in your July 16, 1982 letter resolved." Westling Ex. A, 4.

9. Neither Mr. Tibbetts nor any other Staff person from the Pollution Control Agency contacted either Westling or its attorneys to respond to the letter of August 23, 1982, Westling Ex. A. No enforcement or penalty proceedings were commenced.

10. In August of 1982, John Goslinga assumed responsibility as Westling's Environmental Protection Agency compliance officer. Westling and its counsel recognized that 'it will be Mr. Goslinga's responsibility to monitor the Company's compliance with the applicable regulations." Westling Ex. A, 2.

11. During the fall of 1982, Mr. John Goslinga attempted to respond to the PCA's concerns about Westling's Princeton facility. In that effort, he worked with Michael E. Sommer, Compliance and Enforcement Unit, Regulatory Compliance Section, Solid and Hazardous Waste Division. Mr. Goslinga and Mr. Sommer had a number of telephone conversations and exchanged correspondence. Mr. Sommer told Mr. Goslinga that he, as the regulatory staff member, would assist Mr. Goslinga in conforming to the applicable federal and state hazardous waste rules.

12. The PCA is charged by statute with the responsibility of giving high priority to providing planning and technical assistance to hazardous waste generators. Minn. Stat. S 116.07, subd. 4 (1986).

13. On October 8, 1982, Westling made an initial hazardous waste disclosure to the PCA. This disclosure included a proposed management plan for identified hazardous wastes, The Company's waste management practices were approved by the PCA on an interim basis. Westling Ex. E, 1.

14. On July 21, 1983, Mr. Sommer reinspected the Princeton facility for compliance with the applicable hazardous waste regulations. Mr. Sommer found an accumulation on site of 16 55-gallon drums of methyl ethyl ketone (FO05), perchloroethylene (FO01) and stoddard solvent. The drums were not labeled as

to their date of placement. At the time, however, the Company's distillation unit was inoperable and no hazardous waste manifests documenting recent shipments of such waste from the site were presented. PCA Ex. 4.

15. There is no evidence in the record as to how long the amount of hazardous waste in excess of 1,000 kilograms had been stored on site. The Company had, however, experienced a significant amount of difficulty with its still.

16. If more than 1,000 kilograms of hazardous waste had been stored at the facility for more than 90 days, compliance with the personnel training and record keeping rules would have been required, even if Westling was not a large quantity generator.

17. As a consequence of the inspection in July of 1983 by Mr. Sommer, the Company received a Notice of Violation from the PCA dated August 12, 1983. The Notice of Violation, inter alia, charged that the Company violated the large generator employee training and documentation requirements of the predecessor rule to that charged in this proceeding, 6 MCAR S 4.9004. PCA Ex. 4, 4. The Notice of Violation required the Company to submit, within 30 days of the NOV, written documentation of the actions taken by Westling to respond to the charges therein contained.

18. By letter dated September 14, 1983, Westling indicated to the PCA its intention to remain a small quantity generator by promptly disposing of any hazardous waste stream which could not be recycled on-site. Westling Ex. F.

19. On September 13, 1983, Mr. Sommer, on behalf of the PCA, reinspected Westling for compliance with the applicable hazardous waste regulations and rules. At the time of the reinspection, Westling had shipped excess stored hazardous wastes off-site. Mr. Goslinga and Mr. Sommer discussed the Company's intentions with respect to its hazardous waste stream and future compliance.

20. As a consequence of the reinspection and discussions, Mr. Sommer, on behalf of the PCA, concluded:

Based upon this inspection and the information subsequently received, it appears that Westling Manufacturing Company is presently meeting the intent of the state and federal hazardous waste regulations.

Westling Ex. F, 1. Mr. Sommer, in communicating the results of his reinspection to Westling, wrote to Mr. Goslinga:

At this time, I would like to thank you, John, for all your work in removing those accumulated wastes. If you have any

further questions, please feel free to contact me for assistance in determining your responsibilities under the hazardous waste program.

Westling Ex. F, 2.

21. Both large and small quantity generators must submit annual reports to the PCA which include detailed information on the amount and types of hazardous wastes produced during a calendar year. Minn. Rules pt. 7045.0296 (1987).

22. The Company's reports to the PCA for calendar years 1984, 1985 and 1986 show a production of hazardous waste in excess of the 1,000 kilogram of hazardous waste per month which defines a small quantity generator. PCA Ex . 23.

23. There is no evidence in the record that the Company monitored its hazardous waste production to determine when it ceased being a small quantity generator, or took action to comply with any large quantity generator requirements prior to an inspection by the PCA in 1986.

24. On April 21, 1986, the PCA again inspected the Westling facility for compliance with Minnesota rules regarding hazardous waste. PCA Ex. 7, 8, 19; Tr. 318, 320, 545-47. The inspection was conducted by Donna Portner and Gary Eddy, pollution control specialists for the Agency. The 1986 inspection verified that the Company was producing in excess of 1,000 kilograms of hazardous waste material per month. At the inspection on April 21, 1986, the Company produced no hazardous waste personnel training program and no personnel training records.

25. By letter dated May 15, 1986, Ms. Portner informed Mr. Goslinga that the Company was being classified as a generator of hazardous waste subject to all of the requirements of the Minnesota rules as a large quantity generator. The letter advised the Company that it must take a variety of actions to comply with the hazardous waste generator requirements. The notice included the following statement:

Refer to Minn. Rules pt. 7045.0558 and 7045.0566 to 7045.057b for specifics concerning personnel training, preparedness, prevention, and contingency planning. A sample contingency plan is included for your reference. An overview of these requirements is as follows:

4. The Company shall develop and implement a personal training program within 60 days of receipt of this letter. The training may be classroom instruction or on-the-job training and must include hazardous waste management procedures relevant to the employees' positions. As part of the training, all personnel must become familiar with emergency procedures, emergency equipment and emergency systems. In addition, new employees must receive training during their first six months of employment.

Documentation of personnel training is required. Personnel records of those employees participating in the training must

consist of the employee's job title, job description, and date of the training. Training records for current personnel must be kept until closure of the facility. Training records of former employees must be kept for at least three years from the date the employee last worked at the facility.

PCA Ex. 8, 2.

26. By letter dated June 12, 1986, Mr. Goslinga stated to Ms. Portner that "our personnel training program will be documented." PCA Ex. 9. On the same date that the letter was received by the PCA, Ms. Portner had a telephone conversation with Mr. Goslinga in which she told him to provide her with a copy of the personnel training program and the Company's contingency plan.
PCA Ex. 10.

27. On July 14, 1986, Mr. Goslinga had a telephone conversation with Ms. Portner in which he requested an extension for the submission of detailed compliance with the May 15, 1986 letter of the PCA. PCA Ex. 11.

28. By letter and enclosures dated July 29, 1986, Mr. Goslinga provided to the Agency, among other things, a Personnel Training Program outline which lists eight topics or tasks to be covered in hazardous waste handling and training of Westling employees. PCA Ex. 12B. No more complete description of the training program was ever prepared by Westling.

29. On October 8, 1986, Ms. Portner and Mr. Goslinga had a telephone conversation in which Mr. Goslinga was informed that he must revise the personnel training program to include job titles and written job descriptions. Mr. Goslinga indicated that training had been given to 2-4 employees but wasn't documented. PCA Ex. 13. Ms. Portner sent Mr. Goslinga the address at which he could obtain the hazardous waste rules with a page citation to the personnel training rule. PCA Ex. 13.

30. On October 31, 1986, the PCA received from Mr. Goslinga a contingency plan and a document entitled "Annual Personnel Training Program Outline". PCA Ex. 14A. That submission identified Mr. Goslinga as the program director and Jim Matvik by title as the cleaning department supervisor with stated job responsibilities regarding hazardous waste storage. PCA Ex. 14A. The content of the "Training Program Outline" was less detailed than the previous submission entitled "Personnel Training Program". PCA Ex. 12B.

31. By letter dated September 15, 1987, Ms. Portner responded to the October 31, 1986 submission of Mr. Goslinga. Ms. Portner indicated that to be in compliance with the state hazardous waste rules regarding the April 21, 1986 inspection Westling must submit the following documents:

1. A copy of the log you have been keeping of the weekly inspections of your hazardous waste storage area.
2. A copy of documented new employee training.
3. A copy of documented annual employee training.

4 . A copy of written job titles and job descriptions.

PCA Ex. 15.

32. By letter and enclosures dated September 29, 1987, Mr. Goslinga submitted the following:

1. a sample of weekly inspection checklist on file for each week starting the week of September 13, 1986;
2. a sample of new employee training program;
3. a sample of annual employee training and a copy of the signature sheet that is retained in employee's file;
4. and a job description: to inventory and maintain waste storage for weekly pickup by Safety Klean Corp.

PCA Ex. 16a. The personnel training program included in that submission is identical to that previously submitted in 1986. PCA Ex. 16G.

33. Ms. Portner and Mr. Goslinga had a number of contacts in 1986 and 1987. During one conversation, Mr. Goslinga asked her if he should create special job titles for employees involved in hazardous waste handling. Ms. Portner stated that it would not be necessary.

34. Ms. Portner considered assisting hazardous waste generators in complying with the applicable rules to be one of her job responsibilities.

35. Ms. Portner temporarily left the Agency at or about the time of her letter of September 15, 1987. PCA Ex. 15. The staff responsibility for the Westling file was reassigned to Patricia M. Leach, of the enforcement unit of the hazardous waste division of the Agency.

36. By letter dated October 12, 1987, Ms. Leach communicated the Agency's position on the September 29, 1987 compliance submittal of Mr. Goslinga. That correspondence states the following:

Thank you for your letter and submittal on September 29, 1987. Based on the information you provided, Westling Manufacturing Company is currently in compliance with the requirements of the Minnesota Hazardous Waste Rules. Please be aware that during future inspections your records will be reviewed to verify that you are documenting weekly inspections and personnel training.

Donna Portner has left the Minnesota Pollution Control Agency. If you have questions or comments YOU Can contact me

Westling Ex. C.

37. On November 3, 1987, Michael Tibbetts and Dave Pahoski, pollution control specialists from the Agency, inspected the Company's Princeton

facility. Prior to visiting that facility, Mr. Tibbetts had contacted

Westling's operations manager, Steven Sanborn, by telephone to arrange a convenient date for the inspection. During that conversation, Mr. Tibbetts stated that a purpose of his inspection was to review the Company's personnel training documents. Tr. 213, 276. Mr. Sanborn had been operations manager at the facility since June of 1987. Mr. Goslinga was ultimately responsible to Mr. Sanborn.

38. When Mr. Tibbetts arrived at the Company's facility on November 3, 1987, he met with Mr. Sanborn. Mr. Tibbetts told Mr. Sanborn that he wished to review the Company's hazardous waste personnel training records. Tr. 46-47. Mr. Sanborn directed Mr. Tibbetts to Westling's personnel director, Sharon Sandberg. Mr. Sanborn told Mr. Goslinga that the personnel director had all of the written information the PCA wished to review. Tr. 284. When Mr. Tibbetts explained to Ms. Sandberg that he wished to review the Company's hazardous waste personnel training records, Ms. Sandberg showed Mr. Tibbetts two copies of the Personnel Training Program outline referred to in Finding 28, supra identical to PCA Ex. 12B, except that each copy of the Personnel Training Program had on it a signature of an employee. The employee was not otherwise identified, nor were the documents dated. Ms. Sandberg did not produce any additional documents during Mr. Tibbetts' inspection that would identify the hazardous waste management positions that existed at the Company at the time of the inspection or the identity of employees who occupied those positions. PCA Ex. 12B; Westling Ex. H-2; Tr. 47, 597-98. When asked by Mr. Tibbetts if she had any additional documents regarding hazardous waste training of Westling employees, Ms. Sandberg said that they only had the two signed documents produced. Although Mr. Goslinga was at the facility that day, Mr. Tibbetts did not ask to see him and neither Mr. Sanborn nor Ms. Sandberg advised him of the inspection.

39. Mr. Tibbetts stated to both Ms. Sandberg and Mr. Sanborn that the personnel training records produced by the Company were inadequate because they did not contain dates for the training. Tr. 47-48, 244, 280. Mr.

Tibbetts promised to send Mr. Sanborn a sample form that he, Mr. Tibbetts, would find acceptable.

40. On January 25, 1988, the Commissioner issued an initial Administrative Penalty Order under Minn. Stat. sec. 116.072 (Supp. 1987). That initial Order was not included in the record of this proceeding.

41. The Agency attached to the initial Administrative Penalty Order a sample federal form, which it would have found appropriate to provide the information required under the personnel training rule. Westling Ex. D. The form, apparently, originated with the Environmental Protection Agency and had been distributed to some Agency personnel at an EPA training seminar. At no time prior to the issuance of the Administrative Penalty Order had Westling or any of its employees been provided with a copy of the acceptable form or told of its existence.

42. At the request of Westling, a meeting with PCA staff was held in February of 1988, after the issuance of the initial Administrative Penalty Order. As a consequence of that meeting, certain of the initial charges were dropped. At that time, also, Westling volunteered to construct a model hazardous waste personnel training program.

43. On February 23, 1988, the Commissioner of the Minnesota Pollution Control Agency issued an Amended Administrative Penalty Order (AAPO). it charged the Company with a violation during the 1987 inspection of Minn. Rule pt. 7045.0292, subp. 1H (1987) and Minn Rule pt. 7045.0558, subps. 1, 3 and 6 (1987). Specifically, the AAPO charged that the Company's personnel training program was incomplete, failing to meet the minimum program requirements, and that the Company did not maintain adequate training records at its facility. The records were termed inadequate because they did not contain job titles and job descriptions for each position related to hazardous waste management, failed to contain a description of introductory and continuing training, and failed to document the dates of training for facility personnel. PCA Ex. 18. The AAPO further stated that the penalty Was not forgivable because the Company acted willfully and was a repeat violator of the hazardous waste personnel training program rules. The AAPO proposed an unforgivable penalty of \$2,450 for the violations noted during the November 3, 1987 inspection. PCA Ex. 18.

44. The PCA staff has developed a 'Penalty Calculation Worksheet" and an "Administrative Penalty Memorandum' which attempt to systematize an application of the factors affecting the amount of the penalty stated in Minn. Stat. 116.072 (1987). PCA Ex. 19; PCA Ex. 17.

45. A base penalty of \$2,000 was chosen by the staff member because in his opinion the Company acted willfully. He concluded that the Company clearly knew that the rule had been violated because of previous inspections. PCA Ex. 19, Insert. The violation was found to be minor because the failure to maintain proper personnel training records is not as great a violation as unlawful disposition of hazardous waste. Tr. 542, 43, 655-56; Ex. 19, Insert. A 7.5% increase to the base penalty, or \$150, was recommended because the Company was deemed to be a repeat violator. Tr. 117, 640-41, 856, 860; PCA Ex. 19, Insert. A 5% increase to the base penalty, or \$100, was recommended because, in the opinion of the staff person, the Company had sufficient time between the previous inspection in 1986 and the 1987 inspection to correct the asserted violation. Tr. 552; PCA Ex. 19, Insert. Finally, a 10% increase to the base penalty, or \$200, was recommended because, in the opinion of the staff member, the Company had not made a good faith effort to comply with the personnel training requirement. The staff member concluded that the Company had not acted in good faith and had demonstrated 'habitual noncompliance with an important requirement". PCA Ex. 19, Insert.

46. The Penalty Calculation Worksheet contains the following statement:

If the violation is either repeat or serious, then record on the tally sheet that the penalty is unforgivable. If the violation is neither repeat or serious, then record that the penalty is forgivable as specified in the statute.

PCA Ex. 19, 7. The final recommendation of Mr. Tibbetts was that a nonforgivable administrative penalty of \$2,450 be imposed.

47. Mr. Tibbetts' recommendation was reviewed through the PCA staff hierarchy and ultimately reflected in the Amended Administrative Penalty Order. The penalty calculation was made by Mr. Tibbetts on February 22,

1988. PCA Ex. 19, Tally Sheet. The Amended Administrative Penalty Order which incorporated all of Mr. Tibbetts' recommendations was issued and signed by the Commissioner personally on February 23, 1988.

48. Neither the Penalty Calculation Worksheet, nor the AAPO, mention the letter to Westling by Ms. Leach prior to Mr. Tibbetts' inspection in 1987. Westling Ex. C.

49. The AAPO was issued solely to 'get the Company's attention". Tr. 653, 737.

50. Laborers at Westling Manufacturing Company do not have job titles. Only the supervisors have job titles. Mr. Goslinga had informed Ms. Portner of that fact and she advised him that it was not necessary to create titles to report for purposes of the rule. When Mr. Goslinga provided samples of employee training records, individuals who were supervisors were reported as such, PCA Ex. 14a. This understanding by Mr. Goslinga is in accordance with the statement made by Ms. Portner.

51. During the hearing herein, several PCA witnesses admitted that the rule was ambiguous as regards the degree of detail required to satisfy particular provisions and was subject to varying interpretations. Tr. 163-77; Tr. 393-400.

52. The Agency has not adopted either under the Administrative Procedure Act or, even, internally, a consistent interpretation of the requirements of the rules or a model set of forms. Tr. 406.

53. The PCA staff believes that it has a responsibility to assist regulated companies in complying with the Minnesota hazardous waste rules. They regularly work with individual companies to obtain compliance. Tr. 177; Tr. 369; Minn. Stat. S 116.07, subd. 4 (1986).

54. There is no evidence in the record that the required hazardous waste handling training was not actually given by Westling to all employees handling hazardous waste and the Company is not charged with any mishandling or improper discharge of hazardous wastes.

PERTINENT STATUTORY AND REGULATORY EXCERPTS

Minn. Stat. S 116.072, in relevant part, provides:

Subdivision 1. Authority to issue Penalty orders. The director may issue an order requiring violations to be corrected and administratively assessing monetary penalties for hazardous waste violations under sections 115.061 and

116-07, and Minnesota Rules, chapter 7045. The order must be issued as provided in this section.

Subd. 2. Amount of penalty; considerations.

(a) The director may issue an order assessing a penalty up to \$10,000 for all violations identified during an inspection.

(b) In determining the amount of a penalty the director may consider:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require, if the director specifically identifies the additional factors in the director's order.

(c) For a violation after an initial violation, the director shall, in determining the amount of a penalty, consider the facts in paragraph (b) and the:

- (1) similarity of the most previous violation and the violation to be penalized;
- (2) time elapsed since the last violation;
- (3) number of previous violations; and
- (4) response of the person to the most previous violation identified.

Subd. 4. Corrective order.

(a) The director may issue an order assessing a penalty and requiring the violations cited in the order to be corrected within 30 calendar days from the date the order is received.

Subd. 5. Penalty.

(a) Except as provided in paragraph (b), if the director determines that the violation has been corrected or appropriate steps have been taken to correct the action, the penalty must be forgiven

(b) For a repeated or serious violation, the director may issue an order with a penalty that will not be forgiven after the corrective action is taken

Subd. 6. Expedited administrative hearing.

(a) Within 30 days after receiving an order or within 20 days after receiving notice that the director has determined that a violation has not been corrected or appropriate steps have not been taken, the person subject to an order under this section may request an expedited hearing to review the director's action

(c) The administrative law judge shall issue a report making recommendations about the director's action to the director within 30 days following the close of the record. The administrative law judge may not recommend a change in the amount of the proposed penalty unless the administrative law judge determines that, based on the factors in subdivision 2, the amount of the penalty is unreasonable.

(d) If the administrative law judge makes a finding that the hearing was requested solely for purposes of delay or that the hearing request was frivolous, the director may add to the amount of the penalty the costs charged to the agency by the office of administrative hearings for the hearing.

Minnesota Rule Part 7045.0292, subp. I, in relevant part, provides:

Subpart 1. When allowed without a permit. A generator may accumulate hazardous waste on-site or hazardous waste received from off-site pursuant to part 7045.0219, subpart 5, item G, subitem (5) without a permit or without having interim status if:

H. the requirement of parts 7045.0558 and 7045.0566 to 7045.0576 a refilled regarding personnel training, preparedness, prevention, and contingency planning.

Minnesota Rule Part 7045.0558, in relevant part, provides:

Subpart 1. General. Hazardous waste facility personnel shall successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with the requirements of this chapter. The owner or operator shall ensure that this program includes all the elements described in the document required by subpart b, item C.

Subp. 3. minimum program requirements. The training program must include instruction which teaches facility personnel hazardous waste management procedures relevant to the positions in which they are

The employed, including contingency plan implementation procedures.
The training program must be designed to ensure that facility personnel
them are able to respond effectively to emergencies by familiarizing
with emergency procedures, emergency equipment, and emergency
systems, including, where applicable:

- A. procedures for using, inspecting, repairing, and replacing facility emergency and monitoring equipment;
- B. key parameters for automatic waste feed cutoff systems;
- C. communications or alarm systems;
- D. procedures for response to fires or explosions;
- E. procedures for response to ground water contamination incidents; and
- F. procedures for shutdown of operations.

an Subp. 5. Training review , Facility personnel shall take part in
annual review of the initial training required in subparts 1 to 3.

Subp. 6. Personnel records. The following documents and records
must be maintained at the -facility:

- A. the job title for each position at the facility related to hazardous waste management and the name of the employee filling each job;
- B. a written job description for each position at the facility related to hazardous waste. This description may be consistent in its degree of specificity with descriptions for other similar positions in the same company location or bargaining unit, but must include the requisite skill, education, or other qualifications and duties of employees assigned to each position;
- C. a written description of the type and amount of both introductory and continuing training that will be given to each person filing a position described in item A; and
- D. records that document that the training or job experience required under subparts 1 to 4 has been given to, and completed by, facility personnel.

Based on the foregoing Findings of Fact, the Administrative Law Judge
makes
the following:

CONCLUSIONS

1. the Administrative Law judge and the Commissioner of the Minnesota
Pollution Control Agency have jurisdiction herein and authority to take the
action proposed pursuant to Minn. Stat. S 116.072, subd. 1, 6 (Supp. 1987),
and Minn. Stat. S 14.50 (1986).

2. Proper notice of the hearing was timely given and all relevant

substantive and procedural requirements of law or rule have been fulfilled.
The matter is, therefore, properly before the Administrative Law Judge.

3 . The Agency has the burden of establishing the fact of the violations alleged by a preponderance of the evidence. Minn. Rule pt. 1400.8608 (1985).

4. If the violations are established, the Administrative Law Judge may not recommend a penalty different in amount than that contained in the administrative penalty order unless the amount of the penalty proposed is determined to be unreasonable. Minn. Stat. S 116.07, subd. 6(c) (1987 Supp.).

5. At the time of the inspection referred in Finding 37, supra, Westling was a generator of hazardous waste subject to the personnel training and record keeping requirements of Minnesota Rule Part 7045.0558 (1987).

b. The Company has the legal responsibility to comply with all properly promulgated administrative rules of the PCA.

7. The Agency has not established by a preponderance of the evidence that the training program actually given by Westling did not fulfill the requirements of Minnesota Rule Part 7045.0558, subp. I and 3 (1987).

B. The Agency has established by a preponderance of the evidence that the Company's personnel training records maintained at its Princeton facility at the time of the 1987 inspection did not comply with Minnesota Rule Part 7045.0558, subp. 6 (1987).

9. The Agency is estopped from assessing an administrative penalty to Westling based on the sufficiency of employee job titles contained in previous submissions to PCA staff. That estoppel, however, does not extend to Westling's failure to produce the previously submitted documents containing job titles during the 1987 inspection.

10. The Agency is estopped from assessing an administrative penalty to Westling based on the sufficiency of the position descriptions contained in correspondence with PCA staff. That estoppel, however, does not extend to Westling's failure to produce the records containing those job descriptions at the 1987 inspection.

11. The Agency is estopped from assessing an administrative penalty to Westling based on the sufficiency of the employee training outline submitted during the 1987 inspection.

12. As a consequence of Conclusions 8-11, supra, an administrative penalty may be assessed for Westling's failure to produce the job titles and job descriptions previously provided to the PCA during the 1987 inspection and failure to provide records that documented that the requisite employee training had been timely given.

13. The proposed administrative penalty was based on all cited violations

with no apportionment of the amount to individual alleged violations.

14. As a consequence of Conclusions 7-12, supra, the amount of the unforgivable administrative penalty is unreasonable.

15. Based on the factors contained in Minn. Stat. S 116.072, subd. 2 (1987 Supp.), a forgivable administrative penalty in the amount of \$525 is appropriate.

16. Any Finding of Fact more properly considered a Conclusion and any Conclusion more properly considered a Finding of Fact is hereby expressly adopted as such.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge hereby recommends to the Commissioner of the Minnesota Pollution Control Agency that he assess a forgivable administrative penalty to Westling in the amount of \$525. That Order should also require that all violations found in the 1987 inspection be corrected within 30 days of the date of the Commissioner's decision.

To ensure compliance with the Correction Order, a reinspection of the employee training records maintained at the Princeton facility should be conducted after the period for corrective action expires. If that reinspection discloses continuing violations, an Administrative Penalty Order assessing a substantial penalty should issue.

Dated this 26th day of September, 1988.

BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. S 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Court Reported - Mary Ann Hintz, Route 4, Box 142, Isanti, Minnesota 55040 (612) 444-4647

MEMORANDUM

In 1987, the Minnesota Legislature adopted Minn. Stat. S 116.072 (1987 Supp.). That statute authorizes the Commissioner to impose administrative penalties of up to \$10,000 for hazardous waste violations under Minn. Stat. S 116.07 and Minnesota Rules, chapter 7045, the PCA hazardous waste rules. The Amended Administrative Penalty Order issued to Westling asserted a violation of Minnesota Rule Part 7045.0292, subp. 1H (1987) and Minnesota Rule Part 7045.0558, subp. 1, 3, and 6 (1987). The factors affecting the amount of an appropriate administrative penalty, if the asserted violations are established, are stated in Minn. Stat. S 116.072, subd. 2, (1981 Supp.).

There is no dispute that, as of the date of the 1987 inspection of

Westling's Princeton facility, the Company was subject to the requirements of Minnesota Rule Part 7045.0558 (1987) either as a generator other than as a I

quantity generator, as defined in Minnesota Rule Part 7045.0219, subp. 1 (1987), or as a small quantity generator that accumulates excess quantities of hazardous waste on site. Minnesota Rule Part 7045.0219, subp. 4 (1987).

Minn. Stat. S 116.072 (1987 Supp.) provides that the Administrative Law Judge may not recommend a penalty different in amount than that proposed in an administrative penalty order unless the amount of the proposed penalty is found to be unreasonable. The Administrative Law Judge concludes that the statute affords the Agency and the Commissioner a degree of discretion in assigning monetary amounts to aspects of the violations, if the violations and the facts underlying the penalty calculations are established by the Agency. The normal placement of the burden of proof in an administrative penalty proceeding is not, however, shifted to the Respondent. Minnesota Rule Part 1400.8608 (1985), a provision of the OAH Revenue Recapture Rules, provides that the agency must establish the facts at issue by a preponderance of the evidence unless the substantive law provides a different burden. Minn. Stat. S 116.072 (1987 Supp.), specifically provides that the conference contested case rules of the Office of Administrative Hearings are applicable to this proceeding.

it could be argued that the necessity of finding that the proposed penalty is unreasonable before a different penalty can be recommended was intended to shift the burden of proof from the Agency to the Respondent. Under that construction, Minn. Stat. sec. 116.072, subd. 6(c) (1987 Supp.) overrides the cited administrative rule.

As a matter of substantive law, however, an agency seeking to impose a monetary penalty or limit existing rights has the burden of proof of the facts at issue by a preponderance of the evidence. *Cornell - v. Reilly*, 273 P.2d 572 (Cal. App. 1954); 1 F. Cooper, *State Administrative Law*, ch. 12, S 1 (1965). This general rule, recognized by the rules of the Office of Administrative Hearings, is in accordance with decisions of the Minnesota courts. *Holman v. All_Nation Insurance Co.*, 288 N.W.2d 244, 248 (Minn. 1980); *Chemlease Worldwide v. Brace*, 338 N.W.2d 428, 437 (Minn. 1983). When the Legislature has intended to shift the burden of proof in an administrative penalty context, it has expressly so provided. See e.g. Minn. Stat. S 245.801, subd. 4 (1986).

Hence, the Administrative Law Judge concludes that the Pollution Control Agency has the burden of establishing the existence of the asserted violations and the factors it relied upon in its penalty calculation by a preponderance of the evidence. If the PCA does so, it has a degree of discretion in the dollar amount of penalty assessed for each proven violation and extant factor that Minn. Stat. S 116.072 (1987 Supp.) makes relevant.

The PCA alleges in its Amended Administrative Penalty Order (AAPO) that Westling violated Minnesota Rule Part 7045.0454, subps. 1, 3 and 6 in that it failed to provide a satisfactory hazardous waste personnel training program to its employees and failed to produce during a 1987 inspection personnel records documenting the existence of a satisfactory training program and its completion by all personnel engaged in hazardous waste handling at the facility. Further, the Agency asserts that Westling has been aware of the rule since 1982 and has willfully disregarded its requirements. The amount of the proposed penalty is based on the PCA's conclusion that Westling's conscious disregard of the rule demands a penalty in the amount proposed in order to 'get the Company's attention'.

Westling asserts that it considered Agency personnel to be the Respondent's consultants in interpreting and applying the hazardous waste personnel training rule. It also claims it relied to its detriment on a 1987 certification by a PCA staff member that the Company was in compliance with the rule. Westling states that it is ready and willing to construct a model training and record keeping system. It argues, however, that, in the absence of notice and an opportunity to correct, no violation may be found and no administrative penalty imposed.

It is axiomatic that ignorance of the law is no excuse and one must comply with the law or suffer the consequences. That same precept has been applied to compliance with administrative rules. State ex rel. Kaser v. Leonard 164 Or. 587, 102 P.2d 197, 206 (1940); Veix_y,_Seneca Building &_loan_Assoc., 120 N.J.L. 314, 19 A.2d 219, 224 (1941); 2 Am. Jur. 2d, Administrative_Law, SS 291-292. The primary responsibility for compliance with the applicable rules of the Pollution Control Agency is, then, on the subjects of that regulation. While Minn. Stat. S 116.07, subd. 4 (1986), does require the Agency to assist persons in complying with the hazardous waste rules, that statute does not shift the responsibility for compliance from an individual company to the PCA.

The Administrative Law Judge does not suggest by this conclusion that the Agency has no responsibility as regards compliance with its regulations. As will be discussed subsequently, it is bound by the advice of its employees acting within the scope of their authority, whether real or apparent, at least insofar as any sanction is sought to be imposed. The duty to comply with the applicable regulations is, however, always on the subject of that regulation and not upon the Agency. Westling's attempts in this proceeding to characterize the Agency as its consultant and its assertions that it relied on the Agency to monitor the Company's hazardous waste stream to determine the necessity for compliance provide no excuse under the general rule. The Administrative Law Judge does not find that the Agency personnel ever voluntarily accepted a position as "consultant" to Westling. The efforts by Mr. Sommer, Ms. Portner and Mr. Tibbetts to assist Westling were in discharge of the PCA's statutory responsibility. They did not thereby place the responsibility for construction of the rules, instruction in their requirements and ultimate compliance upon the Agency. Jasaka v. City of-St. Paul, 309 N.W.2d 40, 44 (Minn. 1981).

The Administrative Law Judge does not credit the testimony of Mr. Goslinga that Mr. Sommer told him to stop trying to understand the rules and rely exclusively on the Agency staff. As noted by the PCA, the written communications between Mr. Sommer and Mr. Goslinga negate that testimony. Westling Ex. B, 1.

Minnesota Rule Part 7045.0558 (1987), the Hazardous Waste Facility Personnel Training Rule, has never been interpreted by a Minnesota court. The federal regulation from which it was taken almost verbatim. 40 C.F.R. 264.16, likewise, has not been judicially construed. In the absence of an authoritative judicial construction, the Administrative Law Judge must interpret the rule by using the canons of statutory construction contained in

Minn. Stat. SS 645.08, 645.16, 645.17 (1986), giving effect to the provisions according to their meaning in ordinary English usage. Minn. Stat. S 645.001 (1987 Supp); Resident v Noot, 305 N.W.2d 311, 312 (Minn. 1981).

The first violation alleged in the AAPO is that the Company failed to provide a hazardous waste training program to its employees that contained the minimum program requirements stated in Minnesota Rules Part 7045.0558, subds. I and 3 (1987). PCA Ex. 18, 6. There is no direct evidence in the record, however, that the Company failed to actually provide the training required by Minnesota Rule Part 7045.0558, subp. 1 and 3 (1987). Any such conclusion must be based on the outline of training provided by the Company. PCA Ex. 12B, and a comparison of that topic outline to the minimum program requirements of the rule.

As previously noted, however, no evidence was produced at the hearing to demonstrate that untrained employees at Westling were involved in hazardous waste disposal activities or that the training actually given was not sufficient. In both the Amended Administrative Penalty Order and the briefs of counsel, the deficiencies are discussed in terms of a failure to keep adequate personnel records as required by Minnesota Rule 7045.0558, subp. b (1987). It is asserted that the Training Outline, PCA Ex. 12B, is not sufficiently detailed. That assertion, however, in no way proves that the training actually given was deficient. The PCA did not cross-examine Mr. Goslinga or provide testimony from any Wrestling employee to establish that the training given was inadequate under the cited rule.

It could be argued, however, that if the records required by Minnesota Rule Part 7045.0558, subp. b (1987), are not maintained, there has of necessity been a violation of subparts I and 3 of the rule. The Administrative Law Judge does not accept that argument. Certainly, it is both logically and practically possible to give appropriate training and, yet, not document that fact. In the absence of evidence of the training actually given by Westling, other than the topic outline contained in PCA Ex. 12B, the Agency has failed to establish a violation of Minnesota Rule Part 7045.0558, subp. I and 3 (1987).

Should the Commissioner disagree with this conclusion and determine that an inadequacy in the documents maintained by the Company establishes a violation of Minnesota Rule Part 7045.0558, subp. I and 3 (1987), the Administrative Law Judge would apply to that conclusion the discussion of

equitable estoppel that follows in regard to the charged violations of Minnesota Rule Part 7045.0558, subp. 6 (1987).

Westling is asserted to have violated Minnesota Rule Part 7045.0558, subp. 6A (1987) by failing to maintain a document or record at its facility showing the job title for each position at the facility related to hazardous waste management and the name of the employee filling each such job. The language of the rule, given its normal English usage, refers to a job title for a position associated with hazardous waste management and not the ordinary job title of the individual at the Company. The Administrative Law Judge recognizes that agency personnel did testify at the hearing that either construction of subpart 6A could rationally be accepted. Moreover, Mr. Christenson, the official primarily responsible for enforcing the rule at a supervisory level, changed his testimony concerning the meaning of the rule after cross-examination. Initially, he concluded that the reference to a job title meant the existing job title of the individual. Later, he referred to a job title reflecting that person's responsibility in hazardous waste management.

The phrase "job title" in the rules, however, references the phrase "position at the facility related to hazardous waste management" contained in the same rule provision. Minnesota Rule Part 7045.0558, subp. 6A (1987). There is no indication in the rules that the job title reference refers to the existing job title of the individual performing hazardous waste management duties. The documents produced at the 1987 inspection did not contain job titles related to hazardous waste management and there was no list of the employees performing those duties. Hence, the agency has established a violation of Minnesota Rule Part 7045.0558, subp. 6A (1987).

The Administrative Law Judge has concluded, however, that it would be inappropriate to impose an administrative penalty based on the failure of the Company to assign job titles to all positions related to hazardous waste management. This conclusion results from an application of principles related to equitable estoppel.

As noted in the Findings, on at least one occasion, Mr. Goslinga inquired of Ms. Portner whether he should create titles for individuals engaged in hazardous waste management or whether it would be appropriate to use their existing titles. He also stated to her that only Westling supervisors had distinct job titles. Ms. Portner responded that it would not be necessary to create titles specifically for the purpose of the hazardous waste management personnel records rule. Finding 33, supra. When Mr. Goslinga submitted documents to the PCA identifying a supervisory employee who had a responsibility for hazardous waste management, the job title of "supervisor" was used. See Finding 30, supra. Moreover, by Westling Ex. C, a PCA employee who had authority to determine compliance stated that documents which had been supplied to the PCA and only included job titles for supervisors satisfied the rule. Having received direct advice from one Agency employee with authority to interpret the rules and a certification of compliance by a second PCA employee, Westling may not now be subject to a monetary penalty for accepting that direction and certification, at least as regards the sufficiency of the job titles it used.

in an appropriate case, a government agency may be estopped by its action or inaction from enforcing an otherwise valid rule in circumstances where harm to an individual would outweigh any resulting public detriment. *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985). The agency must apply equitable estoppel to its own actions where it affirmatively prescribes a course of action, then later seeks to deny the correctness of its advice. *Beatty v., Minnesota Board of Teaching*, 354 N.W.2d 466 (Minn. App.

1984); In re Halberg Construction & Supply Co., 385 N.W.2d 381 (Minn. App. 1986).

The Agency argues that estoppel may not be applied in this case because the significant public interest involved in hazardous waste handling outweighs any conduct, however unconscionable, on the part of the PCA or any reliance by an entity subject to its regulations. Obviously, this result is unacceptable from both a legal and equitable point of view. Westling argues just as broadly that no violation may be found because of the advice given by Agency personnel. It characterizes this entire proceeding as one in which the main issue to be determined is whether direction given by Agency personnel to secure compliance can be relied upon.

The Administrative Law Judge rejects the arguments of both parties. He looks to analogous Occupational Safety and Health decisions to apply equitable estoppel principles to this proceeding. With respect to both OSHA regulations and hazardous waste rules, a business entity is required to conform to particular standards to safeguard the health and safety of persons. In both areas, persons subject to the regulations may encounter compliance officers, inspections and proposed monetary penalties.

The general rule in Occupational Safety and Health proceedings is that a statement or action by a compliance officer does not bind the secretary in bringing a prosecution for a violation of an identified standard. *Holman Erection Co., Inc.*, 1977-78 OSHD paragraph 22,318 (1977); *Columbian Artworks __Inc.* 1981 OSHD paragraph 25,737 (1981); *Diversified Industries Division* 1979 OSHD 1 23:393 (1979); *Del-Cook Lumber Co.*, 1978 OSHD 1 22,544 (1978). See, *Donovan v. Daniel Marr & Son* 763 F.2d 477 (1st Cir. 1985).

The result reached in the OSHA cases that a violation can still be established when a compliance officer provides inappropriate information regarding the existence of a violation is consistent with the purpose of the statute, to protect health and safety. If the government were estopped in finding a violation as a consequence of an erroneous opinion of an enforcement officer, a significant danger to health and safety could be perpetuated. If no violation can be found, no corrective order is appropriate. Not even *Westling* argues that it has any vested right to continue its employee training program and record keeping system in its 1986-87 form because of mistakes by enforcement officers.

The Administrative Law Judge does not, however, accept the argument of the Agency that the public interest involved would allow this violation to be the basis of a significant administrative penalty. As the OSHA cases also generally recognize, when an employer has received erroneous compliance information from a compliance officer, no significant sanction is appropriate until that employer has had notice and an opportunity to correct the condition now determined to be violative of the standard. *Columbian Artworks, __Inc.*, 1981 OSHD 1 25,737 (1981); *Del-Cook Lumber Co.*, 1978 OSHD 1 22,544 (1978).

In harmonizing the reasoning of the cited OSHA opinions with the estoppel case law this proceeding, it is appropriate to find a violation of Minnesota

Rule Part 7045.0558, subp. 6A (1987), which requires correction. Equitable estoppel, however, prevents the Commissioner from imposing a significant monetary penalty for Westling's failure to assign employees job titles specifically related to hazardous waste management duties.

At the time of the inspection, however, Westling did not produce a copy of PCA Ex. 14A or a list of persons involved in hazardous waste management as required by the rule. See Findings 30 and 38, supra; Minnesota Rule 7045.0558, subp. 6 (1987). Ms. Leach's letter of October 12, 1987, approved the documents submitted, but it did not relieve Westling of the responsibility of maintaining that record at the facility and providing it to an inspector upon request. See, Finding 36, supra. As more particularly discussed with reference to position descriptions, equitable estoppel does not prevent Westling's failure to produce a copy of its approved record during the 1987 inspection from being the basis for the imposition of an administrative penalty.

The next asserted violation of Minnesota Rule Part 7045.0558, subp. 6 (1987), is a failure to produce a written job description for each position at the facility related to hazardous waste. As discussed in Findings 30 and 32, supra, Mr. Goslinga had previously submitted job descriptions for both supervisors and individual employees involved in hazardous waste handling to the PCA. Those descriptions were approved by Ms. Leach in 1987. Westling Ex. C; Finding 36, supra..

The Administrative Law Judge applies to this asserted violation the same reasoning discussed with reference to the previous violation. The job descriptions do not include the degree of detail required by Minnesota Rule Part 7045.0558, subp. 6B (1987). They do not state the requisite skill, education, or other qualifications for persons assigned to that position. Hence, a violation has been established.

The same equitable estoppel considerations that applied to the previous violation apply to this violation of Minnesota Rule Part 7045.0558, subp. 6B (1987). The job descriptions were included in material that had been provided to the Agency and those descriptions were approved by Ms. Leach in 1987. Hence, the specificity of the job descriptions may not be a basis for imposing an administrative penalty. The rule, however, also provides that the written job descriptions must be contained in a record at the Company's facility. As discussed in the Findings, when Mr. Tibbetts inspected the Princeton facility in 1987, he was not provided with a record that included any job descriptions. His inspection was preceded by specific notice about the records that he wished to review. Moreover, the Company chose the employees who would make those records available to the inspector. Under such circumstances, Westling may be sanctioned for not making the existing job descriptions available to Mr. Tibbetts at the time of his inspection.

Westling argues that since the descriptions did exist in written communications and were in the PCA files, no violation can be established. The rule, however, requires that the records be maintained at the facility. Since the Agency has a statutory right to inspect the records at the facility, the Administrative Law Judge finds the argument that a record otherwise exists

to be unpersuasive. The keeping of records at the facility is included in the rule so that the documents are readily and conveniently available at the site where the inspection takes place. Hence, the failure to produce a record of the written job descriptions that had been approved at the 1987 inspection may be used as a basis for imposing an administrative penalty, irrespective of equitable estoppel principles.

The Agency next asserts that the record the Company provided at the 1987 inspection is deficient in that it did not contain a written description of the type and amount of both introductory and continuing training that was to be given to each person filling a position that relates to hazardous waste management. Minnesota Rules Part 7045.0558, subp. 6.C. (1987). The Agency argues that the document produced by the Company, Westling Ex. 12B, is not sufficiently detailed to satisfy the requirement of the rule. The Administrative Law judge agrees that a violation has been established. The document produced does not show the amount of training or differentiate between new and continuing training.

once again, however, the Administrative Law Judge applies the principles of equitable estoppel to prevent the Agency from imposing a monetary sanction for this asserted violation. It is unquestioned that Ms. Leach, shortly before the inspection, approved the outline of training topics submitted by Westling. Applying the reasoning previously discussed, the Commissioner may not rely upon any asserted deficiency in the written description of training to impose a monetary sanction.

The final asserted violation of Minnesota Rule Part 7045.0558, subp. 6, is that the Company failed to maintain at the facility a record that documented that initial and continuing employee training had been timely given. Minnesota Rules Part 7045.0558, subp. 6. D. (1987). The PCA argues that the records submitted by Westling, Westling Ex. H, are not sufficient because they do not include a date of training. Westling argues that the testimony of Mr. Goslinga as to when training was usually given satisfies the documentation requirement of the rule.

The Administrative Law Judge accepts the position of neither party. The rule does not state a form that the record or documentation must take. Reasonably, the inspector must be able to examine the records at the facility and determine from those records that all required training has been timely given to all employees with hazardous waste handling responsibilities. The Administrative Law Judge, as did Westling, concedes that a date on a document may establish the date of receipt of the training. Westling Ex. H only shows that particular persons signed an outline. Those records do not demonstrate that any training, of any sort, had been given. The signature could equally signify that the recipient had received a copy of the document. Nor does a signature show that all required personnel have received training in a timely manner.

Something is documented when it is verified in writing to exist by someone competent to determine its existence. U.S. ex rel Kempf v. Commanding Officer, 339 F. Supp. 320, 324 (S.D., Ia., 1972). Mr. Goslinga, for example, could have placed into the records at the facility a signed statement by

himself as Hazardous Waste Training Officer that all required training had been timely given, together with a list of persons to whom training had been given for a particular time period. Other methods of documentation in Westling's facility records the giving of the required training are also possible without a date after the signature.

The Administrative Law Judge cannot accept the position of the Company that Mr. Goslinga's testimony about Westling's internal procedures provides the requisite documentation. Something is documented when it is contained in a written record that establishes the existence of the fact. *Arnold v. Pawtuxet Val. Water_Co.*, 26 A. 55, 56 (R.I. 1893). see, *United States v. Pascual* 606 F.2d 5bl, 565 (5th Cir. 1979); *Baker Mortgage Co. Huggenberg* 244 S.E.2d 56, 58 (Ga. App. 1978). The rule requires a record documenting training to be maintained at the facility. Under no construction of the word 'record' or 'documenting' can subsequent oral testimony satisfy the requirement of the rule.

The same considerations of equitable estoppel do not apply to this violation. Ms. Leach's communication with Mr. Goslinga, Westling Ex. C, specifically states that he will be required to document the giving of training, that the records must be maintained and that they would be subject

to review by the Agency. Nothing contained in Ms. Leach's letter indicates that the submission in 1987 would satisfy this requirement of the rule. Hence, the Commissioner may rely upon this violation in assessing an administrative penalty.

The Administrative Law Judge has found that violations of Minnesota Rule Part 7045.0558, subp. 6 (1987), have been demonstrated. He concludes, however, that the amount of the proposed administrative penalty is unreasonable. That conclusion is the necessary result of the failure to establish the most serious charge and the application of equitable estoppel to prevent other established charges from fully supporting a monetary penalty. The PCA witnesses who testified about the calculation of the penalty and its propriety did not assign portions of the penalty to each of the charges. The Administrative Law Judge has no basis in the record for determining whether all asserted violations counted equally in the penalty calculation, or whether some were weighted. Since the Administrative Law Judge has found that the amount of the proposed penalty is unreasonable, he must consider the statutory factors and recommend an appropriate administrative penalty to the Commissioner. In doing so, he is guided by the Agency's staff memorandum it uses to fix such penalties. PCA Ex. 17.

The Administrative Law Judge accepts the characterization of the violation established as minor, which, under the Matrix, calls for a base penalty of \$0-\$2,000, depending on the degree of willfulness the charged violations exhibit.

The Administrative Law Judge understands the penalty calculation directions and Matrix to mean that the violation must be willful and not just the conduct itself. In an analogous context, a willful violation has been defined as an action taken knowledgeably by one subject to the regulatory provision in disregard of the action's legality. TAF Equipment CO. Inc., 1979 OSHD paragraph 23,421 (1979); OSHD Communication Inc. 79 OSHD paragraph 23,759 (1979). 1919 OSHD paragraph 23,421 (1919); Communicationd Inc - Willful conduct is marked by careless disregard of a standard or conduct that results from a conscious, intentional, deliberate or voluntary decision. Communications Inc., supra.

The Administrative Law Judge concludes that Westling should have been aware of the rule. On several occasions, Mr. Goslinga was provided with a citation to its provisions. In more than one letter, its provisions were

highlighted for Mr. Goslinga's attention. The Administrative Law Judge, however, does not find that Westling acted willfully. With respect to the job titles and job descriptions, the Administrative Law Judge is certain that Westling has a copy of its letters to the Agency in its internal files and, with knowledge of their necessity, it could have produced them for Mr. Tibbetts. As regards documentation of employee training, again, the Administrative Law Judge does not find that the violation was willful. It strains credulity to suggest that Mr. Goslinga was acting with reckless disregard for the requirements of the standard when he failed to have men place a date on the training outline they signed or otherwise document the date of training. Neither Mr. Goslinga nor Westling had any financial incentive to maintain an inaccurate record. The Administrative Law Judge accepts Mr. Goslinga's statement that after the receipt of Westling Exhibit C, he thought that the Company was in compliance. The Administrative Law Judge believes it appropriate to select a base penalty of \$500.00, the midpoint of the minor, nonwillful penalty range, \$0 - \$1,000.

The Administrative Law Judge finds no basis for adjusting upward the base penalty of \$500.00 as a consequence of the current violation. The violation occurred in only one management area, no economic benefit was gained and it is not appropriate to consider "unique factors specific to the case." PCA Ex. 19, 4. Contrary to Mr. Tibbetts' conclusion, the Administrative Law Judge has found that the Company was acting in subjective good faith in its compliance effort. Nor is it guilty of "an established pattern of repeated personnel training violations".

The Administrative Law Judge deems it appropriate to consider the incidents described in Findings 14 and 24, supra, as past violations authorizing an increase in the base penalty. The Administrative Law Judge does not find that the conduct of Westling in 1982 constituted a previous violation within the meaning of the statute.

The Agency interprets the word 'violation' merely to mean their judgment that an infraction of the rule has occurred in the past. A previous violation is defined as a "violation of the Minnesota Hazardous Waste Rules Ch. 1045 or earlier hazardous waste rules or Federal RCRA regulations, that were documented at any time by MPCA staff", PCA Ex. 17, 23. Apparently, the Agency takes the position that a previous Violation is established if a staff member makes a contemporaneous written record of his or her opinion that a violation has occurred, even though the individual may dispute the fact of the violation and no Notice of Violation or Administrative Penalty Order is ever issued.

The Administrative Law Judge rejects the PCA's interpretation of the phrase "previous violation". Certainly, due process entitles a party to dispute that a "violation" has occurred even if a PCA staff member otherwise opines. In *Potlatch Corp.*, 1979 OSHD paragraph 23, 294 (1979), conduct was considered a previous violation when the citation was either uncontested or had been the subject of a final order determining that infractions had occurred. see, *Communications Inc.* supra

The asserted 1982 violation was disputed, at the time, by the attorneys for the Company. While the Agency may not have an obligation to respond to every unilateral statement made by a company subject to its rules, the circumstances of the 1982 occurrence fairly placed that duty on the PCA. The Company and its counsel believed it was a small quantity generator. It explained the circumstances of the asserted violation to the Agency and stated that it considered the matter settled without admitting a violation. The absence of response from the PCA precludes it from now asserting that the conduct constituted a previous violation.

The violation in 1986 is not disputed. At the time of the 1986 inspection, Westling was a large quantity generator subject to the employee training and record keeping requirements of Minnesota Rule Part 7045.0558 (1985). As previously noted, it was Westling's responsibility to know the rule and complying with it. *Jasaka Co. v. City of St. Paul*, supra.

With respect to the 1983 inspection, there is no dispute that the hazardous waste barrels on-site were not dated, in violation of the rule. An inspector could not determine without such date whether compliance with the small generator accumulation rules and, derivatively, the employee training and record keeping rules, was required. That admitted conduct is a previous violation which may be considered in determining a penalty.

The Administrative Law Judge agrees with the PCA that the proposed base administrative penalty should be increased by 5% or \$25.00 for the short time elapsed between the 1987 violation and the date of the last previously documented violation, 1986.

The Administrative Law Judge makes no recommendation for an increase in the base penalty to reflect a violator response adjustment. The Administrative Law Judge believes that Mr. Goslinga was acting in good faith in his compliance efforts with the Agency. While Mr. Goslinga's appreciation of the rule's requirements was rudimentary, at best, his confusing interaction with the Agency did little to augment his knowledge. The Administrative Law Judge could conclude that Mr. Goslinga should have known what the rule required but not that he acted in subjective bad faith.

Finally, the Administrative law Judge recommends that the penalty to Westling be a forgivable penalty. The forgivable and unforgivable penalty distinction in the statute has been interpreted by the Agency to be a function of the willfulness and bad faith of the violator. Since the Administrative Law Judge has found that Westling Was not acting in subjective bad faith and that the present violation was a nonserious, nonwillful violation, it is appropriate that the penalty be forgiven upon Westling's compliance with the Commissioner's Correction Order.

B.D.C.

