

U.S. Department of
Homeland Security

United States
Coast Guard



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September 11, 2009

BY ELECTRONIC MAIL

Mr. William E. Reukauf
Acting Special Counsel
U. S. Office of Special Counsel
1730 M Street, N.W.
Suite 300
Washington, DC 20036-4505

RE: OSC File No. DI-08-0563

Dear Mr. Reukauf:

I write on behalf of Secretary Napolitano, the Department of Homeland Security (the Department), and the U. S. Coast Guard (CG), to respond to questions posed by the Office of Special Counsel (OSC) on August 4, 2009, in conjunction with the above-referenced matter. This letter is meant for public dissemination. Previously, on June 2, 2009, I provided to you an investigation conducted by Coast Guard Investigative Service (CGIS), which examined allegations that a former CG employee, Mr. Leroy Falconi, was improperly exposed to asbestos while working at the U. S. Coast Guard Academy (USCGA). Following review of this CGIS investigation, OSC has posed additional questions. The following information is provided in response.

OSC inquired whether signage was required to be posted at locations where asbestos has previously been found. Our review revealed that signage is only required for "regulated areas", and the space where asbestos was located at the USCGA is not a "regulated area". The regulations relied upon are 29 C.F.R. § 1910.1001(b) defining a "regulated area" as one that is established by the employer to demarcate areas where airborne concentrations of asbestos exceed, or there is a reasonable possibility they may exceed, the permissible exposure limits and 29 C.F.R. § 1910.1001(j) (3) (i), requiring warnings signs at each regulated area, as well as approaches to regulated areas. We do not consider the USCGA labs, classrooms, hallways, and offices to be "regulated areas" because, in our assessment, there is not a "reasonable possibility they may exceed the permissible exposure limits."

"Permissible exposure limit" (PEL) is the allowable amount of a material to which someone can be exposed. The permissible exposure limits for asbestos are contained in 29 C.F.R. §1910.1001(c) (1). None of the asbestos-containing material (ACM) in the USCGA labs, classrooms, hallways, and offices is friable, and no release of fibers is expected. It is reasonable to assume that the PEL will not be exceeded by personnel entering the space; therefore, the space is unregulated. If conditions change, which would possibly cause the ACM to become friable, we will quarantine the area and post signage. Note that we did post the required signs and restricted access until an independent company conducted an air sample and cleared the area following this ACM incident that involved and generated this CGIS investigation.

Employee notification requirements are set out in subsection (f) of 29 C.F.R. § 1926.1101. This subsection provides that an employer must, as soon as possible, but no later than 5 working days after the receipt of the results of any monitoring, notify each affected employee of these results, individually in writing, or by posting the results in an appropriate and accessible location. The only affected employees, Mr. Falconi and Mr. Bensik, were provided the requisite written notification.

The CGIS investigation referred to a 1993 survey confirming asbestos at the same location where the 2007 exposure occurred. OSC queried what was being done, if anything, to prevent a recurrence of this situation where no one realized that a previous asbestos exposure had occurred until after the fact. SUPTINST 6260.16A, entitled "Asbestos Exposure Control Procedures", was modified after the 2007 exposure to reinforce the need to be sensitive to the presence of asbestos; the current version of instruction states, "[u]nless clear documentation exists that floor tiles, mastic, insulating or other suspect materials do not contain asbestos, these materials shall be tested for ACM prior to any work proceeding." Annual training also conveys the strong safety message to workers in the revised SUPTINST to test suspected materials. All incoming military personnel are also briefed at their orientation on the presence of asbestos. The policy has clearly been announced that floor tiles, mastic, insulation and other suspect materials will be tested first, unless there is clear proof that no ACM is present. The previous problem generating the complaint and investigation at hand resulted because of assumptions made by two employees, Mr. Bensik and Mr. Falconi, that ACM was not present; these assumptions were based only on the size of the tiles. The USCGA Environmental and Safety Branch is aware that this was an inadequate screening method, and has adopted new policies to prevent such assumptions from being made and acted upon in the future. In addition, the USCGA is considering further refining and clarifying SUPTINST 6260.16A to clearly put employees on notice to err on the side of caution when working with material that they have the slightest suspicion or belief may contain asbestos.

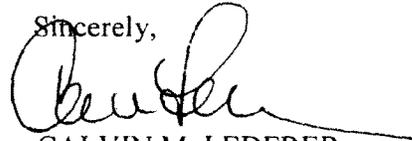
In further implementation of this instruction, the section of the branch creating the work orders and the shop supervisors were first trained on the locations of hazardous materials. Additionally, whenever an order is issued for work to begin on a project, a separate work order is also produced for the environmental branch to approve the initiation of work. This is a new process, and it has been implemented through training, discussion, and email direction. The process may be further refined in the future, if necessary.

The CGIS investigation contained a recommendation from the Coast Guard Captain, who was Chief of the Safety and Environmental Branch at the USCGA at the time of the Falconi allegations, that the position he held should be converted to a civilian position because a civilian employee would, presumably, hold the position for a longer period of time, and without the job rotations required of military officers would provide continuity for safety and environmental operations. This recommendation has been implemented, and the position of Chief, Safety and Environmental Branch, is now held by a civilian employee, Mr. Mark Buck. Mr. Buck has attended Asbestos Supervisor Training in the past year, and continuing to update the asbestos program is one of his top priorities.

During the course of the investigation, two other employees were named as having possibly been exposed to asbestos at the USCGA. OSC inquired whether these employees were notified of the exposure. CGIS followed up on this allegation with EPA CID (EPA CID having conducted an initial investigation into the allegations). According to Special Agent Senad Metjahic of EPA CID in New Haven, who investigated Mr. Falconi's allegations, there was no substantiated asbestos exposure involving these two employees. Thus, these employees were not notified of potential exposure to asbestos.

Thank you for your efforts and your interest in workplace safety compliance issues. Please do not hesitate to contact Ms. Monk of my staff at 202-372-3759, should you wish to further discuss this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Calvin M. Lederer", with a long horizontal flourish extending to the right.

CALVIN M. LEDERER
Deputy Judge Advocate General
U. S. Coast Guard

cc: Hon. Janet Napolitano, Secretary, DHS, c/o Hon. Ivan Fong, General Counsel
Hon. Jane Holl Lute, Deputy Secretary, DHS, c/o Hon. Ivan Fong, General Counsel
Admiral Thad W. Allen, Commandant, USCG
CDR James Pruett, USCGA Staff Judge Advocate

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Coast Guard



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SUPTINST 6260.16
19 Dec 07

SUPERINTENDENT INSTRUCTION 6260.16

Subj: ASBESTOS EXPOSURE CONTROL PROCEDURES

Ref: (a) Asbestos Exposure Control Manual, COMDTINST M6260.16A
(b) OSHA General Industrial Standards, 29 CFR 1910.1001
(c) OSHA Construction Standards, 29 CFR 1926.1101

1. PURPOSE. To provide specific guidance regarding exposure to asbestos while using, installing, handling, and performing maintenance, renovation work, or removal and disposal operations involving asbestos materials by Academy personnel and contractors engaged in work for the Coast Guard at the U.S. Coast Guard Academy.
2. ACTION. All supervisors shall ensure compliance with the provisions of this Instruction.
3. DISCUSSION.
 - a. Asbestos is a confirmed human carcinogen. Overexposure to airborne asbestos fibers can significantly increase the risk of incurring three diseases: lung cancer, asbestosis, and mesothelioma. Asbestosis is a chronic lung disease that impairs breathing; mesothelioma is a cancer of the tissue that surrounds the lungs. Onset of these serious illnesses may occur after a latency period of 10 to 20 years following initial overexposure to airborne asbestos fibers.
 - b. Intact and undisturbed asbestos materials do not pose a health risk. The mere presence of asbestos in a building does not mean that the health of the occupants is endangered. When asbestos-containing material (ACM) is in good condition and is properly managed, the risk of asbestos-related disease is minimal. However, when ACM is damaged, cut sanded, or deteriorates; it may release asbestos fibers into the air and become hazardous.
4. POLICY STATEMENT. Coast Guard personnel assigned to the Coast Guard Academy and members of its civilian work force shall not engage in the removal, rip-out, or repair of asbestos or ACM during the normal execution of their assigned duties. Rather, in the event asbestos or ACM is discovered, or the need arises to drill, cut, sand, or otherwise disturb areas where known encapsulated asbestos is located, an asbestos certified abatement contractor shall be employed to remove any asbestos in question before work proceeds. Unless clear documentation exists that floor tiles, mastic, insulating or other suspect materials do not contain asbestos, these materials shall be tested for ACM prior to any work proceeding. The Safety Officer will arrange for sample collection and verification of material before work proceeds. All asbestos removal and disposal shall comply with federal and state regulatory requirements.

A handwritten signature in cursive script, appearing to read "J. S. Burhoe".

J. S. BURHOE