BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1415736**
LOS ANGELES COUNTY PROBATION DEPARTMENT **dba BARRY J NIDORF JUVENILE HALL** **16350 FILBERT ST.** **SYLMAR, CA 91342** **Employer**	**DECISION**

Statement of the Case

The Los Angeles County Probation Department (Employer) is a government entity that administers correctional programs for detained juveniles. On May 24, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Tomas Micheo, commenced an investigation of Employer's work site, Barry J. Nidorf Juvenile Hall (Barry J.), located at 16350 Filbert Street in Sylmar, California.

On November 22, 2019, the Division issued one citation to Employer. The citation alleges that Employer failed to effectively implement its Injury and Illness Prevention Program (IIPP). Employer filed a timely appeal of the citation on the grounds that the safety order was not violated, the classification is incorrect, the abatement requirements are unreasonable, and that the proposed penalty is unreasonable. Employer also asserted numerous affirmative defenses, including that an independent employee action caused the violation.[1]

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). ALJ Lucas conducted the hearing on May 21, 2020, March 14, 2023, April 5, 2023, and May 3 and 5, 2023, in Los Angeles County, California, with the parties and witnesses appearing remotely via the Zoom video platform. Steven Gatley, attorney with the law firm Lewis Brisbois Bisgaard & Smith LLP, represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division. This matter was submitted on December 28, 2023.

[1] Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition For Reconsideration (May 26, 2017).)

Issues

1. Did Employer fail to effectively implement its Injury and Illness Prevention Program?

2. Did the Division establish that the violation was properly classified as Serious?

3. Is the proposed penalty reasonable?

Findings of Fact

1. During the inspection period, Employer had an operative written IIPP.

2. Employer closed the Special Handling Unit and changed its policy previously permitting juvenile detainees (juveniles) to be in their rooms for part of the day, both of which constituted a new process or procedure.

3. The new process or procedure created a new hazard of increased violence by the juveniles against employee probation officers.

4. Employer did not train its employees on the contents of its written IIPP when it was made aware of this new hazard.

5. There is no evidence that Micheo was current in his division-mandated training at the time of hearing.

6. The adjustment factors used to calculate the proposed penalties were calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to effectively implement its Injury and Illness Prevention Program?

California Code of Regulations, title 8, section 3203, in relevant part, provides:[2]

[2] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

[. . .]

(A) When observed or discovered; and,

(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

[. . .]

(7) Provide training and instruction:

(A) When the program is first established;

Exception: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the investigation, including but not limited to, on May 24, 2019, the employer did not effectively implement their Injury and Illness Prevention Program in that:

Instance 1: The employer did not implement effective controls, including, but not limited to, administrative controls and work practice measures, to minimize employee exposure to violent assaults by juvenile detainees at Barry J. Nidorf Juvenile Hall, including but not limited to, ensuring that

properly trained personnel are available to respond to workplace violence incidents during each shift in a timely manner. Ref. 3203(a)(6).

Instance 2: The employer did not ensure that all employees are adequately trained to respond to increasing work place violence incidents. Ref. 3203(a)(7).

Instance 1: Did Employer fail to implement effective controls to minimize employee exposure to violent assaults?

As the Appeals Board has described in several prior Decisions After Reconsideration, section 3203, subdivision (a)(6), is a performance standard and creates a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions. (*Davey Tree Service*, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012).) In a citation alleging a violation of section 3203, subdivision (a)(6), the issue is generally not that an IIPP is flawed, but that the employer has neglected to implement that IIPP, as it has failed to correct a hazard at the workplace. (*Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Such is the case here. The Division alleges that by failing to implement effective controls that would minimize employee exposure to violent assaults, Employer has not effectively implemented its IIPP.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Implementation of an IIPP is a question of fact. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Therefore, the Appeals Board's findings on this issue are specific to the facts and the record of each case. (See *L&S Framing, Inc.*, Cal/OSHA App. 1173183, Decision After Reconsideration (Apr. 9, 2021).) The Appeals Board has further explained, "Employers are given wide latitude in how they choose to correct hazards..." (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Testimony at hearing by probation officers describes work conditions at Barry J. that can be described in the most generous terms as challenging, including violent incidents that increased over time. Senior Detention Services Officer Brian Lindsey (Lindsey) describes "kids kicking

out panels to the front of a building and … attacking other minors … individuals who were destroying county property." Senior Detention Services Officer Jessica De La Cruz (De La Cruz) describes vandalism to county property. Former Detention Services Officer Ray Poole (Poole) describes being punched by a juvenile and having a door slammed on his ribs. In interviews with Micheo, two officers who did not give testimony at hearing described a similar situation. Detention Services Officer Jaime Fong (Fong) describes being kicked in the arm, while Detention Services Officer Kathleen Iwuoha (Iwuoha) describes being struck on her shin by a juvenile. (Ex. F, Ex. G.)

There is no evidence in the record to a support a finding that Employer did not recognize violence against its employees by juveniles as a hazard. The Division argues instead that the violence described by witnesses Lindsey, De La Cruz, and Poole at hearing, in conjunction with the statements made to Micheo by Fong and Iwuoha, describe a deficiency in the implementation of Employer's IIPP. According to the Division, Employer failed to effectively implement its IIPP by (1) not "meeting their ratios" and (2) by not supplying "proper tools" for the probation officers to do their work. (Hrg. Transcript, Mar. 14, 2023, p. 144.)

Ratios

"Ratios" refers to the number of staff relative to the number of juveniles. The evidence offered by the Division to support its assertion that Employer was not "meeting [its] ratios" is the testimony of Micheo, who made the determination from statements made to him in employee interviews and from statements he read that were made by third parties in letters and a newspaper article. These general statements and conclusions, made without further substantiation, are given less weight here than the evidence presented by Employer. Melissa Soto, Special Assistant for Detention Services Bureau (in charge of staffing), provided testimony and documentation showing that Employer was at all times during the inspection period in compliance with regulations related to staffing ratios. (Ex. Q, Ex. R, Ex. S.). During cross examination, Micheo was unable to give an example of when Employer was not meeting its staffing levels or to describe when Employer was "understaffed." (Hrg. Transcript, Apr. 5, 2023, p. 109.) The Division did not show that Employer was not meeting its required staffing ratios during the inspection period.

Proper Tools

Regarding its assertion that Employer failed to supply the "proper tools" employees required to address the hazard, the Division appears to assert through the testimony elicited at hearing that Employer has phased out pepper spray, has no panic buttons, did not fix doorknobs, and does not have a sufficient supply of radios for its officers. The testimony of Lindsey, Poole, and De La Cruz reveal that pepper spray was supplied to employees and was in use during the

inspection period. There is no significant testimony regarding "panic buttons" or how doorknobs constitute a tool that is at issue. On the question of the number of radios Employer supplied to its probation officers the Division comes tantalizingly close to making its point, but admits radios did not "play into [its] decision to issue the citations." (Hrg. Transcript, Mar. 14, 2023, pp. 159-160.) The Division did not show that Employer failed to supply proper tools to employees that would mitigate the hazard.

The evidence shows Employer identified the hazard of violence against its probation officers by juveniles at the facility and developed procedures to attempt to correct the hazard. The Division failed to meet its burden to show that Employer failed to implement effective controls to minimize employee exposure to violent assaults, and therefore failed to show a violation of section 3203, subdivision (a)(6).

Instance 2: Did Employer fail to ensure that all employees were adequately trained to respond to increasing workplace violence incidents?

Training is the touchstone of any effective IIPP. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002), citing section 3203, subd. (a)(7).) The Division may prove a violation of section 3203, subdivision (a)(7), by showing that the implementation of the training required by this section is inadequate. (See e.g., *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing, *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) As the Appeals Board has noted, "[s]ection 3203, subdivision (a)(7)(E) requires Employers to provide employees training whenever the employer is made aware of a new or previously unrecognized hazard." (*National Distribution Center, LP, Tri-State Staffing, supra,* Cal/OSHA App. 12-0391.)

Lindsey credibly testified at hearing that Employer instituted two rule changes in approximately 2018: (1) the boys' Special Handling Unit (SHU) was closed and (2) juveniles were required to be out of their rooms for the entire day. Lindsey illustrated the problems that arose from these rule changes with an example:

> The procedure [before] would be if you had an individual who was acting out, you could remove that individual and have them either sent to the SHU for a period of de-escalation…[or] if it were just a small minor infraction, they could be removed from the group to their rooms temporarily.

(Hrg. Transcript, Apr. 5, 2023, p. 189.) Lindsey testified that this change in procedure resulted in increased violence against staff. (*Id.* at 190).

These two policy changes constitute a "new process" or "procedure" that requires Employer to provide training and instruction on the new hazards associated with those changes. While the hazard of violence against staff by juveniles, in general, is not new, the increase in violence associated with the closure of the SHU and the out-of-room requirement requires training and instruction on the new hazard of increased violence.

The hearing record includes extensive testimony by officers Lindsey, Poole, and De La Cruz, on the training they received prior to and during their time as officers. Derick Johnson, Head Staff Development Specialist, oversees Employer's training program. He testified at length regarding the training received by officers at Barry J. The evidence presented by them paints a picture of a robust training program. Every officer must undergo and successfully complete a set of instruction mandated by statute (Core Course). The Core Course consists of approximately 168 hours of training on many different modules, including, for example, the California criminal justice system, ethics, "gangs," maintaining security, and, notably, a module called "Supervising Juveniles." (Ex. P.) Officers must also take and successfully complete a course called PC 832, which "all peace officers must take before graduating and being sworn in as a peace officer in the State of California." (Hrg. Transcript, May 5, 2023, p. 185.) Officers must also take continuing education courses, provided and tracked by Employer. (Ex. K.)

The evidence of training provided by Employer demonstrates a training program designed, among other things, to address the hazard of violence against its staff. However, not all "violence against staff" is the same. The evidence established that levels and types of violence against staff increased significantly over time as a result of the changes to Employer's policies and procedures, resulting in a workplace that looked much different than the one for which employees were initially trained. Employer's training program was put in place before those changes to policies and procedures and prior to the increase in violent incidents. There is no evidence in the record that Employer trained on the new hazard of increased violence.[3]

Therefore, Employer failed to ensure that all employees were adequately trained to respond to increasing workplace violence incidents. As such, Employer failed to effectively implement its IIPP, and a violation of section 3203, subdivision (a)(7), is established.

2. Did the Division establish that the violation was properly classified as Serious?

Labor Code section 6432, subdivision (a),[4] in relevant part states:

[3] Lindsey said that "those that worked in the [SHU]…were trained on what would follow up to replace SHU," but did not describe what training was received or if the training was given to any employee outside of those assigned to the SHU itself.

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Further, Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and

[4] Labor Code section 6432 was amended effective January 1, 2021. However, the portions discussed reflect the Labor Code section 6432 as it was in effect at the time of issuance of the citations.

practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Micheo did not testify that he was current on his Division-mandated training at the time of the hearing. Further, testimony was not offered demonstrating that Micheo had experience or expertise regarding the hazards of violence against employees by juveniles. As such, Labor Code section 6432, subdivision (g), cannot be used to deem Micheo presumptively competent to testify regarding the Serious classification of the citation and Micheo cannot be relied upon as an expert to set forth the possibility of serious physical harm from a violation of section 3203.

There is evidence in the record of actual injuries to employees that may result from violent incidents, but there is no evidence that the actual injuries sustained required inpatient hospitalization for purposes other than observation, resulted in the loss of a member of the body or serious disfigurement, or that the injuries resulted in "impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job."[5] Accordingly, the Division failed to meet its burden of proof to establish that the citation was properly classified as Serious. Therefore, the citation is reclassified as General.

3. Is the proposed penalty reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600), citing *Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The parties stipulated at hearing that the penalties were calculated by the Division in accordance with the Division's policies and procedures. As such, the factors analyzed by the Division to determine Extent and Likelihood, along with the adjustment factors of Good Faith, History, and Size, are presumptively reasonable. The Severity of the violation was originally rated as High because it was classified as Serious. However, because the citation is reclassified from Serious to General, the Base Penalty, from which all other adjustments are made, must be reduced in accordance with section 336.

[5] Lindsey testified regarding an incident wherein he was kicked in the head while attempting to restrain a violent juvenile. He described his injuries as a "concussion," but did not seek medical attention. Poole described an incident wherein he was punched in the eye by a juvenile, but does not describe the treatment. De La Cruz testified that she does not recall being injured during 2019. She testified that she was injured at some time prior that, but does not provide details.

Section 336, subdivision (b), provides that a Base Penalty will be set initially based on the Severity of the violation. Section 335, subdivision (a), provides in part:

> (a) The Gravity of the Violation--the Division establishes the degree of gravity of General and Serious violations from its findings and evidence obtained during the inspection/investigation, from its files and records, and other records of governmental agencies pertaining to occupational injury, illness or disease. The degree of gravity of General and Serious violations is determined by assessing and evaluating the following criteria:
>
> (1) Severity.
>
> (A) General Violation.
>
> [...]
>
> ii. When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:
>
> LOW-- Requiring first-aid only.
>
> MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.
>
> HIGH-- Requiring more than 24-hour hospitalization.

To determine the proper Severity, it is necessary to evaluate the type and amount of medical treatment required for an injury most likely to be sustained as a result of an employee not being trained on Employer's IIPP. In this instance, the record shows no evidence of injuries that required hospitalization over 24 hours, however the injuries described would reasonably be expected to require medical attention other than first-aid. As such, the Severity is properly characterized as Medium. A General violation with a Medium Severity has a Base Penalty of $1,500. (§ 336, subd. (b).)

The Division's Proposed Penalty Worksheet indicates that the Division assigned a Medium Extent and Likelihood, resulting in no adjustment to the Base Penalty, for a Gravity-Based Penalty of $1,500. (§ 336, subd. (b).)

Section 336 provides for further adjustment to the Gravity-Based Penalty for Good Faith, Size, and History. The Division's Proposed Penalty Worksheet indicates that Employer was entitled to a 15 percent adjustment for Good Faith, no adjustment for Size, and a 10 percent reduction for History. Because the parties stipulated that these adjustment factors were calculated in accordance with Division policies and procedures, these adjustment factors are applicable. As such, the adjustment factors result in a penalty reduction of 25 percent of the Gravity-Based Penalty which equals an Adjusted Penalty of $1,125. (See § 336, subd. (d).)

Conclusion

The evidence supports a finding that Employer violated section 3203, subdivision (a), by failing to establish, implement, and maintain an effective written IIPP. The citation is reclassified to General and the proposed penalty, as adjusted and discussed above, is found to be reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed, and the associated penalty is modified and assessed as set forth in the attached Summary Table.

Dated: 01/25/2024

Sam E. Lucas
Presiding Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**