

2-2200-8990-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of Paul-William  
Environmental, Inc. Administrative  
Penalty Order Dated May 25, 1994

FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDED ORDER

The above-entitled matter came on for hearing before Bruce D. Campbell, Administrative Law Judge from the State Office of Administrative Hearings in St. Paul, Minnesota, at 10:00 a.m. on August 17, 1994.

Appearances: Adonis A. Neblett, Assistant Attorney General, NCL Tower Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency; and David Cummiskey, Warsaw, Cummiskey, Attorneys at Law, 107 Central Avenue North, New Prague, Minnesota 56071, appeared on behalf of Paul-William Environmental, Inc. (Paul-William Company or Appellant).

The record of the proceeding closed on September 26, 1994, with the receipt by the Administrative Law Judge of the Reply Briefs of counsel.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 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 ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Charles W. Williams, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155-4194 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether Paul-William Environmental, Inc., violated Minn. Rules, pt. 7011.9920 (1993), which incorporates by reference the requirements of 40 C.F.R. § 61.145 and, if so, the appropriate penalty, if any, that should be imposed on the Company.

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

## FINDINGS OF FACT

1. Paul-William Environmental, Inc. is a small company which performs asbestos removal services in conjunction with plumbing work. Mr. William J. is the president and 50% owner of the corporation which is headquartered in Prague, Minnesota.

2. For the past two years, Paul-William has been a subcontractor on the Emmanuel St. Joseph's Hospital renovation project in Mankato, Minnesota. The renovation was being performed one wing at a time. As a wing was to be remodeled, it was sectioned off from the remaining portion of the hospital with a temporary wall. Wings were not occupied as they were being renovated.

3. Paul-William was in charge of removing Regulated Asbestos Containing Material (RACM) at the hospital facility. Before January of 1994, the Company had removed RACM at the hospital on several occasions.

4. On January 21, 1994, an original Notice of Intent to Perform a Demolition of Asbestos Abatement Project (Notice) was sent to the MPCA by Appellant for an asbestos removal project at the Emmanuel St. Joseph's Hospital in Mankato, Minnesota. The original Notice was postmarked on January 19, 1994, and listed the first day of asbestos disturbance as February 7, 1994.

5. On February 3, 1994, MPCA staff received a second Notice from Appellant for the asbestos removal project at the hospital. The second Notice was postmarked February 1, 1994, and amended the project's first day of asbestos disturbance from February 7, 1994, to January 31, 1994. The Respondent began asbestos removal work on January 31, 1994. The amended Notice was received by the MPCA three days after asbestos disturbance began at the hospital and one day after actual asbestos removal was completed on February 1, 1994.

6. The change in the date for asbestos removal was occasioned by a request from the general contractor to Paul-William to begin asbestos removal activities early because of greater than anticipated progress made by other subcontractors on the project.

7. At no time did the Appellant attempt to contact the Minnesota Pollution Control Agency by telephone or facsimile transmission prior to the completion of the asbestos removal. As a consequence, MPCA inspectors had no opportunity to inspect the Appellant's renovation activities at the facility to determine compliance with state and federal law.

8. The Appellant is an owner or operator of a demolition or renovation activity as that term is defined in 40 C.F.R § 61.141 because the Company owned, leased, operated, controlled or supervised a renovation operation.

9. The hospital is a facility as that term is defined in 40 C.F.R. § 61.141.

10. The Appellant's renovation activities were a renovation as that term is defined in 40 C.F.R. § 61.141.

11. Minn. Rules, pt. 7011.9920 (1993) adopts by reference the requirements of 40 C.F.R. pt. 61, subp. M, the asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP).

12. 40 C.F.R. § 61.145, adopted by reference in Minn. Rules, pt. 7011.9920 (1993), applies the federal NESHAP to a renovation project that involves the removal or disturbance of asbestos on at least 80 linear meters of pipes or at least 15 square meters on other facility components or at least one cubic meter of facility components where the length or area could not be measured previously.

13. Both the initial Notice and the second Notice stated that the amount of asbestos to be abated by Paul-William was 1,200 square feet of RACM on facility components. That amount of asbestos disturbance makes the renovation a regulated activity within 40 C.F.R. § 61.145(a)(4).

14. Pursuant to 40 C.F.R. § 61.145(b)(3), an owner or operator of a renovation activity involving the removal of a regulated amount of RACM is required to submit a notice to the Minnesota Pollution Control Agency at least ten working days before asbestos removal work or stripping begins.

15. For asbestos removal work that will begin on a date other than the date indicated in the original notice, a second or amended notice of a new start date must be provided to the Minnesota Pollution Control Agency at least ten working days before the date on which asbestos removal work begins. 40 C.F.R. § 61.145(b)(3)(b)(1).

16. There is no provision in Minnesota Rules or the federal NESHAP adopted by reference in Minnesota Rules for less notice than ten working days before the date on which asbestos removal work is to begin. The purpose of the notice period is to allow the Minnesota Pollution Control Agency to inspect the work as it is being performed and to ensure that appropriate removal procedures, as specified by the federal NESHAP, are strictly followed.

17. Although there is no formal provision in the rules for a starting date sooner than ten working days prior to notice, if Paul-William Environmental, Inc. had contacted the Minnesota Pollution Control Agency, informally, and advised them of the new start date before the work was actually completed, the Pollution Control Agency would have made every effort to perform an inspection while the work was underway.

18. On May 25, 1994, the Commissioner issued an Administrative Penalty Order, which assessed a non-forgivable penalty for the violation of \$4,500, based on the factors stated in Minn. Stat. § 116.072, subd. 2 (1992), including

the severity of the violation and some history of past non-compliance. As a consequence of the seriousness of the violation, the Commissioner determined that the penalty would be non-forgivable. Minn. Stat. § 116.072, subd. 5(b) (1992).

19. The Agency has adopted an administrative penalty order implementation plan pursuant to the requirements of federal law.

20. The Agency has also adopted, as an "internal guideline" to promote uniformity, a detailed manual describing the enforcement tools available to the Agency and stating in a detailed fashion the method of calculating penalties.

21. Neither the current enforcement response plan, nor the manual used by MPCA staff persons in enforcing the rules and in recommending administrative penalties to the Commissioner has been adopted pursuant to the Administrative Procedure Act, Minn. Stat. c. 14 (1992).

22. In response to the APO and, in a timely manner, Paul-William requested a hearing to determine the reasonableness and non-forgivable nature of the penalty proposed.

23. In the course of the hearing, the Company also raised issues regarding the authority of the Commissioner to adopt rules regulating indoor asbestos abatement, contending that Minnesota statutes gives that enforcement responsibility to the Minnesota Department of Health. Paul-William also contended that the enforcement response plan and enforcement response plan manual used by the Agency are invalid, unpromulgated rules, not adopted in accordance with the Minnesota Administrative Procedure Act.

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

#### CONCLUSIONS

1. The Commissioner of the Minnesota Pollution Control Agency and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. § 116.072 (1992), and Minn. Stat. c. 14 (1992).

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and therefore, the matter is properly before the Administrative Law Judge.

3. The Minnesota Pollution Control Agency has statutory jurisdiction to regulate the removal of RACM from an indoor renovation project pursuant to Minn. Stat. § 116.07, subd. 4 (1992).

4. The MPCA properly exercised its statutory authority to adopt Minn. Rules, pt. 7011.9920 (1993), which incorporates by reference 40 C.F.R. pt. 61.145 subp. M, the federal asbestos NESHAP.

5. Paul-William Environmental, Inc. violated 40 C.F.R. § 61.145(b)(3) and, consequently, Minn. Rules, pt. 7011.9920 (1993), by failing to give ten days' notice to the MPCA before beginning asbestos removal or stripping from the renovation project.

6. The failure to give formal or informal notice to the MPCA prior to the completion of the asbestos removal work ensured that inspectors could not visit the site and monitor compliance at any time during the removal work.

7. The Commissioner appropriately considered the factors listed in M.S.A. Stat. § 116.072, subd. 2 (1992), including the serious nature of the violation and the Appellant's history of non-compliance.

8. It is not appropriate to include in the penalty calculation, a factor related to the size of the asbestos stripping or removing entity.

9. Based on the seriousness of the violation, the Commissioner correctly determined that the penalty should be non-forgivable.

10. It is not appropriate to assess any cost of the proceeding against the Appellant, since the appeal was in no way frivolous.

11. Any Conclusion more properly termed a Finding of Fact, and any Finding of Fact more properly termed a Conclusion is hereby expressly adopted as such.

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

RECOMMENDATION

IT IS THE RECOMMENDATION of the Administrative Law Judge to the Commissioner of the Minnesota Pollution Control Agency that the Administrative Penalty Order assessing a non-forgivable penalty against Paul-William Environmental, Inc. of \$4,500 be enforced.

Dated this 3rd day of October, 1994.

s/ Bruce D. Campbell  
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BRUCE D. CAMPBELL  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 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: Tape Recorded; No Transcript Prepared.

MEMORANDUM

The Appellant does not contest the fact of the violation discussed in the Findings. It apparently believes that exigent circumstances at least partially justify the violation of the rule. The Appellant does, however, argue strongly

that the amount of the penalty, \$4,500, which cannot be forgiven, is unreasonable under all attendant circumstances, including the size of the company. The Appellant also contends that the enforcement response plan and manual used by the Department which resulted in the non-forgivable penalty assessed is an invalid, unpromulgated rule which could be disregarded. Finally, the Appellant argues that the Minnesota Pollution Control Agency does not have statutory authority to regulate asbestos removal in an indoor setting, stating that the Asbestos Abatement Act, Minn. Stat.

§§ 326.70-326.82 (1992), vests that authority in the Department of Health. Under this analysis, Minn. Rules, pt. 7011.9920 (1993), which incorporates by reference the federal NESHAP, would be invalid.

For the reasons hereinafter discussed, the Administrative Law Judge determines that the Minnesota Pollution Control Agency had statutory authority to adopt the cited rule and incorporate by reference the federal NESHAP. Further, the Administrative Law Judge concludes that the enforcement response plan and the manual are not invalid, unpromulgated rules. Finally, the Administrative Law Judge believes it inappropriate to incorporate into the penalty calculation, when a dangerous substance such as asbestos is involved, the size of the company performing the renovation. Given the serious nature of the violation, the history of non-compliance and the great potential for harm, a non-forgivable administrative penalty in the amount of \$4,500 is appropriate.

The Appellant contends that the MPCA is without statutory authority to adopt rules related to asbestos pollution of the indoor atmosphere. It relies on the definition of air pollution contained in Minn. Stat. § 116.06, subd. 1 (1992), which defines air pollution as "the presence in the outdoor atmosphere of any air contaminant . . . ." (Emphasis added.) Under this reasoning, the Appellant contends that the Minnesota Pollution Control Agency cannot regulate the activities of the Appellant who performed asbestos abatement within a structure contained building. Only the Department of Health, it is argued, has such authority under the Asbestos Abatement Act.

The Administrative Law Judge does not accept the reasoning of the Appellant. As clearly demonstrated by the Agency, it has plenary authority to prevent the presence in the outdoor atmosphere of an air pollutant. In order for the Agency to ensure that the outdoor atmosphere is not contaminated, it is necessary for it to regulate work practices related to asbestos within enclosed areas such as a building. Initial Brief of the Minnesota Pollution Control Agency, pp. 4-7; Reply Brief of the Minnesota Pollution Control Agency, pp. 11-15. Logically, the proper removal of asbestos in an indoor setting prevents its discharge into the exterior atmosphere when containment barriers are removed. As also demonstrated by the Agency, the indoor-outdoor argument advanced by the Appellant in this proceeding was considered and rejected by the Environmental Protection Agency in 1975 when the respective jurisdictions of the federal Environmental Protection Agency and the Occupational Safety and Health Agency were delineated. Reply Brief of the Minnesota Pollution Control Agency, p. 14.

The Administrative Law Judge concludes, as did the Agency, that the Department of Health and the Minnesota Pollution Control Agency have a

complementary concurrent jurisdiction with respect to asbestos removal. As previously demonstrated in the rulemaking proceeding, the Agency had and has statutory authority to adopt and enforce Minn. Rules, pt. 7011.9920 (1993), which adopts by reference the federal asbestos NESHAP.

The Appellant also argues that the enforcement plan and manual contained in Exhibit 20, pp. 173-223, and the Administrative Penalty Order calculation worksheet, pp. 41-44, constitute an invalid unpromulgated rule. The Agency concedes that the penalty calculation worksheets and the response plan and manual were not adopted in accordance with MAPA. The MPCA argues, however, that they do not have the force and effect of law, a prime requirement for t

existence of a rule. The Agency argues that they are not binding on the Agency or the Administrative Law Judge and each case is given separate consideration for reasonableness.

As recognized by the courts, guidelines or policy statements of an agency which are meant for the internal management of the agency and designed to ensure consistency in the approach taken by the agency are not unpromulgated rules. In Carver County v. Commissioner of Public Safety, 365 N.W.2d 1304 (Minn. App. 1985), the Commissioner used an internal standard or guideline that had not been adopted under the APA which required five years of verified total abstinence from alcohol before a revoked driver's license would be considered for reinstatement. The Minnesota Court of Appeals held that the five-year guide, which did not have the force and effect of law, was not a rule and was reasonable as applied. See, In the Matter of an Assessment Issued to Leisure Hills Health Care Center, C5-93-2343 (Minn. App. 1994), rev. den, September 16, 1994.

The issue involved is also quite equivalent to occupational safety and health penalty calculations, in which the secretary has devised detailed formulas for calculating OSHA penalties for each type of violation. That penalty calculation has not been adopted by the Secretary of Labor under a rulemaking proceeding. The courts have universally held that the penalty proposal does not have the force and effect of law and becomes advisory only. Brennan v. OSHRC, 487 F.2d 438, 442 (8th Cir. 1973); Long Manufacturing Co. v. OSHRC, 554 F.2d 903 (8th Cir. 1977).

The Administrative Law Judge concludes that the penalty calculation worksheets and the APO enforcement response plan and manual are not invalid unpromulgated rules. In each situation, the relevant statutory factors are to be examined and the result cannot be unreasonable as applied. Since the penalty calculations by the Commissioner do not have the force and effect of law, they are not rules within the meaning of the Minnesota Administrative Procedure Act. In In the Matter of an Assessment Issued to Leisure Hills Health Care Center, C5-93-2343 (Minn. App. 1994), rev. den, September 16, 1994.

The primary argument of the Appellant appears to be that the violation by Paul-William was really a minor, technical violation which resulted in no determinable actual damage and that the small size of the company makes the penalty imposed unreasonable. The Administrative Law Judge disagrees.

Pursuant to Minn. Stat. § 116.072 (1992), the Commissioner is authorized to issue administrative penalty orders for violations of Minn. Rules, pt. 7011.9920 (1993). A maximum penalty of \$10,000 may be imposed. Minn. Stat. § 116.072, subd. 2(a) (1992). The Administrative Law Judge believes that

the history of non-compliance contained in the record, when coupled with a violation which prevented an inspection for a known carcinogenic agent, amply justifies a penalty of \$4,500. The prior non-compliance of the Appellant is discussed at pages 13 and 14 of the Initial Brief of the Minnesota Pollution Control Agency and page 18 of the Reply Brief of the Minnesota Pollution Control Agency. The Administrative Law Judge concludes that the MPCA properly viewed the history of prior violations of the Appellant in determining an appropriate penalty.

A main theme of the Appellant's argument as to harm is that both gravity of the violation and the forgivable or non-forgivable nature of the penalty

should depend upon proof of actual damage to the environment. Stated colloquially, the Appellant seems to be saying, "no harm, no foul". The Administrative Law Judge believes that it is appropriate to consider the vast potential for damage that is occasioned when a known carcinogenic agent is disturbed under circumstances precluding inspection for legal compliance with applicable safety measures. It is that potential for fatal consequences when inspection is precluded that justifies the Agency in imposing the non-forgivable penalty imposed herein without proof of actual damage. To do otherwise would significantly compromise the asbestos removal and inspection process.

Finally, it could be argued that since the Company has small annual revenues, the amount of the penalty is unreasonable. It is true that with other violations, there is a penalty component related to the size of the company. With respect to asbestos removal, however, the Administrative Law Judge believes that different considerations apply. The standard deals with a potentially lethal subject matter that can occasion significant harm to the public health in general. It should properly be classified as an ultra-hazardous activity. Under such circumstances, it is fair to hold all who choose to participate in this hazardous undertaking to the same rigorous standard, irrespective of the size of the company.

BDC

