

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 2700-95

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY

COMPLAINANT

VS.

KENTON COUNTY JAIL

RESPONDENT

* * * * *

DECISION AND ORDER
OF THIS REVIEW COMMISSION

This case comes to us following respondent Kenton County Jail's motion for discretionary review which we granted.¹ We then received briefs from the parties.

The secretary of labor, the enforcer of the Kentucky occupational safety and health act (KRS chapter 338), issued citations to Kenton County following an inspection which took place February 13 to 27, 1995. Item 1 said the employer (Kenton County) did not use HEPA² filters as required by 29 CFR 1910.134 (a) (2)³ to protect jail employees from "...airborne Mycobacterium tuberculosis during transport of prisoners known to have TB

¹ Our Rules of Procedure (ROP) 48 (1), enacted as section 48 (1), 803 KAR 50:010.

² High efficiency particulate filters will filter out particles the size of TB bacteria or 1 to 5 microns (a micron is 1 millionth of a meter. Page B-3 of complainant's exhibit 1.

³ Adopted in Kentucky by 803 KAR 2:308.

disease."⁴ Item 1 carried a proposed penalty of \$1,250. Then item 2 said Kenton County violated 29 CFR 1910.134 (b) (1)⁵ because it did not have "Written standard operating procedures governing the selection and use of respirators..." This citation also carried a proposed penalty of \$1,250.

Following a trial held on November 13, 1995, our hearing officer affirmed both citations and the penalties proposed by the secretary of labor. In his conclusions of law, our hearing officer said Kenton County Jail violated the standards (we use the terms regulations and standards interchangeably) by failing to provide HEPA respirators and by not having standard operating procedures controlling the use of respirators. The recommended order said "...Respondent had knowledge of its duty to protect employees...exposed to inmates suspected of having infectious tuberculosis." Recommended order (RO) 6.

Despite the fact that the jail, both during trial and in its proposed findings of fact and conclusions of law, raised significant points attacking the validity of the citations, the recommended order did not address those concerns. We then granted review so Kenton County could make those same arguments to us.

Although this commission is authorized to "...hear and rule on appeals from citations..." by KRS 338.071 (4), giving us the

⁴ This citation was amended at the hearing to read "suspected or known" rather than "known." Recommended order (RO) 5. Labor's amendment of the citation in no way influenced this commission's decision in the case.

⁵ Also adopted in Kentucky by 803 KAR 2:308.

ultimate authority to make findings and conclusions in contested cases, we appoint hearing officers to take proof and make recommended orders. KRS 338.081. Following issuance of the recommended order this commission may grant review when, as happened here, Kenton County Jail asked for discretionary review under ROP 47 (3). Once this commission takes a case for review, we may affirm the recommended order or issue our own decision in its stead. KRS 338.071 (4).

In its brief to us on review, the jail argued it did not have notice that 29 CFR 1910.134 applied to it. Section 1910.134 (a) (1) says

In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination.

1910.134 (a) (1)

The above language at the beginning of 1910.134 alerts an employer to those hazards listed, "dusts, mists, gasses and vapors," but says nothing about biological hazards such as tuberculosis. The compliance officer testified no lay person reading the above language would have any reason to know it applied to TB and jails. Transcript of the evidence (TE) 53. We find there is no proof in this case that 1910.134 applies to jails with employees exposed to TB. We do not hold, however, that 1910.134 does not apply to jails with TB. We conclude instead there is no showing in the instant case based on the facts presented. It remains for the secretary of labor in some future case to prove that 1910.134 applies to jails with employees exposed to possible

cases of tuberculosis.

The compliance officer also testified that a 1993 compliance directive issued by the U.S. Department of Labor (complainant's exhibit 1) formed the basis for the citation. The directive said that only HEPA masks would protect against occupational exposure to tuberculosis (TB) and cited to 1910.134. In response to the jail's objection to the introduction of the 1993 compliance directive, the secretary's lawyer admitted the directive led to the issuance of the citation. TE 15.

From time to time the U.S. Department of Labor issues compliance directives to its inspectors who enforce the occupational safety and health laws. But there is no proof in this case that these directives are circulated to or published for the general public and we so find. There is no showing in this case that the subject directive, complainant's exhibit 1, has been enacted into law in either the federal system or in Kentucky.⁶ In Bethlehem Steel Corp., CCH OSHD 25,839, the federal commission said

...we conclude that the judge [ALJ] improperly relied on the memorandum issued by the Atlanta OSHA technical support group. Memoranda prepared by the Secretary or his designees do not have the force and effect of law. It is sufficient...to conclude that the document in question is an internal statement of enforcement policy and, because there is no showing that at the time of the inspection Respondent was aware of the contents of the memorandum, it has no

⁶ KRS 338.031 says employers in Kentucky must comply with the general duty clause (KRS 338.031 (1) (a)) and with the occupational safety and health standards as promulgated. 330.031 (1) (b). These standards are found in 803 KAR chapter 2.

probative effect.⁷

We agree with the reasoning of the federal commission. Because the compliance directive is not enacted in Kentucky as a regulation, we conclude it does not have the force and effect of law and may not be used to create a legal obligation.

Then the issue arises whether Kenton County Jail was itself aware that 1910.134 applied to masks or respirators used to prevent the spread of TB bacteria. Kenton county jailor Donald Younger testified he did not read 1910.134 as applying to tuberculosis infections. TE 108-109. Even the inspecting compliance officer, Lee Hughes, testified that a layman reading the regulation would not know it applied to TB. TE 53. We therefore find that according to the facts of this case the Kenton County Jail had no knowledge that 1910.134 applied to the prevention of the spread of tuberculosis bacterial.

We reached a different conclusion in Jefferson County Corrections Department,⁸ KOSHRC 2588-94, where we upheld a citation which charged the Jefferson County jail with not providing its corrections officers with HEPA masks to control the spread of TB bacteria. In that case our hearing officer found that a Jefferson county jail administrator studied the very same U.S. Department of Labor compliance directive which made the connection between 1910.134, HEPA respirators and jails with employees exposed to

⁷ Although not bound by federal occupational safety and health law precedent, we often find the decisions helpful to our analysis of a case as we do here.

⁸ A copy of the decision is attached as appendix A.

possible cases of TB. Mr. Tucker, the jail administrator, prior to the inspection by Kentucky OSHA attended a seminar put on by Kentucky's division of education and training (a part of Kentucky's OSHA administration) during which the directive was analyzed for the class by the instructor. That gave Mr. Tucker, and by implication the jail, actual notice that 1910.134 applied to it.

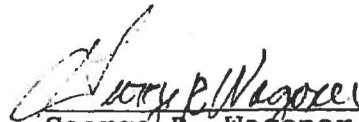
When the secretary of labor inspects a jail in Kentucky and seeks to enforce the wearing of approved respirators by jail employees dealing with inmates with possible TB infections, he has several choices. If the facts permit the secretary to allege actual notice, then he may cite under 1910.134. If he cannot prove actual notice or that 1910.134 on its face applies to tuberculosis, then he may cite under the general duty clause (KRS 338.031 (1) (a)) when proof discloses either employer or industry knowledge of the hazard of exposing jail employees to possible cases of TB.


Our reasoning applies to both citations.

We conclude the secretary of labor did not prove Kenton County Jail had notice 1910.134 applied to it. We therefore reverse our hearing officer and dismiss both citations and their proposed penalties.

It is so ordered.

Entered October 1, 1996.


George R. Wagoner
Chairman



Charles E. Yates
Member



Donald A. Butler
Member

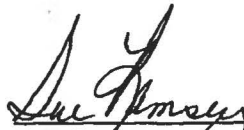
Copy of the foregoing Order has been served upon the following by
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HON GORDON R SLONE
COUNSEL
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and by Certified Mail #P059 750 527, upon:

HON KENNETH E RYLEE JR
ASST COUNTY ATTY
307 KENTON COUNTY BLDG
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This 1st day of October, 1996.



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