

**FINAL
SAFETY AND HEALTH CODES BOARD
PUBLIC HEARING AND MEETING MINUTES
THURSDAY, July 27, 2017**

BOARD MEMBERS PRESENT: Mr. John Fulton
Mr. Chris Gordon
Mr. Courtney Malveaux
Mr. David Martinez, New Vice Chair
Mr. Travis Parsons, New Chair
Mr. Kenneth Richardson, II
Ms. Milagro Rodriguez,
Mr. Chuck Stiff, Outgoing Chair
Mr. Tommy Thurston

BOARD MEMBERS ABSENT: Mr. Jerome Brooks
Mr. Lou Cernak, Jr., Outgoing Vice Chair
Ms. Anna Jolly

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. Ed Hilton, Director, Boiler Safety Compliance Management
Mr. Ron Graham, Director, VOSH Health Compliance
Mr. Warren Rice, Director, Consultation Services
Mr. John Crisanti, Manager, Office of Policy and Planning
Ms. Holly Raney, Regulatory Coordinator
Ms. Regina Cobb, Senior Management Analyst
Ms. Deonna Hargrove, Richmond Regional Health Director
Ms. Monica Vanney, DHRM/LCI

OTHERS PRESENT: Ms. Lisa Wright, Court Reporter, Chandler & Halasz, Stenographic Court Reporters
Joshua E. Laws, Esq., Assistant Attorney General, OAG

PUBLIC HEARING

Board Chair, Mr. Chuck Stiff, called the Public Hearing to order at 10:00 a.m. A quorum was present. He explained that the sole purpose of the hearing was for the Board to receive comments from the public regarding the Proposed Regulatory Action to Amend 16VAC25-50, Boiler and Pressure Vessel Rules and Regulations. Next, he invited anyone who wished to speak to address the Board.

Although there were no comments for the public, Mr. Hilton, Director, Boiler Safety Compliance for the Department, addressed the Board concerning the various revisions to the Boiler and Pressure Rules and Regulations. He explained the various revisions to the Boiler and Pressure Rules and Regulations were suggested by the Department of Legislative Services to improve the clarity of these regulations. Then Mr. Stiff adjourned the Public Hearing at 10:05 a.m.

BOARD MEETING

Immediately following the Public Hearing, Mr. Stiff called to order the Safety and Health Codes Board meeting at 10:06 a.m. A quorum was present.

ORDERING OF AGENDA

Mr. Stiff requested a motion to approve the Agenda. A motion to accept the Agenda was made and properly seconded. The Agenda was approved, as submitted, and the motion was carried by unanimous voice vote.

APPROVAL OF MINUTES

Mr. Stiff asked the Board for a motion to approve the Minutes from the February 16, 2017 Board meeting. The motion was made and properly seconded. The Minutes were approved by unanimous voice vote.

ELECTION

Mr. Stiff stated that generally the Board switches back and forth between labor and management representatives. He announced that at the next meeting the new Chair would then appoint a Secretary. Next, he requested nominations for a new Chair. Mr. Travis Parsons was nominated. There were no other nominees. By unanimous voice vote, Mr. Parsons was elected as Board Chair.

Next, Mr. Stiff asked for nominations for Vice Chair. Mr. David Martinez was nominated. There were no other nominees. By unanimous voice vote, Mr. Martinez was elected as Board Vice Chair. Mr. Parsons permitted Mr. Stiff to continue presiding over this meeting.

PUBLIC COMMENTS

Mr. Stiff opened the floor for comments from the public, however, there were no comments.

OLD BUSINESS

16VAC25-60, et seq., Final Regulation to Amend the Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes

Mr. Withrow began by requesting that the Board consider for adoption, as a final regulation of the Board, language to amend 16 VAC25-60, *et seq.*, Administrative Regulation for the VOSH Program, (Enforcement of VDOT's MUTCD; Clarification of Anti-retaliation Safeguards for Public Sector Employees, etc.).

He refreshed the Board's memory about the rulemaking process of this regulation, which started with a Notice of Intended Regulatory Action, adopted by the Board on October 29, 2015, and published in the Virginia Register on December 28, 2015, with a 30-day comment period ending on January 27, 2016.

He continued by stating that the Board adopted the proposed regulation on March 3, 2016, which was published on November 28, 2016, with a 60- day comment period and a public hearing. He added that no comments were received during that comment process.

He informed the Board that the only changes from the final briefing package from the proposed package are some additional language (highlighted) that was added for clarification on the FOIA provisions regarding VPP.

Mr. Withrow called the Board's attention to items allowing VOSH to enforce the Virginia Department of Transportation Work Area Protection Manual, which is based on the federal OSHA regulation. This regulation will allow the Department to be a little more stringent than federal OSHA and it will help VDOT to enforce their contracts and make sure that the employees are safe. This is important for VDOT because when VDOT has a contract breach, there is a whole legal process that it must go through to get to clients. A citation can get things done much quicker than to get an abatement to occur.

Next, Mr. Withrow addressed the clarification of a little conflict in the Department's regulation about whistleblower having to do with the Commissioner's authority to litigate a whistleblower case if the Department cannot settle it in the public sector. He noted that state agencies do not go to court against local government agencies or political subdivisions.

The third item Mr. Withrow discussed was just making sure that §40.1-7 of the *Code of Virginia* applies to public employers and that §40.1-7 of the Code of Virginia says the Commonwealth's Attorneys can represent the Commissioner when litigation is necessary.

Mr. Withrow's fourth item dealt with regulatory language concerning how to resolve a failure to abate issue with a state agency. He informed the Board that there are a variety of ways to settle things.

His fifth item specifically addressed the Freedom of Information Act provisions for the Virginia Voluntary Protection Program (VPP). VPP files will be treated in the same way as a VOSH enforcement case file.

In item 6, he stated that there was a change of the term "anti-discrimination" to "whistleblower" since federal OSHA refers to the program as "Whistleblower."

Item 7 clarifies that if the Department litigates a whistleblower case, the statute provides the court with the ability to restrain violations and issue penalties appropriately. He added that money received from penalties issued would go directly to the employee; not the Department or the Commonwealth.

Item 8 clarifies the Commissioner's authority to take and preserve testimony, examine witnesses, and administer oaths, constitutes an administrative subpoena power.

He stated that items 9 and 10 are placing into regulation rulings from case law.

Regarding impact of these amendments, Mr. Withrow stated that there is impact on Item 1 because employers could be subject to citation and penalty; however, they are required by contract to comply. Any costs for correction are already required under the contract, and the only additional impact would be the possibility of a penalty if they are not complying.

He informed the Board that Items 2 through 6 did not have any additional impacts. Item 7, which was the ability of the Commissioner to ask for penalties at the litigation stage of a whistleblower case would be affected as a financial burden to the employer. He added that the Department averages litigating one whistleblower case a year or less.

He concluded by recommending that the Board consider for adoption, as a final regulation of the Board, the final amendments to 16VAC25-60, *et seq.*, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, Miscellaneous Changes, in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act, §2.2-4000, *et. seq.*

A motion to accept the Department's recommendation was made and properly accepted. The motion was approved by voice vote, with Mr. Malveaux abstaining.

16VAC25-200, Final Regulation on Virginia Voluntary Protection Programs (VPP)

Mr. Withrow began by requesting that the Board consider for adoption, as a final regulation of the Board, 16VAC25-200, Virginia Voluntary Protection Program (VPP).

Mr. Withrow reminded the Board of the rulemaking process for this regulation. The Notice of Intended Regulatory Action (NOIRA) was adopted by the Board on October 29, 2015, which was actually in response to a statute adopted by the General Assembly which codified the Virginia Voluntary Protection Program in July 2015. He continued by stating that the NOIRA was published on December 28, 2015, with a 30-day comment period ending on January 27, 2016. No comments were received. The Board adopted the proposed regulation on March 3, 2016. The proposed regulation was published on December 12, 2016, with a 60-day comment period ending on February 16, 2017. Again, no comments were received during the comment period.

Mr. Withrow informed the Board of the four categories of changes – some are more administrative and not substantive. He explained that, when the Department submitted the proposed regulation to the Department of Planning and Budget (DPB), DPB suggested that the Department contact the Register of Regulations for consistency in regulations, language used, etc. DPB identified a number of issues with the VPP regulation, for example: substituting “Department” for “Agency”; requested definitions for the terms: “Challenge” and “VOSH”; reference to “Small Business” was deleted because that term was not used in the VPP regulation; a definition for “nested contractor” was added.

He continued by stating that some changes were recommended by the Department, e.g., adding definitions for “Applicant”, “Commissioner of Labor and Industry”, and “Participant”. The word “employer” was substituted in a number of places for “company” since the VPP regulation will apply to state and local government agencies.

Mr. Withrow referred to the Board to page 4 of the briefing package which lists the issues the final regulation addresses.

He informed the Board that the VPP sites nationally have averaged injury and illness rates that are 50 percent below the national average, and in Virginia, injury and illness rates average about 60 percent below the national average. He noted that there is spending associated with the regulation; it's a voluntary program; and there are significant benefits to the company as well.

He stated that the Department only takes VPP applications in which the Department is about 98 percent of approval.

With respect to impact on the Department, Mr. Withrow stated that the Department was successful in going to the General Assembly this year and getting three more positions for VPP, along with three consultation positions which have a significant impact on the Department. He added that the Department is making significant efforts to expand the use of VPP, both in construction and general industry.

With respect to employees, Mr. Withrow stated that the Department believes that VPP has a great impact on employees in that there are fewer injuries, illnesses, and fatalities. He added that the core element of VPP is to develop a really good safety and health management system with employee involvement in developing it and running it. Employees will have a direct say in safety and health. It's a "win-win" for everybody.

Mr. Withrow concluded by recommending that the Board consider for adoption as a final regulation of the Board 16VAC25-200, Virginia Voluntary Protection Program, in accordance with the authority of the Board under §40.1-22(5) and the requirements of the Administrative Process Act, §2.2-4000.

A motion to accept the Department's recommendation was made and properly accepted. The motion was approved by voice vote, with Courtney Malveaux abstaining.

NEW BUSINESS

Report on Periodic Review of Certain Existing Regulations

Ms. Holly Raney, Regulatory Coordinator for the Department of Labor and Industry, informed the Board of the five regulations that were identified for review in 2017, in accordance with the Administrative Process Act (§2.2-4017 of the *Code of Virginia*) and Governor McAuliffe's Executive Order 17 (2014).

The regulations for review are as follows:

1. 16VAC25-20, Regulation Concerning Licensed Asbestos Contractor Notification, Asbestos Project Permits, and Permit Fees
2. 16VAC25-30, Regulations for Asbestos Emissions Standards for Demolition and Renovation Construction Activities and the Disposal of Asbestos-Containing Construction Waste – Incorporation by Reference, 40 CFR 61.140 through 61.156;
3. 16VAC25-40, Standard for Boiler and Pressure Vessel Operator Certification;
4. 16VAC25-70, Virginia Confined Space Standard for the Telecommunications Industry; and
5. 16VAC25-97, Reverse Signal Procedures – General Industry – Vehicles/Equipment Not Covered by Existing Standards

Ms. Raney explained that, following the Board's February 16, 2017 approval, the periodic review process for the regulations began with publication of a Notice of Periodic Review in the *Virginia Register*, which began a public comment period of at least 21 days, but not longer than 90 days. She added that the public comment period began on March 20, 2017 and closed on April 14, 2017, with no comments being received for any of these regulations during the public comment period.

During her presentation, Ms. Raney discussed the Review and Analysis for each regulation undergoing review and the factors that were required to be considered:

- The continued need for the regulation;
- The complexity of the regulation;
- The extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and
- The length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

After discussing each factor for consideration for each regulation, Ms. Raney concluded by recommending, on behalf of the Department, that the Board vote to retain all five regulations “as is” with no changes.

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

Items of Interest from the Department of Labor and Industry

Mr. Withrow informed the Board that they would be receiving an invitation through “ticketbud” to the VPP Machine Guarding Best Practice Day, hosted by Goodyear Tire & Rubber Co. on September 13, 2017 at The Institute for Advanced Learning and Research in Danville, VA.

Commissioner Ray Davenport began by reminding the Board of federal OSHA’s increased maximum penalty, effective since August 2016, and that State Plans must be at least as effective as federal OSHA. He stated that VOSH penalties are incorporated by statute in the *Code of Virginia*. He stated that, during the 2017 General Assembly session, the increase in maximum penalties was adopted by the General Assembly and signed by the governor, with the maximum penalty increasing from \$7,000 to \$12,471 for other-than-serious and failure to abate violations. The maximum penalty for willful violations will increase from \$70,000 to \$124,709, effective on July 1, 2017. He stated that the Department met with its stakeholders to explain the penalty increase and to make them aware of the changes even prior to the General Assembly session.

Commissioner Davenport also informed the Board that on April 6, 2017, OSHA’s delayed enforcement of the federal Silica standard for construction. The Board adopted a federal-identical version of the Silica standard on September 13, 2016; however, VOSH did not delay enforcement of its standard because of the short notice of this delay by OSHA and the Town Hall regulatory requirements. He stated that the Department did not think it was a good idea to enforce the standard, and then not enforce the standard.

Because of the delay of the federal OSHA regulation, an effective date for the construction standard is June 23, 2017. He added that VOSH’s use of the National Emphasis Program (NEP) for the Silica Standard in Construction has been suspended on any case inspections opened on or after June 23, 2017. The suspension will await the pending revision and reflect the adoption of the new Silica standard on the federal level. VOSH will continue to respond to silica-related employee complaints, referrals, and situations where the potential exposure to silica in Construction is observed in plain view of VOSH personnel.

Commissioner Davenport reiterated that, during the 2017 General Assembly session, Gov. McAuliffe and the General Assembly provided \$650,000 of additional funding for three consultants and three VPP coordinators. He added that the Department was not successful on the compliance side of the House. He continues to be concerned about the twelve unfunded compliance officer vacancies on the compliance side.

He thanked Brett Vassey of the VMA and the Virginia AFL-CIO, Chuck Stiff, among others that came out in support of the funding which became effective on July 1, 2017.

Commissioner Davenport informed the Board that OSHA uses statistics to show nationally that there is one compliance officer for every 59,000 workers. In Virginia, he said the ration is approximately one compliance officer per 80,000 workers.

Commissioner Davenport stated that year- to-date VOSH has investigated 19 fatalities, and that seven of those fatalities occurred during the month of July.

Mr. Stiff asked about the effectiveness of the Reverse Signal unique standard. Commissioner Davenport responded that there is no activity that he's aware of regarding adopting the reverse signal standard on the federal level. Mr. Withrow added that OSHA has sent out a request for information regarding the Reverse Signal regulation. He also stated that the Reverse Signal regulation cut the Virginia fatality rate by at least 50 percent.

Mr. Withrow, then again addressed the settlement penalty phase. He said that failure to abate and other-than-serious violations went from \$7,000 up to \$12,000, and that serious and other- than-serious went from \$7,000 up to \$12,000. He continued by stating that failure to abate amount did not change.*

Lastly, Commissioner Davenport thanked the Board for their time commitments.

Items of Interest from the Department or from the Board

Mr. Stiff recognized the Department staff for their work in making these meeting run smoothly.

Adjournment

There being no further business, a motion was properly made and seconded to adjourn the meeting. The motion was carried unanimously by voice vote. The meeting adjourned at 11:13 a.m.

* Following the adjournment of the meeting, Mr. Withrow realized that he had mistakenly stated to the Board, during the Board meeting, that the new VOSH penalty increase that took effect on July 1, 2017 **did not** affect VOSH “failure to abate” penalty levels. He stated that the penalty did change VOSH failure to abate penalty levels, and added the following chart with the correct amounts:

Violation Type	Old	New
Serious	\$ 7,000	\$12,471
Other-than-serious	\$ 7,000	\$12,471
Repeat	\$70,000	\$124,709
Willful	\$70,000	\$124,709
Failure to Abate	\$ 7,000	\$124,471