



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 238-1040

Members
James-Paul Geary
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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

KATHLEEN PISCITANI/ELIZABETH PUGH, et al.

v.

Docket No. 15-88-042-3

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants Kathleen Piscitani and Elizabeth Pugh are professionally employed by the Hancock County Board of Education and assigned to teach at Jefferson Elementary School in Newell, West Virginia. On behalf of the entire staff at Jefferson, they filed a level one grievance in January 1988 after learning that asbestos had been detected and removed "in a questionable manner" from their school building without notification to the staff. Grievants sought various remedies related to their belief that they have been exposed to asbestos at Jefferson and that the building might possibly contain more asbestos materials and be contaminated by airborne asbestos fibers.

The grievance was denied at the lower administrative levels and filed at level four March 2, 1988, with request for hearing. After several continuances of scheduled hearings by agreement of the parties, the hearing was conducted May 26, 1988. At the conclusion of the hearing, Superintendent Russell Slack agreed

to a proposition that another air sampling from Jefferson School be tested. The parties agreed that the record would remain open until tests were completed; grievants were then to determine if they wished to pursue the grievance and/or modify the relief sought.

On December 23, 1988, and January 18, 1989, respondent's counsel filed reports on the latest testing at Jefferson. Accordingly, by letter dated January 26, 1989, the undersigned requested that the parties file proposed findings of fact and conclusions of law no later than February 17, 1989, if grievants were not going to withdraw the action. Neither party responded at the designated time, but the request for extension until February 27 by grievant's representative was granted for both parties.

Grievant's evidence in this matter consisted of Ms. Pugh's and Ms. Piscitani's testimony at levels two (January 29, 1988) and four and a collection of excerpts from various federal statutes, regulations and advisories. Of record are reports derived from three separate air samplings and analyses of those samples taken at Jefferson. Respondent produced two explanatory letters about the various tests from personnel employed in the asbestos abatement-testing field and, at levels two and four, called upon three individuals who were employed in the field.

Factual circumstances which precipitated the grievance dispute are not contested. Sometime in late February 1987, while grievants were working after school, they noticed workmen in the building. The men said they were going to remove

asbestos wrappings on exposed pipes in basement classrooms and other parts of the basement areas of the building (T2.6). Grievants had worked in the affected classrooms for a number of years but thought the crumbling white substance on the pipe wrapping was old paint. Grievant Pugh claimed the powdery residue from the wrap got on teachers and students alike (T4.__).¹

According to Assistant Superintendent Carl Fodor, as part of some general school construction, administrators became aware of the presence of asbestos in several county schools, including Jefferson, probably sometime early in the 1986-87 school year. Foder said he was unaware of regulations that may have required notice to employees in the building about asbestos, although Jefferson Principal Betty Buben was notified, as his concern was to arrange for removal of the material by persons expert in the field (T2.92,93).² School officials were apparently advised that no school personnel could be in the building while abatement work was performed, for health and safety reasons, and that

¹A February 27, 1987 photograph of Ms. Pugh's classroom clearly shows the deteriorated state of the wrap covering a ceiling pipe extending horizontally across the entire ceiling of the room, and another picture of the main floor exit shows the crumbling condition of pipe wrap covering a vertical pipe located in a corner area. Gr. Ex. No. 2.

²School officials did not elaborate on exactly how the asbestos was detected at Jefferson; whether asbestos-containing materials (ACM) were friable (subject to crumbling and more prone to become airborne); or if tests were conducted on the ACM to determine the relative amounts of asbestos present.

directive was followed. Removal work was completed during the weekend of February 27, 28 and March 1, 1987.

When grievants returned to school Monday morning, March 2, 1987, they found custodial staff who had worked off-hours attempting to clean the building for use.³ They obtained Environmental Protection Agency (EPA) literature about ACM used in construction materials, potential health problems due to inhalation of airborne asbestos fibers, detection of ACM in fibers, detection of ACM in school buildings and asbestos removal standards. The staff requested the written results of tested air samplings taken at Jefferson after the asbestos removal.

PTL-Inspectorate Inc. (PTL), Pittsburgh, Pennsylvania, performed the post-abatement clearance tests at Jefferson. Air samplings were taken while the abatement-containment area was still encapsulated with protective plastic, presumably after bagging and disposal of the removed ACM and wash down of the area. PTL issued a March 6, 1987 report entitled "Filter Analysis for Airborne Asbestos." The three page report described where each sampling was taken at asbestos removal sites in the school and listed the numerical value of "Fibers/CC"

³Grievant Pugh said the school was dirty and grimy as "we usually have" (T2.46,47), but she experienced a tickle in her throat when she breathed (T2.55). Grievant Piscitani believed the air was more dusty and she also had a scratchy feeling in her throat (T2.20).

(fibers per cubic centimeter) and LLD at each site. The report concluded:

NOTES; 1) LLD is lower level of detectability as per NIOSH. Fiber concentrations below the LLD do not meet the statistical confidence level recommended. To lower the LLD, more sampling time or volume is required. 2) Field blank cassettes should be submitted with each group of samples.

Grievants were dismayed by the report and could not understand the data therein; they also believed the final paragraph of the report signalled a problem with the test results. Their request for a second air testing of their school was granted. Industrial Health Foundation, Inc. (IHF), Pittsburgh, retested the facility March 26, 1987. Despite their repeated requests to respondent, teachers at Jefferson were not given the report until December 15, 1987, nearly nine months after the March 26 test, and the findings therein distressed them even more.

IHF's 11-page report, dated March 31, 1987, was detailed, extensive and written in layman's terms; test sites were identified in writing and on an area floor plan. IHF found airborne fiber concentrations in four of five tested areas in the school to exceed what it characterized as EPA clearance levels of 0.01 fibers greater than five microns per cubic centimeter of air sampled (fibers > 5 μ /cc). Five test areas samplings were void due to heavy particulates and fibers and those rooms could be assumed to have airborne fiber concentrations greater than the prescribed level, according to IHF. IHF's sampling and testing methods were clearly described and it concluded with recommendations that all affected rooms in the basement area and stairwell be cleaned in a specifically prescribed manner, which

assumed the presence of asbestos, with follow-up visual inspection and air sampling.

Of record is an October 13, 1987 letter from Glenn Goss, Manager, Asbestos/Safety Division, Professional Services Industries, Inc. (PSI), Pittsburgh,⁴ addressed to School Superintendent Russell Slack and Jefferson School Principal Betty Buben. Mr. Goss wrote that he was responding to a school official's telephone call about IHF's March 26, 1987 air sampling.⁵ Goss stated that PTL's final clearance air samplings inside asbestos abatement work areas, to certify areas for occupancy, and IHF's ambient air sampling during normal school activities, both taken to determine total airborne fiber concentrations, involved different samples and the results should not have been compared. He stated that analytical methods of both test results determined all airborne fibers of a specified size, length and width but did not distinguish asbestos fibers from other fibers present. He suggested that the high airborne fibers detected in IHF's report were due to clothing, carpeting, dust and dirt found during normal school hours in any building because PTL's sampling results taken immediately after asbestos

⁴PSI is associated with PTL and they share the same Pittsburgh address.

⁵Respondent maintained that IHF's report was not immediately released to Jefferson's teachers because school officials were waiting for clarification and an advisory on the matter from another source, presumably, the firm which conducted the initial clearance tests, PTL-PSI.

removal "were below recommended levels acceptance by the EPA, OSHA and NIOSH."

Ronald Gainer testified on behalf of respondent at level two about the PTL and IHF test results. Gainer is an employee of BCM Eastern, Inc. (BCM), an engineering consulting firm based in Pittsburgh. He stated that he had background and training in asbestos removal and testing from EPA courses in asbestos management, airborne analysis and asbestos bulk analysis; held certification in EPA's Asbestos Hazard Emergency Response Act (AHERA) as an inspector, management planner and design professional; and had been working in the field for over three years. Besides its work in Hancock County,⁶ his firm worked extensively with the Pittsburgh school system, according to Gainer. Mr. Gainer's testimony followed the rationale presented by Mr. Goss, but he added that IHF was in error for applying clearance level sampling methods and standards to an entire building (T2.72). He noted he would not have made IHF's stringent cleaning recommendations "without a lot more testing" (T2.71).⁷

At level four, PTL-PSI Vice-President John Holleran testified about PTL's original post-abatement testing at Jefferson

⁶Apparently, BCM was utilized for consulting and testing work in Hancock County Schools at some time after the initial abatement work at Jefferson.

⁷Gainer's response about the need for additional tests may have been correct, but it is not clear whether IHF's work contract to conduct air sampling tests at Jefferson gave it the authority to retest its March 26 sampling results prior to issuing a report and making the recommendation for cleaning the building.

School. He explained that regulations in effect in March 1987 required analysis of tested air samplings in containment areas by Phase Contrast Microscopy (PCM) to determine fiber content found. Holleran stated that nothing in PTL's original report indicated any problems according to EPA regulations and standards prevailing at that time. His analysis of IHF's report was nearly identical to previous evidence on the matter and he faulted IHF's testing procedures and practices.⁸ He noted that new federal regulations promulgated after March 1987 required that abatement studies be done with Transmission Electro Microscopy (TEM), a refined microscopic technique which identifies and discriminates between asbestos and non-asbestos fibers.

Mark Mueller, Assistant Vice-President at BCM also testified on behalf of respondent. He stated that his firm was not affiliated with either PSI-PTL or IHF and had not been involved with abatement or testing at Jefferson School in 1987.⁹ He also stated his belief that the PTL clearance test procedures and results in March 1987 were acceptable with then-current

⁸Mr. Holleran stated that IHF's results were likely to have been the result of "poor housekeeping" at the school. He said his firm would not have been comfortable giving recommendations such as IHF's given the collection methods it used during normal school operations.

⁹His response to seeing the photographs of pipe wrapping at Jefferson was that, although the wrap material appeared friable, there was no way to determine if the wrappings were ACM without testing the materials to determine the asbestos concentration. He said as of December 1987, damaged ACM found in readily accessible school areas would require that the area be isolated with immediate abatement but prior to that time the rule required a recommendation of abatement of friable ACM.

regulations. Mueller said the interior portion of an outside wall with ACM would not need testing unless there was damage but; if major renovation work was to be undertaken, workers would be trained to deal with the situation. Mr. Mueller also discussed conditions in which workers in the asbestos industry might need annual medical surveillance or periodic x-rays. Workers with an 8-hour exposure to asbestos in the workplace of .1 fibers per cc, the defined "action level," would be candidates for such monitoring.¹⁰

Grievants made five requests "to resolve this action" in their written level four appeal:

- 1.) Periodic lung x-rays paid for by the board.
- 2.) Recommendations of second air sample test, taken on March 26, 1987, be fulfilled.
- 3.) Exterior walls tested for asbestos at Jefferson.
4. Proper asbestos removal followed through in other schools with proper notification and written copy of procedure made available.
- 5.) After removal from all schools involved, that testing results be known immediately to the people in each building.

¹⁰Grievants do not fall under the category of what appears to be an "at risk" population identified by EPA, who may be subject to "occupational exposure," workers involved in asbestos manufacture and related activities; "paraoccupational exposure," workers' families, due to asbestos taken home on work clothes; or "neighborhood exposure," people living or working near such operations. Gr. Ex. No. 1.

Holleran and Mueller both agreed that prevailing expert opinion is that there are no known "safe" levels of asbestos exposure.

At level four, grievants eventually shifted their focus from whether the original abatement at Jefferson was the "rip and tear" variety, presumably causing the spread of asbestos fibers throughout the building. They did not challenge PTL's clearance tests and did not pursue claims that ACM removal was conducted in a "questionable manner." Grievants' concern, instead, appeared to be that friable ACM had contaminated the school prior to abatement as documented by IHF's March 26 tests and subsequent report.¹¹

BCM's August 24, 1988 post-hearing report, signed by Mr. Gainer, indicated it conducted PCM pretesting and ongoing safety inspections at two county junior high schools prior to and during abatement procedures by another firm, Project Development Group (PDG). BCM conducted post-abatement testing by both PCM and TEM analysis of PDG's work. The report also outlined BCM's retesting at Jefferson as per the May 26, 1988 agreement at level four:

BCM performed TEM sampling in accordance with the AHERA requirements mandated in 40 CFR 763.90(i). Samples were taken in areas where Industrial Health Foundation, Inc. [IHF] sampled and found the samples too dirty to analyze. Aggressive sampling was used for the testing. A blower was used to direct air against all surfaces in the school

¹¹During the level four proceeding but prior to its agreement to retest air samplings at Jefferson, respondent asserted it had fully met the conditions outlined in grievants' fourth and fifth requests for relief in that it did comply with notice requirements for abatement work at area schools subsequent to the first removal work done at Jefferson. After the retesting agreement, grievants indicated they might redefine their requested relief if they were not satisfied after the new testing was completed at their school.

to stir up any fibers. The samples analyzed using TEM were found to be below the EPA requirements.

Gainer followed up with a January 6, 1989 letter to Superintendent Slack and reiterated his August communication, in part. He included the data supplied by RJ Lee Group, Inc., which performed the TEM analysis needed to discern asbestos fiber content of the sampled air at Jefferson.¹² Gainer wrote,

In summary, the sample results show that the sampled areas meet CFR 763.90(i) requirements for final clearance testing which is the average of the five indoor samples to be less than 70 structures per square milimeter (s/sq mm).

Grievants made no response to the latest BCM testing and in its level four proposed findings of facts ignores all of the evidence of record except IHF's report and recommendations. Grievants contend respondent did not follow IHF's recommendations and aver their health has been compromised as per W.Va. Code §18-29-2(a), i.e., that respondent's "action, policy or practice constitut[ed] a substantial detriment to or interference with ... the health and safety of students or employees." Citing no specific federal or state regulations on their various claims for relief, grievants urge that the grievance be granted.

Despite BCM's purported sampling at Jefferson, conducted at some undetermined time after the level four hearing, and the

¹²The materials from RJ Lee Group, Inc. consisting of a cover letter and seven pages of data are not readily understood. Samples were taken from five "JEF-INSIDE- 01 through - 05" areas and five "JEF-OUTSIDE - 01 through - 05" areas, and three other "Blank" areas. Only the former five were analyzed. Each analyzed area had a separate "Count Sheet" page with information contained therein only fully understandable by a professional in the field.

submitted reports, respondent did not address BCM's findings in its February 28, 1989 proposals but instead resubmitted the level two decision. Respondent denies wrongdoing and urges that grievants "have failed to establish any claim, grievance or cause upon which relief can be granted."

In addition to the foregoing narration, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievants taught in a school where friable asbestos-containing pipe wrapping was removed in February-March 1987. They questioned respondent's lack of notice to them of the presence of ACM and impending abatement, the manner in which the ACM was removed and whether the school had significant levels of asbestos fibers in the air, carpets, walls and furnishings which required decontamination measures.

2. The evidence preponderates that clearance level tests after removal of ACM at Jefferson showed air fiber content to be within EPA guidelines as of March 1987. An ambient air test on March 26 during normal school hours using aggressive sampling methods showed the presence of excessive amounts of unidentified airborne fibers in several areas of the school. A third sampling of five unidentified areas in Jefferson School showed varying amounts of asbestos fibers, the average of which fell below areas of concern, according to the consulting firm which

conducted the tests. The sufficiency and content of the third test and written report were not challenged by grievants herein.

3. Grievants offered no medical evidence which would tend to support their request for periodic chest x-ray examination, no scientific evidence that Jefferson school was in need of specified cleaning for a determined asbestos decontamination, and no factual evidence that the inside of exterior walls in Jefferson need analysis to determine asbestos content, if any, of the materials therein.

4. Grievants did not contest respondent's claims that it has been in compliance with all regulations pertaining to notice to school staff and parents of asbestos abatement actions at school sites subsequent to the first asbestos removal at Jefferson thus that issue is moot.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Butler v. McDowell Co. Bd. of Educ., Docket No. 33-88-208 (March 31, 1989); Lucas v. Mercer Co. Bd. of Educ., Docket No. 27-88-180 (December 15, 1988); Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

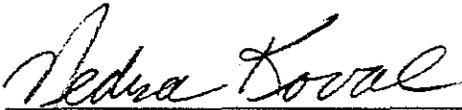
2. Grievants did not establish by a preponderance of the evidence that respondent's actions, policy or practice interfered with their health or safety, as contemplated by W.Va. Code §18-29-2(a).

3. Grievants established no basis in fact or law upon which to grant the five items of relief they sought in the instant grievance.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: April 24, 1989


Nedra Koval
Hearing Examiner