

**FINAL**

**SAFETY AND HEALTH CODES BOARD  
MEETING MINUTES  
TUESDAY, DECEMBER 14, 2004**

The Safety and Health Codes Board meeting was called to order at 10:05 a.m.

**BOARD MEMBERS PRESENT:** Mr. Roger Burkhart  
Mr. Louis Cernak  
Ms. Juanita Garcia  
Mr. James J. Golden  
Ms. Anna Jolly  
Mr. Alvin Keels, Sr.  
Mr. Satish Korpe  
Dr. James H. Mundy  
Ms. Milagro Rodriguez  
Mr. Linwood Saunders  
Mr. Chuck Stiff

**BOARD MEMBERS ABSENT:** Mr. Kenneth Rigmaiden  
Dr. Khizar Wasti

**STAFF PRESENT:** Mr. C. Ray Davenport, Labor and Industry Commissioner  
Mr. Glenn Cox, Director of VOSH Programs  
Mr. Fred Barton, Boiler Safety Compliance Director  
Mr. Ronald Graham, Health Compliance Director  
Mr. Jay Withrow, Office of Legal Support Director  
Ms. Reba O'Connor, Regulatory Coordinator  
Mr. John Crisanti, Office of Planning and Evaluation Manager  
Ms. Wendy Williams, Human Resource Analyst  
Ms. Regina Cobb, Agency Management Analyst Sr.

**ORDERING OF AGENDA**

After calling the meeting to order, as the first order of business, Chairperson Anna Jolly asked for a motion from the Board to accept the proposed Agenda. Mr. Lou Cernak made the motion to accept the Agenda as submitted and Mr. Chuck Stiff seconded the motion. The motion was carried by voice vote.

**APPROVAL OF MINUTES**

Chairperson Jolly asked for a motion from the Board to approve the Minutes of August 3, 2004 meeting. Dr. Mundy made the motion to accept the Minutes and Mr. Cernak seconded the motion. The motion was carried by voice vote.

**PUBLIC COMMENT**

Chairperson Jolly opened the floor to comments from the public on matters relevant to the Board, however, no members of the public had any comments for the Board.

## **OLD BUSINESS**

### **Bylaws of the Safety and Health Codes Board**

John Crisanti, Planning and Evaluation Manager, requested, on behalf of the VOSH Program, that the Board replace the existing 13-year old Board Bylaws and adopt the draft revised Bylaws developed by Department staff. The draft Bylaws were originally presented to the Board for review at its April 21, 2004 meeting.

Mr. Crisanti summarized the draft bylaws as including updates to reflect current statutory and regulatory requirements. He added that this revision is a complete workplan document in that it sets out the statutory responsibilities of the Board, the terms of member appointments, resignation of membership, procedures for filling vacancies and reimbursement policy.

Mr. Crisanti listed other changes that include: greater detail as to the duties of the Board's officers during meetings; elimination of the possibility of voting by proxy; impact of internet on public participation in the regulatory process; and replacement of the ex-officio membership of the Executive Director of the former Department of Waste Management with the current Director of the Department of Environmental Quality (DEQ). Mr. Crisanti added that the final revision includes a minor style change and eliminates references directing actions to be undertaken by individuals or entities other than the Board itself, such as, the Commissioner or the Department, as Bylaws may address actions to be taken only by the Board itself.

Mr. Crisanti stated that the purpose of the revision is to reflect statutory and regulatory changes during the last 13 years which impact policy boards of the Commonwealth and to include various administrative procedures.

In summarizing comments from the Board on the draft Bylaws, Mr. Crisanti stated that eight Board members responded to the request by staff for comments and all eight approved of the draft without any suggested amendments.

Mr. Crisanti concluded by requesting that the Board repeal its current Bylaws and to adopt the proposed bylaws in Appendix A. as the new bylaws of the Board.

Chairperson Jolly asked for a motion from the Board based on the Department's recommendation. Dr. Mundy made the motion that was seconded by Mr. Stiff. The motion was carried by unanimous voice vote.

## **NEW BUSINESS**

### **Request to Initiate Notice of Intended Regulatory Action (NOIRA) to Amend the General Industry Standard for Telecommunications, General, Approach Distances, §1910.268(b)(7)**

Mr. Jay Withrow, Director of the Office of Legal Support, requested on behalf of the Department that the Board authorize the Department to initiate the regulatory process to the General Industry Standard for Telecommunications, General, Approach Distances, §1910.268 (b)(7)(i), by filing a Notice of Intended Regulatory Action (NOIRA), pursuant to the Virginia Administrative Process Act (§2.2-4007).

Mr. Withrow informed the Board that the VOSH Program wants to amend §1910.268(b)(7)(i) to have the Telecommunications Standard track similar provisions in the Electric Power Generation Transmission, and Distribution Standard for general Industry, §1910.269(l)(2)(i). Making the two provisions identical would provide safety protections for telecommunications workers equivalent to those already afforded

general industry electrical transmission workers. Mr. Withrow stated that telecommunications workers are currently required to be trained on methods for isolating or insulating themselves from live electrical parts through the use of gloves. He also noted that if every energized part within reach of the employee were insulated accidental, electrical contacts involving other parts of the body, such as the employee's head or back could be averted as well. He stated that the effect of the requested change is that, except for the live electrical part the employee is working on, all other nearby live or "hot" electrical parts and power lines must be insulated so an employee cannot accidentally contact an energized part or power line with some other uninsulated part of his body, or other conductive object(s).

Mr. Withrow, on behalf of the Department of Labor and Industry, recommended that the Board direct the Department to initiate a NOIRA to amend §1910.268(b)(7)(i), General Requirements for Clearances as they apply to the Construction of Electric Power Generation, Transmission and Distribution, as authorized by Virginia Code §40.1-22(5).

Chairperson Jolly asked for a motion from the Board based on the Department's recommendation. Mr. Saunders made the motion that was seconded by Mr. Cernak. The motion was carried by unanimous voice vote.

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

Mr. Withrow requested on behalf of the Department that the Board authorize the Department to initiate the regulatory process to amend the Administrative Regulations 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.

Mr. Withrow explained that the current VOSH Administrative Regulations have not had any significant revisions since 1994, and that amendments are necessary to comply with changes to statutory law or to address procedural or other administrative changes that have occurred since the Administrative Regulations were revised. In referring to the list of revisions, he noted the major revisions were needed for the following items: C., D., and E. of provision IV of the briefing package. In provision C., Mr. Withrow discussed adding to § 30 of the Administrative Regulations, Applicability to Public Employers, Va. Code §§ 40.1-49.9, 40.1-49.10, both dealing with warrants, § 40.1-49.11, Conduct inspection, testing, or collection of samples for analysis; and § 40.1-49.12, Review by courts. Mr. Withrow also noted that in provision IV.D. of the briefing package, § 30 would allow penalties to be made applicable to public employers for willful violations and in provision IV. E., criminal penalties would be made applicable to public employers for willful violations causing employee's death.

Mr. Withrow also mentioned other sections affected by these revisions. Section 90, Release of Information and Disclosure Pursuant to Requests under the Virginia Freedom of Information Act and Subpoenas, would allow the release of VOSH contested case file information once litigation has been initiated and a copy of the file has been released to the employer under a discovery request for production.

Last of the revisions Mr. Withrow discussed appeared in provision IV.N. of the briefing package which dealt with amending Part V, Inspections, to codify the Department's multi-employer worksite inspection policy.

On behalf of the staff of the Department of Labor and Industry, Mr. Withrow recommended that the Board direct the Department to initiate a NOIRA to amend the Administrative Regulations for the VOSH Program as authorized by Virginia Code §40.1-22(5).

Mr. Korpe asked if VOSH bars companies for a certain number of years when they have had a number of violations. Mr. Withrow responded that data is filed on all inspections and this information is posted on the federal website for access. He continued by stating that VOSH lacks the authority to bar employers from doing business and that any action to bar such employers would require a statutory change. He added, however, that VOSH can cite the employer for repeat or willful violations for penalties.

Mr. Stiff asked for background information on provision I. on page 3 of the briefing package in which an amendment is sought to add regulatory authority for the VOSH Program to issue citations and penalties for an employer's failure to comply with the applicable manufacturer's requirements for construction, design, installation, testing, inspection, etc. Mr. Withrow responded that the "General Duty Clause" is used where there has been a violation of a consensus standard referencing manufacturer's operating procedures standards, ANSI standards, etc. He explained that adding this provision in question would eliminate the need for relying on the "General Duty Clause" when a consensus standard or manufacturer's instructions are available.

Chairperson Jolly asked for a motion from the Board based on the Department's recommendation. Dr. Mundy made the motion that was seconded by Mr. Cernak. The motion was carried by a unanimous voice vote.

**16 VAC 25-100-1915, Fire Protection in Shipyard Employment, §§1915.501 – 1915.509; Incorporation by Reference, §1915.5; and Appendix A of Subpart P of Part 1915; Final Rule**

Mr. John Crisanti, on behalf of the VOSH Program, requested the Board to consider for adoption federal OSHA's new final rule for Fire Protection in Shipyard Employment, §§1915.501-1915.509; and 1915.5, Incorporation by Reference of National Fire Protection Association (NFPA) Consensus Standards, and Appendix A to Subpart P of Part 1915, as published in 69 FR 55702 on September 15, 2004.

In summarizing the standard, Mr. Crisanti stated that Federal OSHA promulgated a unified fire protection standard for shipyard employment which provides increased protection for shipyard employment workers from the hazards of fire on vessels and vessel sections and at land-side facilities. He continued by stating that the new standard requires a written fire watch policy while prohibiting workers who perform hot work such as welding, cutting, or grinding to act as their own fire watch. He noted that the new rule also includes a model fire safety plan that employers can use to develop their site-specific plans. He explained that the purpose of this standard is to increase the protection of shipyard employment workers from fire hazards.

Mr. Crisanti informed the Board that federal OSHA retains authority for private sector maritime activities. He also stated that this standard would have application only in the public sector if, and when, any such public sector activity might occur. He noted that currently there is no maritime activity under VOSH's jurisdiction, and as such there is no impact on public sector employers in Virginia at the current time. He added that there are no public sector employees in shipbuilding in Virginia at the current time and that no impact on the Department is anticipated by this action.

On behalf of the staff of the Department of Labor and Industry, Mr. Crisanti recommended that the Board adopt federal OSHA's new final rule for Fire Protection in Shipyard Employment, §§ 1915.501-1915.509, and 1915.5, Incorporation by Reference, and Appendix A to Subpart P of Part 1915, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of March 15, 2005.

Chairperson Jolly asked for a motion from the Board based on the Department's recommendation. Mr. Korpe made the motion that was seconded by Mr. Burkhart and Ms. Rodriguez. The motion was carried by a unanimous voice vote.

**16 VAC 25-90-1910.134, Respiratory Protection Standard, §1910.134; Revisions to Appendix A – Controlled Negative Pressure REDON Fit Testing Protocol**

Mr. Ron Graham, Director of Occupational Health Compliance, requested the Board, on behalf of the VOSH Program, to adopt federal OSHA's revised Appendix A: Controlled Negative Pressure REDON Fit Testing Protocol, to the Respiratory Protection Standard, § 1910.134, as published in 69 FR 46986 on August 4, 2004.

Mr. Graham summarized the amendment by stating that federal OSHA had approved an additional quantitative fit testing protocol, the controlled negative pressure (CNP) REDON fit testing protocol, for inclusion in Appendix A of its Respiratory Protection Standard, § 1910.134. He continued by stating that federal OSHA adopted its protocol under the provisions of the Respiratory Protection Standard that allow individuals to submit evidence for including additional fit testing protocols in this standard. He also stated that in addition to amending the Respiratory Protection Standard to include the CNP REDON protocol, federal OSHA also made several editorial and non-substantive technical revisions to the standard associated with the CNP REDON protocol and the previously approved CNP protocol.

Mr. Graham stated that the purpose of the new protocol is to give employers an additional protocol to assist workers and employers in the proper fit and selection of respirators based on workplace conditions.

He informed the Board that employers covered by this revision already must comply with the fit testing requirements specified in paragraph (f) of § 1910.134; there will be improvement in employee confidence in their respirators; and no impact on the Department is anticipated by this action.

In response to Mr. Korpe's question about the meaning of REDON, Mr. Graham explained that it means a redonning of the respiratory, taking the respiratory off and on twice.

On behalf of the staff of the Department of Labor and Industry, Mr. Graham recommended that the Board adopt the Controlled Negative Pressure REDON Fit Testing Protocol in Appendix A of the Respiratory Protection standard, § 1910.134, and related editorial and non-substantive technical revisions, as authorized by Virginia Code, §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of March 15, 2005.

Chairperson Jolly asked for a motion from the Board based on the Department's recommendation. Mr. Stiff made the motion that was seconded by Mr. Saunders and Dr. Mundy. The motion was carried by a unanimous voice vote.

**Items of Interest from the Department of Labor and Industry**

Commissioner Ray Davenport updated the Board on some of the things going on at the Department of Labor and Industry that specifically involve Safety and Health or the VOSH program and the Boiler and Pressure Vessel program.

He first noted that in January of 2002, the Department had 129 discrimination cases over 90 days old and as of November 1, 2004, there are no cases over 90 days old. Second, he noted that in the Office of Legal Support (OLS), in January 2002, there had been over 300 open contested cases. As of November 30, 2004, OLS had 135 open contested cases, 24 of these contested cases have been assigned to staff for litigation and 103 cases are in litigation. Two cases are on appeal.

Third, in the Boiler and Pressure Vessel Program, the backlog of approximately 10,000 to 15,000 reports caused by the many problems encountered due to the changeover to a new software program as of November 1, 2004 is negligible.

Commissioner Davenport thanked Glenn Cox for the backlog reduction in VOSH Discrimination, Jay Withrow for Legal Support and Fred Barton, Chief Boiler Inspector for the work that they and their staffs did to make these improvements.

Commissioner Davenport announced that Bill Burge is the new Assistant Commissioner of the Department of Labor and Industry. The Commissioner stated that Mr. Burge will be responsible for all VOSH programs and the Boiler and Pressure Vessel program.

Commissioner Davenport then discussed funding for Occupational Safety and Health. As a state plan state, Virginia's standards must be as effective as those of federal OSHA. Virginia is also required to have a minimum number of Safety and Health Compliance Officers or CSHOs.

He explained that Virginia's established benchmarks are 59 – 38 Safety and 21 Health Compliance officers. Due to budgetary restraints, however, Virginia has been unable to meet the required number of benchmarks for years. Currently, Virginia has unfunded benchmarks on our books because we do not have the funds to hire the CSHOs. He stated that the benchmarks are funded 50/50, i.e., for every dollar Virginia puts up, OSHA matches the dollar up to a certain ceiling. If Virginia fails to appropriate funding for the benchmarks then the federal money cannot be use. The Department has been notified by federal OSHA that federal funds allocated to states, but not used by those states, will be re-appropriated to other states. He continued by stating that Virginia is one of eight states and the Virgin Islands that have failed to provide state matching funds to match all the federal dollars available.

Commissioner Davenport informed the Board that in FY 2003, Virginia returned over \$530,000 (16%) federal dollars because of the lack of state matching funds. In FY 2004, Virginia fell short by \$294,000. He expressed his concern that if Virginia loses these matching funds, it may never get the opportunity to receive these matching funds again, making VOSH 5 short of the needed number of CSHOs. He concluded by stating that we may be calling on each Board member to help educate the legislators about this issue. He thanked Board members who had participated in a conference call offering support for the VOSH Program during the budget reductions of 2002, and wished everyone a happy holiday.

### **Items of Interest from the Board**

Mr. Korpe commented on situations in construction sequencing and nothing is done until someone dies. He recommended language in regulations that require employers to have milestones for project safety. Mr. Cox explained that there is no way that VOSH can monitor all milestones and that VOSH has no authority to arbitrarily step in.

Chairperson Jolly asked for a motion to adjourn the meeting. Dr. Mundy made the motion that was seconded by Mr. Saunders and Dr. Mundy.

### **Adjournment**

There being no further business to come before the Board, Dr. Mundy made the motion to adjourn which was seconded by Ms. Rodriguez. The motion was carried by voice vote. The meeting adjourned at 11:25 a.m. Following a short break, the Board began its video training on Conflict of Interest and Procurement Law.