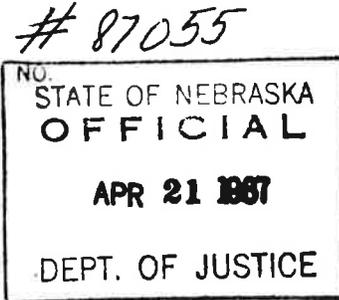


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



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

DATE: April 17, 1987

SUBJECT: Asbestos Act, Neb.Rev.Stat. §§71-6301 et seq.

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

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

You have asked several questions about the above act:

1. Are state agencies, political subdivisions, and municipalities "public entities" under 71-6301(3)?

Yes. It is a general rule of statutory construction that words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning. Neb.Rev.Stat. §49-802(5) (Reissue 1984). In The American Heritage Dictionary, "public" is defined as, "Connected with or acting on behalf of the people, community, or government, rather than private matters or interests." "Entity" is defined as, "A particular and discrete unit; an entirety." Courts have given the phrase "public entity" a meaning consistent with those definitions. Thus, in Vallas v. City of Chula Vista, 56 C.A.3d 382, 128 Cal.Rptr. 469, 472 (1976), the court viewed a public entity as an independent body politic with sovereignty and not a department or office within an entity. The court in English v. Newark Housing Authority, 138 NJSuper. 425, 351 A2d 368, 370 (1976), deemed a political subdivision a public entity because it has had sovereignty parceled out to it by the state and is to that degree independent of the state and equal to it. In Duerfeldt v. State, 184 Neb. 242 166 N.W.2d 737 (1969), the court held a department of state government created by law was a legal entity. Supra at 244.

L. Jay Bartel
Martel J. Bundy
Janie C. Castaneda
Dale A. Comer
Laura L. Freppel

Lynne R. Fritz
Yvonne E. Gates
Jill Gradwohl
Royce N. Harper
William L. Howland

Marilyn B. Hutchinson
Mel Kammerlohr
Sharon M. Lindgren
Charles E. Lowe
Steven J. Moeller

Harold J. Mosher
Fredrick F. Neid
Bernard L. Packett
Lisa D. Martin-Price
LeRoy W. Sievers

James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugai
Linda L. Willard

Gregg F. Wright, M.D., M.Ed.
April 17, 1987
Page -2-

2. Must employees of a business entity exempt from licensure under 71-6302 be certified?

Yes. This is an exemption from licensure for the business entity, not an exemption from certification for the individual employees who will work on the asbestos project. Note that the training program must be available for review and approval by the department. Thus the employee may take such course in meeting the requirement for certification in Neb.Rev.Stat. §71-6310(2)(a), but the employee must also meet the requirements in §71-6310(2)(b) in order to be certified.

3. Does 71-6304(3) provide the Department with authority to approve asbestos sites?

Yes. Access to an "approved asbestos disposal site" is a condition of licensure. There is no express authority for the department or anyone else to approve such sites, but authority is implicit in the department in Neb.Rev.Stat. §71-6303(1) which provides: "The department shall administer sections 71-6301 to 71-6314." (Emphasis added.) The rules and regulations adopted to do so must be consistent with rule-making authority given to the director in Neb.Rev.Stat. §71-6303(2) and (3).

4. Are the waiver provisions of 71-6309(1) and (3) valid?

Probably. The Legislature may make classifications which operate equally on each subject within the class if the classification is based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect to them. See, Galloway v. Wolfe, 117 Neb. 824, 223 N.W. 1 (1929), in which the classification was held invalid. The reason for the rule loses force when those most needing protection are exempted from coverage. See, Low v. Rees Printing Co., 41 Neb. 127, 59 N.W. 362 (1894), in which the classification was also held invalid.

In this case, there are two classes: those business entities primarily engaged in asbestos projects and those businesses which are not primarily so engaged. Those not primarily so engaged may have less of an impact on the health and safety of the public unless, being less focused on such projects, they have less expertise. There is less need for such a classification because a business entity is already exempted from licensing for engaging in its own asbestos project, using its own employees.

Because of the findings which the director must make before he can grant a waiver from the licensing requirement under

Neb.Rev.Stat. §71-6309(3), the applicant for such a waiver may reasonably be required to give the same information as the applicant for licensure and to meet the requirements of Neb.Rev.Stat. §71-6304 in order to show that its workers will be protected.

5. Does the Department have authority under 71-6312 and 71-6314 to take administrative action against unlicensed business entities or uncertified persons and assess civil penalties?

Probably not. The ultimate issue here is whether there has been an improper delegation of judicial functions in violation of Sec. 1, Art. II of the Nebraska Constitution which requires the separation of legislative, executive and judicial powers. We have concluded there has been an improper delegation to the department of personal jurisdiction of the department over unlicensed persons, as discussed below.

In this case the Legislature itself has defined what is unlawful, as it must. See, Lincoln Dairy v. Finnegan and Marquart v. Maucker, 215 N.W.2d 278 (Ia. 1974). The Legislature itself has specified that the civil sanction for the offense is a fine and how much that fine will be, as it must do (or set guidelines for determining the amount of such fine) if the fine is to be imposed by an administrative agency. See, County Council for Montgomery County v. Investors Funding Corp., 270 Md. 403, 312 A.2d 275 (1973). The Legislature has expressly granted the department jurisdiction to determine whether the violation has occurred and, if so, it has granted the director authority to impose the fine, subject to judicial review, as it must do. Dept. of Banking v. Hedges, 136 Neb. 382, 286 N.W. 277 (1939) and Hadden v. Aitken, 156 Neb. 215, 55 N.W.2d 620 (1952), overruled on other grounds. This grant of subject-matter jurisdiction is incidental to the exercise of the police power by the department in enforcing this act, as in Hedges, above. However, this grant of personal jurisdiction over persons who have not been granted a license or certification by the department cannot be incidental to such grant, as in Hadden, above.

In Marquart v. Maucker, where a state university was trying to impose a fine created by its own rules as a sanction for violating such rules, the court held such a fine could be legally imposed or assessed "only by a lawful tribunal in a case wherein it has jurisdiction, properly invoked, of the offense charged [subject-matter jurisdiction] and of the person of the accused [personal jurisdiction]." Supra at 282. In that case the agency had neither because it had no authority to create an offense and make a fine a sanction for such offense.

Gregg F. Wright, M.D., M.Ed.
April 17, 1987
Page -4-

6. Can the Department assess a fine as a civil penalty against a licensed business entity for permitting an uncertified person to work on an asbestos project?

No. Employing or permitting an uncertified person to work on an asbestos project is a ground for disciplinary action against a licensee. Neb.Rev.Stat. §71-6308(1)(d). However, the possible sanctions stated there and in Neb.Rev.Stat. §71-6314(1) do not include a fine. That sanction is reserved for the offense of engaging in an asbestos project without a required license or without a required certification. The uncertified person working on an asbestos project would be subject to such a penalty.

7. Is there a contested case under the procedures set forth in 71-6314 which requires notice and hearing on proposed or intended disciplinary action?

Yes. Notice and hearing are required as set forth in Neb.Rev.Stat. §71-6314. Thus it is a "contested case" as defined in Neb.Rev.Stat. §84-901(3).

8. Can we read this section with sections 71-6308 and 71-6310(4) so as to construe 71-6314 to involve our usual procedure of actions (denial, suspension or revocation) followed by hearing if requested within 30 days?

No. The express language of the statute is controlling. Your rules of practice and procedure recognize this. See, 184 NAC 1.011.

While the hearings under Neb.Rev.Stat. §71-6314 are to be held in accordance with rules and regulations of the department, the setting of a hearing concurrent with notice of the intended action is statutory and, as such, is the process due to the licensee or certificate holder. However, you can tell them such hearing will be held as scheduled unless prior to that date they advise you in writing either that they do not wish to contest your proposed action or they request a continuance for good cause and you grant it.

9. How does a "declaratory order" under 71-6314(3) fit into the disciplinary scheme?

That section provides:

(3) Following the hearing, the director shall determine whether or not the charges are true, and if true, the director may (a) issue a declaratory order finding the charges to be true or (b) deny, refuse to renew, suspend, or revoke a license or certificate or

impose a civil penalty prescribed in section 71-6312. A copy of such decision, setting forth the finding of facts and the particular reasons upon which it is based, shall be sent by either registered or certified mail to the alleged violator. The decision shall become final thirty days after a copy thereof is mailed, unless the alleged violator, within such thirty-day period, appeals the decision as provided in Chapter 84, article 9.

(Emphasis added.) When that section is read with the rest of the Act, it is obvious that subsection (a) is the ultimate fact which you must find before you can impose an appropriate sanction under subsection (b). It is part of your decision, not an alternative disposition of the case before you unless you find criminal violations. Then such a finding is as far as you can go.

10. Does the Department have authority to require record-keeping, to require prior notice of inception of asbestos projects, and to conduct inspections of exempt business entities to ensure that approved training programs are conducted or conducted in compliance with regulations?

No, except with respect to the training program. Yes. Yes. The department cannot require a business entity which is exempt from licensing to keep the post-licensing records specified in Neb.Rev.Stat. §71-6307. That section specifically applies to licensees. However, the director does have authority under Neb.Rev.Stat. §71-6303(2) to adopt rules and regulations necessary to carry out §§71-6301 to 71-6314. This includes enforcement of the training requirements under Neb.Rev.Stat. §71-6302 and the certification requirements under Neb.Rev.Stat. §71-6310. To do so the director must have notice that such a project is planned. Thus the director has implicit authority under Neb.Rev.Stat. §71-6303 to require such notice before such an asbestos project of the business entity's own facilities is undertaken. Similarly the director may require that such a project not be undertaken until the proposed training program has been inspected and approved and the employees who will work on such project have been identified and then certified as required by Neb.Rev.Stat. §71-6310.

11. If they are not so conducted, is action other than injunction permitted under the Act to enforce the training requirements?

Probably not directly. If Neb.Rev.Stat. §71-6314 appropriately delegated personal jurisdiction over non-licensed persons to the department, then it could bring an action against a business entity for violation of §71-6312(1) on the ground that

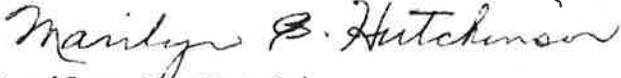
Gregg F. Wright, M.D., M.Ed.
April 17, 1987
Page -6-

it was not entitled to the exemption in Neb.Rev.Stat. §71-6303 because it had not complied with the provisions of it. However, as set out in response to Question 5 above, we question whether the department has such jurisdiction.

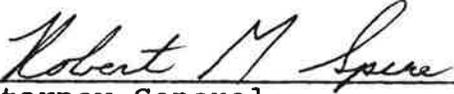
An indirect sanction if a training program is not approved is that the employees will have to successfully complete an approved basic course offered somewhere else before they will be issued a certificate.

Sincerely yours,

ROBERT M. SPIRE
Attorney General


Marilyn B. Hutchinson
Assistant Attorney General

APPROVED BY:



Attorney General