

FINAL

**SAFETY AND HEALTH CODES BOARD
MEETING MINUTES
THURSDAY, July 9, 2015**

BOARD MEMBERS PRESENT: Mr. Jerome Brooks
Mr. Lou Cernak, Jr.
Mr. John Fulton
Ms. Anna Jolly
Mr. Travis Parsons
Mr. Courtney Malveaux
Mr. David Martinez
Ms. Milagro Rodriguez, Chair
Mr. Tommy Thurston

BOARD MEMBERS ABSENT: Ms. Rebecca LePrell
Mr. Kenneth Richardson, II
Mr. Chuck Stiff, Vice Chair

STAFF PRESENT: Mr. C. Ray Davenport, Commissioner of Dept. of Labor & Industry
Mr. Bill Burge, Assistant Commissioner
Mr. Jay Withrow, Director, Legal Support, BLS, VPP, ORA, OPP & OWP
Mr. Paul Schilinski, Director, Occupational Safety Compliance
Mr. Ron Graham, Director, Occupational Health Compliance
Ms. Reba O'Connor, Regulatory Coordinator
Mr. John Crisanti, Manager, Office of Policy and Planning
Mr. Ed Hilton, Director, Boiler Safety
Ms. Regina Cobb, Senior Management Analyst
Mr. Mario Suarez, Safety & Health Compliance Officer, Norfolk
Ms. Jessica Steeves, Safety & Health Compliance Officer, Norfolk
Mr. Kwame Acquah, Safety & Health Compliance Officer, Richmond

OTHERS PRESENT: Ms. Barbie O'Hanlan, Court Reporter, Halasz Reporting & Videoconference
Ms. Beverly Crandell, Safety Program Coordinator, Tidewater Community College
Ms. Veronica Haynes, SHIM
Mr. Scott Shahan, Virginia State Police
Samuel R. Brumberg, Esq., Ass'n of Electric Cooperatives, Glen Allen, VA
Mr. Bobby Glenn, SMM

ORDERING OF AGENDA

Chair Milly Rodriguez called the meeting to order at 10:08 a.m. A quorum was present.

Ms. Rodriguez requested a motion to approve the Agenda. Mr. Travis Parsons moved to accept the Agenda, and Mr. Tommy Thurston properly seconded the motion. The Agenda was approved, as submitted, and the motion was carried by unanimous voice vote.

APPROVAL OF MINUTES

Ms. Rodriguez asked the Board for a motion to approve the Minutes from the December 11, 2014, Board meeting. On proper motion by Mr. Thurston and seconded by Mr. Martinez, the Minutes were approved by unanimous voice vote.

ELECTION OF OFFICERS

Ms. Rodriguez, who informed the Board that elections are held each year during the first Board meeting after July first, asked for nominations for the office of Chair. Ms. Rodriguez was nominated to continue as Chair and the nomination was properly seconded. There were no other nominations. By voice vote, the Board unanimously elected Ms. Rodriguez to serve a second consecutive term as Chair.

Next, Ms. Rodriguez asked for nominations for Vice Chair. Mr. Chuck Stiff was nominated to continue as Vice Chair, and the nomination was properly seconded. There were no other nominations. Mr. Stiff was unanimously elected to serve a second consecutive term as Vice Chair by voice vote.

PUBLIC COMMENTS

Ms. Rodriguez opened the floor for comments from the public, however, there were no comments.

OLD BUSINESS

None

NEW BUSINESS

Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39

Mr. Jay Withrow, Director of Legal Support, VPP, ORA, OPP & OWP for the Department of Labor and Industry, requested, on behalf of the Department, that the Board consider for adoption federal OSHA's Amendments to the Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39, as published in 79 FR 56129 on September 18, 2014.

Mr. Withrow began by stating that Virginia, as a state plan state, is normally required to adopt federal – identical regulation within six months of the publication of the federal regulation. He added that Virginia is past the six months' time limit because it had to wait for a general assembly action on the part of the recording and reporting requirements. He noted that the proposed effective date for the

regulation is September 15, 2015.

In summarizing the changes to the recording and reporting requirements in Part 1904, he explained that there are three different sections to be discussed. He stated that the first change involved an update to non-mandatory Appendix A to Subpart B of Part 1904 - Partially Exempt Industries. He informed the Board that the OSHA 300 log is required to be completed by industries that primarily are considered to be high hazard and there is a list of industries that are low hazard that are not required to complete the OSHA 300 on an annual basis. He added that OSHA used to track industries by Standard Industrial Classification or SIC code, but in the '90's there was a switch to the North American Industrial Classification System (NAICS) coding. The switch is not a one-to-one switch from SIC to NAICS codes so a significant number of industries were impacted as to whether they fell into this low hazard area or not.

He continued by stating that the second area has to do with reporting requirements. He informed the Board that under the old Virginia statute and under OSHA's old regulations, employers were required to report fatal accidents to the department with eight hours, any catastrophes defined as involving the hospitalization of three or more workers, were required to be reported with eight hours. OSHA changed some of their reporting requirements. Fatality reporting requirements are state-identical at eight hours. The hospitalization of an employee, as a result of an accident, changed from three people down to one person. The revised standard changed the definition of what hospitalization meant.

Mr. Withrow mentioned that two new categories for reporting -- amputations and loss of an eye-- were added for reporting. Loss of an eye does not mean going blind; it means actually losing an eye. He continued by stating that the Department had the statute on the books and could not adopt a regulatory change until the Department changed the statute, so the Department made a legislative amendment. Mr. Withrow apologized to the Board because there was a drafting error by the Department in the recently adopted revision to §40.1-51.1.D. The VOSH proposed regulation is not identical to the federal OSHA requirement to report in-patient hospitalizations, amputations and loss of an eye within 24 hours. The Virginia statute mistakenly requires an 8-hour reporting period across the board for everything.

As a result, the statute went through the general assembly as being the same as the federal OSHA requirements because that was the Department's intent. Mr. Withrow added that to address this issue, the Department had to actually change the federal regulation to match the statute since a statute trumps a regulation. Mr. Withrow explained that now the Department has to return to the General Assembly in 2016 to bring the statute into conformity with the OSHA regulation. Once the statute is amended, VOSH will file another proposed regulation with the Board to bring the VOSH regulation into conformity as well.

Ms. Anna Jolly questioned what this means for enforcement. Mr. Withrow responded that the Department has developed an enforcement policy that already appears on the Department's website. The enforcement policy tells employers that if they do not meet the eight hour reporting requirement for hospitalization, amputation, and loss of an eye, but they do meet the 24-hour requirement in the federal regulation, the violation would be considered, a *de minimus* violation of the statute.

Mr. Withrow stated that the VOSH statute has a provision that says the commissioner can establish procedures for determining what a *de minimus* violation of a regulatory requirement would be. He added that *de minimus* basically means that the violation does not have any direct impact on employee safety and health because the reporting requirement is something that occurs post-accident; thus,

missing the eight hour requirement and meeting the 24 hour requirement has no direct impact on the safety and health of that employee. He added that a *de minimus* violation does not go on an employer's record nor appear in any database and there is no penalty associated with it.

Mr. Withrow mentioned that the third area of changes included some definitions for safety meetings, definition of "amputation" and an additional method that employers could use to report these kinds of incidents. In addition to telephoning the Department directly, coming to one of the Department's offices, using OSHA's toll free hotline, and now OSHA has also added an electronic submission form online.

Mr. Withrow referred to the Basis, purpose and Impacts. With respect to impact, he stated that changing from SIC to NAICS, slightly increases the number of establishments required to report injury and illnesses. Also, he added that the amendment will result in a four percent increase in and over establishments engaged in recordkeeping and a two percent increase for all establishments with more than ten employees.

Mr. Withrow informed the Board that for many years the Department has been getting weekly reports from Virginia Workers' Compensation Commission about certain types of accidents and injuries, including amputations, the Department has identified to them as being of interest to the Department.

Mr. Withrow referred to page eight of the briefing package which shows the estimations on the number of establishments impacted nationwide and then Virginia's numbers. With respect to "Benefits", Mr. Withrow stated that OSHA does believe that the revised rule addresses a number of previous shortfalls in the 1904 regulation. There is obvious benefit to employers who are going from having to do some of the recordkeeping and now they don't because they are now at a low hazard. The amendment should allow the Department to use resources more effectively; find out about very serious injuries more quickly, get in and make sure things get corrected so that incidents do not recur.

With respect to costs, he stated that OSHA estimated the costs at nine million dollars, which is equated to \$242,500 for Virginia. The standard is both technologically and economically feasible.

He concluded by recommending that the Board adopt the amendments to Occupational Injury and Illness Recording and Reporting Requirements – NAICS Update and Reporting Revisions, 16VAC25-85-1904.2 and 16VAC25-85-1904.39, as authorized by Virginia Code §§ 40.1-22(5), 40.1-51.1.D., and 2.2-4006.A.4(c), with an effective date of September 15, 2015.

A motion was properly made and properly seconded. The Department's recommendation was approved unanimously by voice vote.

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program

Mr. Withrow announced that the next two NOIRAs are for unique regulations so they will have to go through a full promulgation process with notice and comment periods which can take from 12 to 18 months.

He then requested the Board to authorize the Department to initiate the regulatory process to amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program by filing

a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

He began by listing the following sections that are to be reviewed:

- Applicability of anti-retaliation safeguards to public sector employees, *16VAC25-60-30*.
- Application of Commonwealth's Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30*, which primarily has to do with the Department's authority to get a warrant if we went into a local government situation and the Department's inspectors were refused entry. Mr. Withrow stated that the Department has not yet had a problem in this area, but we need to know that we could get in to inspect if we needed to.
- Allowance for the Commissioner to petition the Cabinet Secretary and then the Executive regarding resolution of anti-retaliation violations with a state agency, *16VAC25-60-30.G*. Mr. Withrow stated that this is another whistleblower situation involving state employees.
- Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program, *16VAC25-60-90*.
- Change of section title(s) to reflect recent terminology changes in occupational discrimination or anti-retaliation cases, *16VAC25-60-110*.
- Provision of penalties for occupational discrimination or anti-retaliation cases at the litigation stage, *16VAC25-60-110*.
- Title update to reflect prior statutory changes, *16VAC25-60-245*. Mr. Withrow stated that this section allows the commissioner to take and reserve testimony and administer oaths to individuals that we're trying to interview who are being uncooperative.
- "Burden of Proof" in VOSH court cases to be specified as "preponderance of the evidence", *16VAC25-60-260*.
- Burden for proving an affirmative defense to a citation lies with the defendant, *16VAC25-60-260*.
- Applicability of anti-retaliation safeguards to public sector employees, *16VAC25-60-30*.
- Application of Commonwealth's Attorney to act on behalf of the Commissioner for public sector employers, *16VAC25-60-30*.

He next briefly reviewed the Basis, Purpose and Impact of this NOIRA. With respect to impact on employers, employees and the Department, Mr. Withrow stated that it is unknown at this time. He also briefly explained the regulatory process involved – the Board adopts the NOIRA, which gets published in the Virginia Register of Regulations, the NOIRA goes out for notice and a 30-day comment period. Afterwards, the Department develops a proposed regulation for the Board to adopt. If the Board decides to go forward with the proposed regulation, it gets published again and then the Board holds a public

hearing, followed by a 60-day comment period. The Department reviews and responds to all comments received during this comment period. The Department then develops a final regulation for the Board to adopt, amend, or the Board may decide not to adopt anything.

In conclusion, Mr. Withrow recommended that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to amend the Administrative Regulation for the VOSH Program by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

A motion to accept the Department's recommendation was properly made and seconded. The motion was approved unanimously by voice vote.

Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Adopt a Virginia Voluntary Protection Program (VPP) Regulation

Mr. Withrow requested the Board to authorize the Department to initiate the Department to initiate the regulatory process to adopt a Virginia Voluntary Protection Program (VPP) Regulation by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act, §2.2-4007 of the Code of Virginia.

He informed the Board that VPP is a recognition program for employers who adopt and implement exemplary safety and health management systems. VPP is designed to recognize the "best of the best" of employers.

Mr. Withrow explained that there is a list of issues that the Department is looking at with respect to this NOIRA: categories of participation; ways to participate; site-based, mobile workforce, VPP corporate; application requirements; requirements for a comprehensive safety and health management system; certification process; on-site evaluation process; annual submissions; recertification process; and withdrawal or termination.

He informed the Board that in Virginia there are two types of VPP participation: Star sites and Merit sites. Star sites have met all requirements of VPP; and Merit sites have demonstrated the potential and willingness to achieve Star status and are implementing planned actions to fully meet the VPP Star requirements.

With respect to impact on employers, Mr. Withrow stated that VPP is a voluntary program so the impact is self-imposed by the employer. It helps employers to identify and correct occupational hazards in a proactive and cooperative approach. VPP sites set up various committees to address all kinds of things from accident investigation, to ergonomics, to lockout/tagout, and confined space. Employees are directly involved in those committee meetings.

He added that VPP sites nationwide average about 50 percent below their injury incident rates for their industry, and in Virginia, it's 65 percent below the national average. He highlighted a success story in Virginia which has two facilities of the Department of Corrections facilities (Augusta and Lunenburg) in VPP.

He continued by stating that VPP sites have lots of subcontractors that work on their sites. Those subcontractors also are required to comply with the VPP requirements when they come onto the sites.

VPP extends beyond the site and impacts construction contractors and temporary labor agencies, too. Mr. Withrow mentioned that the Department has another strategic partnership with the Associated General Contractors (AGC) to get into the construction arena.

He concluded by recommending, on behalf of the Department, that the Safety and Health Codes Board direct the Department to initiate a Notice of Intended Regulatory Action (NOIRA) to develop a regulation that provides for the operation of Virginia's Voluntary Protection Program (VPP), as required by §40.1-49.13 of the Code of Virginia, and pursuant to the Virginia Administrative Process Act (§2.2-4007).

A motion to accept the Department's recommendation was properly made and seconded. The motion was approved unanimously by voice vote.

Notice of Periodic Review of Certain Existing Regulations

Ms. Reba O'Connor, Regulatory Coordinator for the Department of Labor and Industry, requested the Board's permission to proceed with the periodic review process for the following three regulations:

1. 16VAC25-55, Financial Responsibility of Boiler & Pressure Vessel Contract Fee Inspectors;
2. 16VAC25-73, Regulation Applicable to Tree Trimming Operations; and
3. 16VAC25-75, Telecommunications, General, Approach, Distances.

She explained that, in accordance with the Administrative Process Act, §2.2-4017 of the Code of Virginia, and Executive Order 17 (2014), "Development and Review of State Agency Regulations," governs the periodic review of existing regulations. She continued by stating that the Executive Order requires that state agencies conduct a periodic review of regulations every four years.

Ms. O'Connor stated that if the Board grants approval for the Department to proceed, the process of periodic review begins with publication of the Notice of Periodic Review in the Virginia Register, which starts a public comment period of at least 21 days, but no more than 90 days. The Department will review the regulations and any public comments, then prepare recommendations for the Board's consideration.

Ms. O'Connor concluded by recommending that the Board approve the publication of a Notice of Periodic Review in the Virginia Register for the above-mentioned regulations.

A motion to accept the recommendation was properly made and seconded, and the Department's recommendation was approved unanimously by voice vote.

Items of Interest from the Department of Labor and Industry

Department of Labor and Industry Commissioner, Ray Davenport, congratulated Madam Chair on continuing in the chairmanship position. He commented on the legislation to codify Virginia's Voluntary Protection Program (VPP) and the bipartisan support for Virginia's VPP. He thanked Board member, Courtney Malveaux, for his assistance with the Manufacturing Association. He thanked the State Chamber of Commerce and the current VPP sites that stepped forward and help shepherd this legislation through. He added that the Governor held a ceremonial bill signing for VPP on June 3, 2015.

He noted that in attendance at the bill signing were Department staff, many VPP sites, both management and labor employees, the Virginia Manufacturing Association (VMA), represented by Mr. Malveaux, the Virginia AFL-CIO, and the State Chamber of Commerce.

Next, Commissioner Davenport called the Board's attention to the pamphlets which were distributed entitled "Preventing Employee Misclassification." He stated that the Governor issued Executive Order 24 on August 14, 2014, that brought the taskforce together to address employee misclassification. He stated that the taskforce is ongoing in its work. He informed the Board that the Department has issued a policy memorandum to its employees on how we are going to handle VOSH inspections regarding employee misclassification, e.g., requesting subcontractors report licensing requirements when a VOSH inspection is conducted. He added that the policy is available on the Department's website as well as the press release. He cautioned that Employee Misclassification can lead to payroll fraud, reduce Workers' Compensation and unemployment insurance protections, impact tax laws, etc.

Commissioner Davenport informed the Board that Mr. Danny Sutton, Employer Representative for the Agriculture Industry, has resigned from the Board – being unable to attend meetings. He added that the Department would be seeking someone to fill this vacant position.

Commissioner Davenport then thanked Department staff for their hard work in preparation for the Board meeting. In closing, he thanked the Board for taking time and giving their expertise to serve on this Board.

Items of Interest from the Board

Mr. Travis Parsons asked about Virginia's plan to adopt the new OSHA Confined Spaces in Construction Standard. Mr. Ron Graham, Director of Health Compliance for the Department, responded that this new standard will be on our next Board meeting Agenda as a replacement for the Virginia Unique Confined Spaces Standard in the Construction Industry because the current Virginia unique Confined Space Standard in Construction is not as effective as the new federal OSHA standard.

Mr. Graham mentioned that today OSHA had issued a 60-day temporary enforcement policy for the Confined Spaces in Construction Standard.

Adjournment

There being no further business, a motion was made, and properly seconded to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 11:40 a.m.