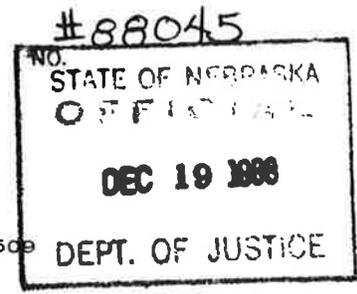


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ROBERT M. SPIRE
 Attorney General
 A. EUGENE CRUMP
 Deputy Attorney General

DATE: December 15, 1988

SUBJECT: Scope of Certification of Asbestos Workers

REQUESTED BY: Gregg F. Wright, M.D., M.Ed.
 Director of Health

WRITTEN BY: Robert M. Spire, Attorney General
 Marilyn B. Hutchinson, Assistant Attorney General

You have asked whether military members and civilian employees of Offutt Air Force Base must be certified for an asbestos occupation by the department before such persons may engage in an asbestos project on behalf of such federal agency. No, as discussed below.

1. The federal government is immune from suit without its consent.

The United States Constitution provides in Art. VI, cl. 2 that it and the laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding. In Art. I, §8, cl. 17 it gives Congress power to exercise exclusive legislation over all places purchased by the consent of the Legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock-yards and other needful buildings.

Those provisions were interpreted in Hancock v. Train, 426 U.S. 167 (1976), to require clear language to subject federal installations to state permit requirements for enforcing the Clean Air Act, clarity which was lacking in 42 U.S.C. §7418 on which the state relied. In response, Congress amended that section to make manifest its intent that federal installations be so bound.

However, comparable clear language is missing in the Occupational Health and Safety Act (OSHA), the Asbestos Hazard Emergency Response Act (AHERA) and the Toxic Substances Control Act (TOSCA) and in federal regulations to implement them.

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The head of each federal agency is directed by 29 U.S.C. §668 to establish and maintain an effective and comprehensive occupational safety and health program consistent with OSHA standards. Executive Order 12196 directs all agencies of the executive branch except military personnel to comply with OSHA standards. Executive Order 12088 directs federal agencies to comply with TOSCA standards. However, in both cases enforcement is to be by the agencies. Executive Order 12088 expressly provides that it creates no right enforceable at law against the United States, its agencies, officers or any person.

In conclusion, in the absence of express consent by Congress, federal installations such as Offutt Air Force Base are exempt from state enforcement of any standards set pursuant to OSHA or TOSCA.

2. An employee of the United States does not secure a general immunity from state law while acting in the course of his/her employment on an asbestos project but a state may not require such activity to cease until such employee is certified and pays a fee.

In Johnson v. State of Maryland, 254 U.S. 51 (1920), the issue was whether the state could interrupt the acts of the general government itself. The Court, in an opinion written by Justice Oliver Wendell Holmes, held it could not.

In that case an employee of the post office department, while driving a government motor truck in the transportation of mail over a post road in Maryland, was arrested, tried, convicted and fined for so driving without having obtained a license from the state. The Court found:

Of course, an employee of the United States does not secure a general immunity from state law while acting in the course of his employment.

Supra at 56. However, the Court went on to conclude:

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government

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has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed.

Id. at 57.

It is such an approach which has been directed for federal agencies by 29 U.S.C. §668, by executive orders referred to above and by the provision of safety programs mandated under 5 U.S.C. §7902 with authority to purchase special clothing and equipment for those in hazardous occupations in 5 U.S.C. §7903.

In conclusion, it is the duty of Offutt Air Base to employ competent persons to work on its asbestos projects and to provide them safe working conditions and the clothing and equipment they need for engaging in a hazardous occupation. It must be presumed that it has done so without oversight by the state through certification of those employees.

Sincerely yours,

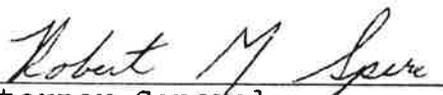
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