UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
RONALD H. HUNT, ET AL.,	)	**DOCKET NO. TSCA-03-2003-0285**
	)	**TSCA Appeal No. 05-01**
RESPONDENTS.	)	

ORDER ON REMAND

I. Background

This proceeding was instituted on July 22, 2003, by the Associate Director for Enforcement, Waste and Chemicals Management Division, United States Environmental Protection Agency, Region 3 ("Complainant"), pursuant to Section 16(a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a). The Complaint alleges in 47 counts that the five named Respondents – Ronald H. Hunt, Patricia L. Hunt, David E. Hunt, J. Edward Dunivan, and Genesis Properties, Inc. – violated Section 409 of TSCA, 15 U.S.C. § 2689, Section 1018 of the Residential Lead Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, and the Federal regulations promulgated thereunder, codified at 40 C.F.R. Part 745, Subpart F. As the basis therefor, the Complaint states that various individual Respondents own the four residential dwellings in Richmond, Virginia identified as 1124 North 28th Street, 1813 North 29th Street, 3015 Barton Avenue, and 2405 Third Avenue; that those dwellings were constructed prior to 1978; and, as "lessors," or the agent thereof (Respondent Genesis Properties, Inc), Respondents entered into a total of ten written leases for the dwellings. The Complaint alleges further that the dwellings are "target housing" containing lead-based paint, that Respondents knew at all relevant times that the dwellings contained lead-based paint and/or lead-based paint hazards, and that they failed to make the legally required disclosures concerning lead-based paint to their prospective lessees.

By Order dated July 2, 2004, the undersigned granted both Complainant's Motion for Accelerated Decision as to 32 counts of the Complaint (Counts 5-13, 17-22, 25-28, 35-47) and Complainant's Motion to Withdraw the remaining 15 counts of the Complaint (Counts 1-4, 14-16, 23, 24, and 29-34). In granting Accelerated Decision, this Tribunal relied, *inter alia*, upon evidence proffered by Complainant including the reports of inspections of the subject dwellings performed by four employees of the City of Richmond Department of Public Health (RDPH) evidencing that those dwellings contained lead-based paint. *See*, Order on EPA's Motion for Accelerated Decision, Motion to Withdraw, and Motion to Reschedule Hearing, dated July 2, 2004, at 6-7.

A hearing was held on September 14, 2004, in Richmond, Virginia, to resolve the remaining issue in the case, that of the appropriate penalty to be assessed against the various Respondents for the 32 counts on which they had previously been found liable. Included in the evidence Complainant presented at hearing in support of its proposed penalty[1] were the aforementioned RDPH inspection reports as well as the oral testimony of Lonnie Sims, a RDPH employee who had inspected the Respondents' 3015 Barton Avenue property. *See*, Transcript of Hearing at 154-181 (hereinafter cited as "Tr. __").

On March 8, 2005, an Initial Decision was issued in the case imposing a civil penalty in the amount of $27,504.40, jointly and severally, against Respondents Ronald H. Hunt and Patricia L. Hunt; a civil penalty in the amount of $15,840.00, jointly and severally, against Respondents Patricia L. Hunt and David E. Hunt; a civil penalty in the amount of $9,856.00 against Respondent J. Edward Dunivan; and a civil penalty in the amount of $31,024.40 against Respondent Genesis Properties, Inc. *See*, *Ronald H. Hunt, et al.*, EPA Docket No. TSCA-03-2003-0285, 2005 EPA LEXIS 9 (ALJ, March 8, 2005).

Respondents filed an appeal of the Initial Decision with the Environmental Appeals Board (EAB) on April 11, 2005. Prior to issuance of a decision on the appeal, Complainant filed with the EAB three Notices and/or Status Reports relating to an issue it had recently discovered concerning the state licensing of the RDPH employees who had performed the inspections and prepared the reports regarding the presence of lead-based paint in the subject dwellings. *See*, Complainant's Notice of Potential Witness Issue, dated November 18, 2005, Complainant's Status Report: Potential Witness Issue, dated December 8, 2005, and Complainant's Final Status Report: Potential Witness Issue, dated December 19, 2005.

As a result, on January 20, 2006, the EAB issued a Remand Order in this action directing the undersigned to "assess the significance of the information submitted in the [Complainant's post-decision] status reports [received] November 18, December 9, and December 21, 2005, concerning the status of inspectors who conducted inspections at the subject properties, and to determine whether this information alters in any way [the] determinations or [the] ultimate conclusions in the case, including the penalty assessed" as set forth in the July 2, 2004 Order on Accelerated Decision or the Initial Decision issued in this case on March 8, 2005.

On January 24, 2006, the undersigned issued an Order giving the parties an opportunity to file Post-Remand Briefs on this issue, if they so desired. Complainant filed such a Brief on or about February 28, 2006 (hereinafter cited as "C's PRB"); Respondent did not file any such Brief.

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[1] In its Prehearing Exchange, Complainant proposed to assess Respondents Ronald Hunt and Patricia Hunt, jointly and severally, a penalty of $44,204; Respondents David Hunt and Patricia Hunt, jointly and severally, a penalty of $17,820; J. Edward Dunivan a penalty of $15,840; and Genesis Properties, Inc. a penalty of $42,224, as to the 32 Counts for which they were liable.

II. Relevant Virginia Statutory and Regulatory Provisions on Inspection Certifications

In 1994, the Commonwealth of Virginia passed a law providing that -

> After January 1, 1995, it shall be unlawful for any person who does not hold a *certificate* issued by the Board as a certified lead contractor, professional, or worker to perform lead inspection, evaluation, or abatement activities.

Va. Code Ann. § 54.1-503(B) (1994) (italics added).[2] Initial violations of this provision were designated Class 1 misdemeanors, and subsequent violations rose to the level of Class 6 felonies. *See*, Va. Code Ann. § 54.1-517 (1994).

The "Board" referred to in Section 54.1-503 (and as referred to herein) is the "Virginia Board for Asbestos Licensing and Lead Certification," within the Virginia Department of Professional and Occupational Regulation ("DPOR"), to which the legislature gave the power to, *inter alia*, "[p]romulgate, in accordance with the Administrative Process Act, regulations necessary to certify all persons performing lead inspection, evaluation, and abatement activities consistent with the Residential Lead-Based Paint Hazard Reduction Act and United States Environmental Protection Agency regulations. . . . " *See*, Va. Code Ann. § 54.1-501(7) (1994).

The Board, however, did not immediately promulgate administrative regulations implementing the provisions regarding issuance of such certifications, and so section 54.1-503(B) was amended the following year to read –

> *One hundred and twenty days after the effective date of the Board's initial regulations*, it shall be unlawful for any person who does not hold a certificate issued by the Board as a certified lead contractor, professional, or worker to perform lead inspection, evaluation, or abatement activities.

Va. Code Ann. § 54.1-503(B) (1995) (italics added).

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[2] It should be noted that the term "certificate" used in subsection B of § 54.1-503 is inconsistent with the terminology in subsection A of § 54.1-503, enacted seven years earlier in 1987, providing that it is unlawful for persons to engage in asbestos work without a "license," and with the overall section title of "Licenses required." This terminology was made consistent by changing the term "certificate" to "license" when the statute was amended in 1997. *See*, Va. Code Ann. § 54.1-503(C) (1997). The Regulations, however, implementing subsection B were not updated to use the term "license" until 2003. *See*, 18 Va. Reg. 3213 (August 12, 2002). In that the bulk of the inspections in this case occurred before the statute and/or regulations were amended, the term "certification" is used herein to refer to the requirements of Va. Code Ann. § 54.1-503(B) and the relevant Regulations.

The Board's first set of regulations implementing the provision requiring certifications for lead inspectors was issued and became effective on October 1, 1995,[3] and therefore, consistent with the 120 delay provision in Va. Code Ann. § 54.1-503(B), starting on *January 29, 1996*, it became unlawful for any person not properly certified to perform a "lead inspection" in Virginia.[4] *See*, 18 Virginia Administrative Code (VAC) 15-30-10 (1995) *et seq.*; C's PRB Exs. 1 and 9. The 1995 Regulations implementing Va. Code Ann. § 54.1-503(B) established two types of certificates for "inspector/risk assessors"[5] - one is an "interim certification" and the other is an "individual certification." 18 VAC 15-30-100 (1995).

An "interim certification" is "an authorization issued by the department [DPOR] to an individual who has applied to the department and *has been found qualified* but has not passed the required examination." 18 VAC 15-30-20 (1995) (italics added). In order to obtain an interim

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[3] The first set of Regulations was issued by the Board under "emergency provisions" of the Commonwealth's Administrative Process Act, then adopted and implemented as Final Regulations effective November 13, 1996, and subsequently amended on October 1, 2003. *See*, C's PRB Ex. 9; Virginia Register Volume 13, Issue 2, at 97-212 (October 14, 1996), and Historical Notes to VAC 15-30-10 (2006) regarding Virginia Register Volume 19, Issue 24 amendments effective October 1, 2003. In that some of the inspections in this case were conducted as far back as April 1996 and others as recent as September 13, 2004, all the various iterations of the Virginia Administrative Regulations are applicable in this case. However, the date of the regulations cited herein is only provided where the text of the regulation was significantly amended.

[4] Complainant suggests in its Post-Remand Brief that the certification requirement became effective "March 1, 1996," but it is unclear how that date was calculated. *See*, C's PRB at 4, 5 n.8. However, in that the first inspection at issue here was conducted in April 1996, the discrepancy is of no significance.

[5] "Certified inspector/risk assessor" was only one of many different certifications available for issuance by the Board established under the initial regulations. Other "certified" positions included "contractor," "planner/project designer," "lead worker" and "lead technician," the last of which was allowed to perform lead "inspections," but not lead "risk assessments." *See*, 18 VAC 15-30-20 (1995). In the 2003 amendments to the regulations, the certifications were separated and merged into "licensed lead inspector" and "licensed lead risk assessor," and the title of "lead technician" was eliminated. 18 VAC 15-30-20 (2003). An "inspection" is defined in the Regulations as "a surface-by-surface investigation for the presence of lead based paint. . . ." 18 VAC 15-30-20. A "risk assessment" is "an on-site investigation . . . to determine the existence, nature, severity and location of lead-based paint hazards, and the provision to the property owner/occupant of a report explaining the results of the investigation and providing options for reducing lead-based paint hazards with a rationale for those options." *Id.* Under the initial regulations, persons with a "certified inspector/risk assessor" certificate could legally perform both functions. *See*, 18 VAC 15-30-20 (1995).

certification as an inspector/risk assessor, an applicant must: (1) either successfully complete a DPOR approved initial lead inspector/risk assessor course, or successfully have completed an equivalent course (*i.e.* EPA sanctioned training courses) prior to January 1, 1996 and a DPOR approved refresher course; and (2) either have one year of experience in a related field (*e.g.* lead, asbestos or environmental remediation work), or "25 inspections over at least a three-month period as a lead inspector technician" and one of the following: either a bachelor's degree and one year experience in a related field; a certification as an industrial hygienist, an engineer, a registered architect, or in an environmentally related field, such as an environmental scientist; or a high school diploma or its equivalent and two years experience in a related field. 18 VAC 15-30-230 (1995).

To obtain an "individual certification," an applicant must have completed all of the foregoing requirements for an interim certification *and* have passed a "department approved certification examination for inspector technician and a department approved certification examination for risk assessor in target housing and public buildings *before the expiration of their interim certificate*." 18 VAC 15-30-240 (1995) (italics added). Interim certificates are thus anticipated by the Regulations to be often issued as a preliminary step toward "individual certification;" however, the Regulations do not limit or differentiate the work which may be legally performed by persons holding an "interim" certificate as compared to an "individual certification." 18 VAC 15-30-520 (1995). The Regulations do provide however that interim certificates expire six months after the date of completion of the DPOR approved initial or refresher accredited training program and are generally "not renewable."[6] 18 VAC 15-30-100. Individual certifications expire after 12 months (at the end of the month) from the date the initial or refresher training program was completed regardless of the date the certification was issued by the department and *are renewable* on a limited basis to last up to 36 months after completion of the most recent training program. *Id.* In addition, the Regulations provide that "any applicant who fails to renew his certification within six months after the expiration date on the certification shall not be permitted to renew and shall apply as a new applicant." 18 VAC 15-30-140(F).

The 1995 Regulations also delineated the requirements for accreditation as a DPOR approved training program and the curricula to be covered in those training programs. *See*, 18

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[6] The Board clarified the status of interim licenses in its 2003 Amendments to the Regulations, wherein it stated that –

> "Interim license" means the status of an individual who has successfully completed the appropriate training program in a discipline from an accredited lead training provider, as defined by this chapter, and has applied to the board, *but has not yet received a formal license* in that discipline from the board. Each interim license expires six months after the completion of the training program, and *is equivalent to a license for the six-month period.*

18 VAC 15-30-20 (2003) (italics added).

VAC 15-30-260 to 500 (1995). The course for a lead inspector/risk assessor required a minimum of 40 hours of training "with a minimum of eight hours devoted to hands-on training which includes site visits." 18 VAC 15-30-380 (1995).[7] At the end of the training, applicants have to successfully pass a written examination and a hands-on skills assessment conducted to "test the trainees's knowledge and retention of topics covered during the course" and "the ability of the trainee to demonstrate satisfactory performance of work practices and procedures" as specified in the Regulations. 18 VAC 15-30-390. The course for lead inspectors is required to cover, *inter alia*, information on lead paint, its health effects, federal, state and local applicable regulations, lead paint inspection methods, paint and dust sampling methodologies, visual inspection, and identification of lead-based paint hazards." 18 VAC 15-30-480. The standards trainees are expected to meet involve testing for the presence of lead paint in all painted surfaces using documented methodologies "which incorporate adequate quality control procedures" including the collection of paint chips and the use of x-ray fluorescence spectroscopy to test for the presence of lead paint in accordance with the manufacturer's and HUD guidelines. 18 VAC 15-30-510 to 530.

III. Status of the Inspectors' Licenses/Complainant's Arguments

The allegations of violations in this case arose out of initial inspections performed in 1996 and 1997 by four RDPH employees: Michael Slavin, Michael Asante (f/k/a Michael Graham), Lonnie Sims and Ben Yan. Those inspections revealed the existence of lead paint in the subject premises, triggering, *inter alia*, the obligations under TSCA of Respondents, as lessors and leasing agent, to disclose to prospective tenants their knowledge of the presence of lead paint. It was Respondents' failure to make such disclosure in connection with 10 leases entered into after the inspections that subjected them to liability and the penalties imposed in this action.

In its Status Reports and Post-Remand Brief, Complainant states that it has discovered the following with regard to those RDPH employees' licenses:

A That Michael Slavin, the RDPH employee who inspected Respondents' 1124 N. 28th Street property on October 20, 1997 (*see*, C's Hearing Exhibit (Hrg. Ex.) 21), received his interim lead inspector/risk assessor certification on July 17, 1996 and his individual certification on September 3, 1996. His individual certification expired on June 30, 1997, before the subject inspection, but Mr. Slavin "renewed" his licensed late on November 10, 1997. Additionally, or alternatively, Complainant represents that Mr. Slavin had successfully completed the requisite

[7] The 2003 Amendments to the regulations reduced the required hours of training to 24 for a "lead inspector," but a "lead assessor" still requires 40 hours of training. 18 VAC 15-30-380(A)(1)&(B), 15-30-250 (2003).

training and passed the requisite department approved examination for a lead inspector/risk assessor license prior to the subject inspection.

B. That Michael Asante (f/k/a Michael Graham), the RDPH employee who inspected Respondents' 1813 N. 29th Street property on April 16, 1996 (*see*, C's Hrg. Ex. 23), did not have a Virginia lead inspector/risk assessor certification of any type at the time. However, prior to conducting the inspection, on September 11, 1995, Mr. Asante had completed an EPA approved risk assessor course. Subsequently, on June 4, 1996, he completed a DPOR approved refresher course and on July 17, 1996 obtained his interim license and then on September 3, 1996 received his individual certification as a lead inspector/risk assessor.[8]

C That Lonnie Sims, the RDPH employee who conducted inspections of 3015 Barton Avenue on a number of occasions, the first being June 26, 1997 (*see* C's Hrg. Ex. 24), also did not have a Virginia lead inspector/risk assessor certification of any type at the time of that initial inspection. However, prior thereto in 1996 and April 1997, he had received training in lead paint inspections. Mr. Sims received his interim certification from the Board on July 17, 1996, three weeks after his first inspection. That interim certification expired on February 28, 1997.[9] Approximately 5 months later, in April 1997, Mr. Sims completed a refresher course and applied for and was issued a new interim license on July 23, 1997, about a month after the initial inspection. Mr. Sims received his individual certification on January 15, 1998. That certification expired on April 30, 1998 and Mr. Sims remained uncertified until February 23, 2001, when he was issued another individual certification which expired on October 31, 2001. Mr. Sims then once again remained unlicensed until March 25, 2004, when he was issued another interim license which expired on September 30, 2004.[10] Then on March 2, 2005 he was issued another full certification after passing the examination.

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[8] Exhibits 2 and 3 to C's Post-Remand Brief indicates that Mr. Asante has maintained his lead inspector certification/licensure essentially continuously since 1996 to present. He too routinely applies for and is renewed during the six month grace period after expiration of the prior license. *See*, C's PRB Exs. 2, 3.

[9] Although 6 month interim licenses are not generally renewable, under the 1995 Regulations such licenses could be renewed if the examination for full certification was not available. The Board has indicated that this is what occurred in this case and why Mr. Sims' interim license, set to expire on December 21, 1996, did not actually expire until February 28, 1997. *See*, C's PHB Ex. 6.

[10] Exhibit 4 to C's Post-Remand Brief, the Board "License Transcript" for Mr. Sims shows that he was licensed under two different numbers beginning in March of 2004, creating some inconsistencies regarding his status.

Therefore, Complainant states Mr. Sims was licensed at the time he conducted the subsequent "drive-by" inspections of the property in July 1997 and in May, June and September of 2004 (Tr. 170-71).

D. That Ben Yan, the RDPH employee who conducted an initial inspection of Respondent's 2405 Third Avenue property on April 3, 1997 (*see* C's Hrg. Ex 25), also did not have a Virginia lead inspector/risk assessor certification of any type at the time of that inspection. However, prior to the initial inspection, on November 22, 1996, Mr. Yan had completed a risk assessor initial training course and on May 7, 1997, approximately a month after his initial inspection he received his interim certification. Mr. Yan's interim certification expired on May 31, 1997, but he was issued his individual certification on June 10, 1997 which he renewed prior to its expiration on October 24, 1997 (expiration date November 30, 1998). Thus, Complainant states Mr. Yan was fully certified when he conducted the follow-up inspection of the subject dwelling on June 18, 1998 (*see*, C's Ex. 26).[11]

See, C's Post-Remand Brief at 5-8 and Exs. 2-7 attached thereto.

Complainant raises a number of factual and legal arguments in support of its position that the inspectors' lack of certification at the time they performed their inspections of the Respondents' properties should not alter this Tribunal's determinations made in the Order on Accelerated Decision or Initial Decision. First, Complainant states that all four inspectors "possessed lead detector skills" and had received lead inspector training prior to their inspections, and all passed the examination and received their individual certificates shortly after such inspections. As to Mr. Slavin, Complainant states that due to the "retroactive effect" of his late renewal of his certification, he was effectively fully certified at the time he conducted his inspection and thus this Tribunal's findings based upon Mr. Slavin's report on his October 20, 1997 inspection of Respondents' 1124 N. 28th Street property (C's Hrg. Ex. 21) are not subject to

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[11] Exhibit 2 to C's Post Remand Brief which is a "license transcript," *i.e.* a computer printout regarding the license, and Exhibit 3 which is a Memorandum from Adrienne Mayo of the Board for Asbestos, Lead, and Home Inspectors, to Complainant's counsel, dated November 18, 2005, are not entirely consistent in that the Memorandum reflects Mr. Yan's "late renewal" of his lead risk assesor certificate or license on October 24, 1997 (with an expiration date of November 30, 1998) while the license transcript does not. However, both Exhibits indicate that Mr. Yan maintained his certification, now known as licensure, as a lead inspector/risk assessor essentially continuously from May 1997 until November 1999. At that point his license expired and he did not obtain a new license until April 2002, but he has remained licensed continually since then. He routinely is issued a new license within the 6 month grace period after expiration of the prior license.

reconsideration pursuant to the EAB Remand Order.[12] C's PRB at 8. With regard to Mr. Yan, Complainant argues that while he was uncertified at the time of his initial inspection of Respondent's 2405 Third Avenue property on April 3, 1997 (C's Hrg. Ex. 25), he had received training prior thereto, and was certified at the time of the reinspection on June 12, 1997 to determine the occurrence of lead paint abatement activities (C's Hrg. Exs. 26 and 57) at which time he also found the presence of lead paint on the premises, albeit in a non-hazardous condition. Similarly, Complainant states that while uncertified at the time of the initial inspection of Respondent's 3015 Barton Avenue property on June 26, 1997, Mr. Sims held a valid inspector/risk assessor license at the time of his four subsequent "drive-by" assessments when he determined that conditions remained unchanged.

Additionally, Complainant argues that the inspection reports, albeit issued in most cases by uncertified inspectors, contain probative, reliable information regarding the presence of lead paint in the subject dwellings and, pursuant to Section 22.22(a) of the Consolidated Rules (40 C.F.R. § 22.22(a)), such evidence is admissible. Complainant notes that the inspectors, while not certified, were trained to detect lead based paint in the dwellings at the time of the inspections and that Respondents have not offered any testimony or evidence that lead paint was, in fact, not present in the dwellings. Thus, the validity of the lead detection results of the inspectors at the four dwellings is reliable and unchallenged and supports the factual and legal determinations of the presence of lead paint made in the prior liability and penalty decisions in this case. C's PRB at 12-15.

Complainant also asserts that Respondents' disclosure obligations under the Lead Disclosure Rule which they were found in this action to have violated, are unaffected by the inspectors' lack of certification at the time of inspection. Complainant states that the inspection reports, even if created by non-certified inspectors, gave Respondents "notice" of lead-based paint in the premises and were "records or reports pertaining to lead based paint and/or lead based paint hazards" and therefore, Respondents were obligated to disclose their knowledge and provide the reports to prospective tenants under the Disclosure Rule, 40 C.F.R. §§ 745.113(b)(2), 745.107(a)(4), 745.113(b)(3); and 745.115(a)(2). C's PRB at 10-11.

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[12] Complainant's claim of retroactivity appears based upon representations made to its counsel by A.G. Mayo, Office Manager for the Board, in e-mails dated November 21, 2005 and December 8, 2005 so interpreting the Board's Regulation 18 VAC 15-30-140(F) providing that "any applicant who fails to renew his certification within six months after the expiration date on the certification shall not be permitted to renew and shall apply as a new applicant." *See*, C's PRB Exs. 5, 6. Exhibit 3 to C's Post-Remand Brief, a computer print-out record from the Board, indicates that Mr. Slavin maintained his certification/licensure as a lead inspector/risk assessor essentially continuously from July 1996 until June 30, 1999. During that period, he routinely renewed his license during the 6 month grace period after expiration, which Board terms as "late renewal." *See,* C's PRB Ex. 3

IV. Discussion

The initial issue presented here is the effect of the inspectors' lack of Virginia lead inspector certifications at the time they conducted their lead inspections, on the admissibility of and/or weight to be given to their written or oral expert testimony regarding the presence of lead paint in the subject dwellings.[13]

A. Admissibility

As Complainant notes in its Post Remand Brief at 12, the admissibility of evidence in this proceeding is guided by the Consolidated Rules of Practice which provide in relevant part that:

> The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . .

40 C.F.R. § 22.22.

The EAB had held that "it is instructive to examine analogous federal procedural rules and federal court decisions" when in interpreting the Consolidated Rules. *Patrick J. Neman, D/B/A The Main Exchange*, 5 E.A.D. 450, 455, n.2, 1994 App. LEXIS 10, *14 (EAB 1994). *See also*, *Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524, n.10, 1993 EPA App. LEXIS 6, *26 n.10 (EAB 1993) (although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *Detroit Plastic Molding*, 3 E.A.D. 103, 107, 1990 EPA App. LEXIS 4, *9 (CJO 1990) (same)."

Federal courts have held that whether a witness is qualified as an expert is governed by the Federal Rules of Evidence (FRE) and that state law cannot disable a person from testifying as an expert in federal court. *Malbrough v. State Farm Fire & Cas. Co.*, 1996 U.S. Dist. LEXIS 14640 (D. La., September 30, 1996)(expert witness' lack of state licensing goes to the weight, not admissibility, of evidence); *Marlowe v. Uniroyal Tire Co.*, 1994 U.S. Dist. LEXIS 14582, 8-9 (D. Ill. 1994)(reconstruction expert may testify in federal court even if prohibited to do so in state court by state law); *Geophysical Systems Corp. v. Seismograph Service Corp.*, 738 F. Supp. 348 (D. Cal. 1990)(state law requiring geophysicists be licensed does not prohibit unlicenced geophysicist giving expert opinion testimony in federal court); *Ueland v. United States*, 291 F.3d 993 (7th Cir., June 3, 2002) (no rule of state law could block the national government from obtaining medical information from a federal prison's staff physician; the Supremacy Clause makes state law subordinate to federal, not the reverse.); *TC Systems Inc. v. Town of Colonie*, 213 F. Supp. 2d 171 (D. N.Y. 2002)(whether witness is qualified as an expert is governed by

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[13] Complainant never explicitly offered Mr. Sims as an "expert" in this case, however, as indicated below, the sum and substance of his testimony was "expert testimony," as to whether the Barton Avenue dwelling contained lead paint and whether "abatement activities" had occurred there.

FRE; fact that witnesses' qualifications are not unassailable does not mean the witness is incompetent to testify).

With regard to the admission of expert testimony, FRE 702 provides that –

> If the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FRE 702.

Thus, the two basic prerequisites of FRE 702 for admitting expert testimony are: (1) that the witness be *qualified as an expert* in a scientific, technical or specialized matter based upon knowledge, skill, experience, training, or education; and (2) the expert's testimony *assist the trier of fact* to understand the evidence or to determine a fact in issue.

The standards for qualifying a witness as an "expert" are very "liberal;" any one or more of the listed bases for qualification, alone or in any combination, is sufficient. *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3rd Cir. 2000); *Kannankeril v. Terminix Intl., Inc.*, 128 F.3d 802, 809 (3rd Cir. 1997) ("If the expert meets liberal minimum qualifications, then the level of the expert's expertise goes to credibility and weight, not admissibility"). Licensure is *not* a requirement under Rule 702 for being qualified as an expert. *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 385 (9th Cir. 1992)(licensure in the discipline or speciality which is the subject of expert opinion is not a requirement under the Federal Rules of Evidence; the fact that the experts were not licensed hematologists does not mean that they were testifying beyond their area of expertise); *Marlborough v. State Farm Fire & Cas. Co.,* 1996 U.S. Dist. LEXIS 14640 (D. La., September 30, 1996)(expert witness' lack of state licensing goes to the weight not admissibility of evidence). Thus, the mere fact the inspectors were not certified by Virginia would not prevent them from being qualified as an "expert" in this proceeding.

In terms of providing evidence which would "assist the trier of fact," the standard is also quite low in that any information not within common knowledge is a proper subject of expert testimony. *See e.g.*, *U.S. v. Lopez-Lopez*, 282 F.3d 1, 14-15 (1st Cir. 2002)(information on global positioning system and drug smuggling not within common knowledge so proper subject for expert testimony); *U.S. v. Moore*, 104 F.3d 377, 384 (D.C. Cir. 1997)(fact that duct tape is tool of narcotics trade not within common knowledge and subject to expert testimony). The fact that both federal and state governmental entities regulate lead paint inspectors and mandate training,

experience and licensure of lead paint inspectors, indicates that determining the presence or absence of lead paint in a dwelling is not within "common knowledge."

As to the subsequent requirements under Rule 702 relating to the expert testimony being based upon reliable "principles and methods," this "gatekeeping" requirement is derived from the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and applies only in cases where an opponent is challenging the admissibility of expert testimony involving a new scientific theory or methodology. *See, United States v. Nichols*, 169 F.3d 1255, 1262-1264 (10th Cir. 1999) (*Daubert* hearing unnecessary when proposed testimony does not involve new scientific theories or methodologies and opponents' arguments relate solely to alleged flaws in laboratory tests); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (because evidence rules seek to avoid 'unjustifiable expenses and delay" the trial judge has discretionary authority to avoid unnecessary "reliability" proceedings in ordinary cases).[14] Respondents in this case have never challenged the scientific methodology upon which the inspectors' opinions were partially based, *i.e.*, XRF fluoroscopy. To the contrary, at the hearing Respondents *stipulated* to the accuracy of the readings regarding the presence of lead paint taken by Mr. Sims using the XRF fluoroscopy machine during his June 26, 1997 inspection of the Respondents' 3015 Barton Avenue premises, as reflected in Exhibit 25. Tr. 166-67.

Thus, in terms of the admissibility of the various inspectors reports and testimony of Mr. Sims, the issue comes down to whether the inspectors, despite being uncertified, meet the minimal requirements under FRE 701 and the Rule 22.22, to be qualified as "experts." As a preliminary matter, it should be noted that, while in their Answer (¶¶ 39, 49, 60, 72) Respondents denied that the subject dwellings contained lead-based paint (as defined in 40 C.F.R § 745.103), at no time during the pendency of this proceeding did the Respondents challenge the admissibility of the various inspectors' reports in this case opining, based upon the inspectors' personal observations and/or the results of XRF tests they conducted, that the dwellings contained lead paint, nor did Respondents object to the admission of Mr. Sims' testimony at hearing in this regard. *See*, Respondents' Response to EPA's Motion for Accelerated Decision dated June 7, 2004, conceding liability; Tr. 11-13 (stipulating to admission into the record, *inter alia*, inspectors reports); Tr. 154-201 (testimony of Lonnie Sims). Further, while admittedly Respondents were presumably unaware of the inspectors' lack of licensure at the time they chose not to object to such evidence, their lack of awareness constitutes no excuse because it does not appear from the record that Respondents ever inquired of Complainant regarding the inspectors' licensure and received an erroneous response. Further, DPOR, which possesses definitive information on the inspectors' licensure, was at all times equally available to both parties. *See also*, C's PRB Ex. 6 (suggesting DPOR maintains a website with licensing data, albeit data that is perhaps not complete nor completely reliable) and C's PRB Ex. 8 at 10 (EPA/HUD "Interpretive Guidance for the Real Estate Community on the Requirements for Disclosure of

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[14]T The EAB has suggested that this part of FRE 702 and *Daubert* are not controlling principles in Agency hearings, which are not bound by the strict rules governing jury trials. *Solutia, Inc.,* CERCLA App. No. 00-01, 2001 EPA App. LEXIS 19 n. 22 (EAB, Nov. 6, 2001).

Information Concerning Lead-Based Paint in Housing, dated December 5, 1996, noting that HUD maintains a website with a list of certified inspectors). Therefore, Respondents are not really in a position at this point in the proceedings to challenge the admissibility of the inspection reports and the opinions contained therein and, in fact, have not. *See, U.S. v. Cisneros*, 203 F.3d 333, 346-347 (5th Cir. 2000) (failure to timely object to admission of evidence constitutes waiver unless it rises to the level of "plain error"); *Macsenti v. Becker*, 237 F.2d 1223, 1231-1232 (10th Cir. 2001) (failure to lodge timely objection on *Daubert* grounds waives all but plain error in admission of expert opinion evidence; court need not assess reliability of evidence in absence of timely request by objecting party); *Goebel v. Denver & Rio Grande Western R&R*, 215 F.3d 1083, 1088 n.2 (10th Cir. 2000) ("If there is no objection to the expert testimony, the opposing party waives appellate review absent plain error.").

Even assuming Respondents were nevertheless allowed at this point to object to the admission of the inspectors' reports and/or testimony of Mr. Sims, there is no basis for finding that evidence inadmissible. The evidence proffered by Complainant shows that all four of the inspectors had successfully completed training in the field of lead paint inspections prior to conducting the subject inspections. Mr. Slavin had been issued an "individual certification" based upon his qualifications prior to his relevant inspection. Further, all four inspectors had been hired and had been working for some period of time prior to the subject inspections as lead paint inspectors for RDPH and it was in such professional capacity that they performed the inspections. As to Mr. Sims, he testified that he was initially hired as an environmental inspector to conduct lead-based paint inspections by RDPH in 1995, which was over a year before he conducted his first inspection of Respondents' Barton Avenue premises in June 1997, and that he continued to work in that position through 1998. Tr. 156-57. He then left that position and subsequently held two other positions performing lead paint inspections before returning to work in January of 2004 for RDPH as a lead inspector. Tr. 157. He estimated that he had performed "upwards of two to three hundred" lead paint inspections for RDPH. Tr. 161. Prior to working for RDPH, Mr. Sims testified that he worked for the Department of the Army, Director of Housing Engineering, conducting lead paint inspections and asbestos inspections. Tr. 161. At the time of his testimony he stated he was a "licensed and certified lead paint inspector." Tr. 160-61. Thus, all four of these inspectors had such knowledge, skill, experience, training, or education in a specialized scientific or technical field, *i.e.* lead paint inspections, to qualify under the liberal standards of FRE 702 as an "expert."

Further, in that their opinions as to the presence of lead paint in Respondents' properties is beyond common knowledge and goes to an essential fact which must be proven in this case for Complainant to prevail, *i.e.*, that Respondents knew of lead paint and/or had records regarding lead paint in the premises so as to trigger their obligations under the Disclosure Act, the testimony on the issue was relevant and material and would be admissible under Consolidated Rule 22.22.

Therefore, even had this Tribunal been aware that the inspectors lacked the requisite certifications to lawfully perform the inspections under Virginia law, their reports and the

testimony of Mr. Sims would nevertheless have been admitted into evidence at the hearing of this proceeding.

B. Weight of Evidence

The question then becomes, should the lack of the inspectors' certifications reduce the weight that was given to their reports and/or testimony in reaching the decisions made in this case on liability and penalty, and if so, does it change the outcome of this case in terms of liability or penalty, or both?

As a preliminary matter, it is important here again to note, that while Respondents denied in their Answer that the subject dwellings contained lead-based paint, at no time thereafter during the pendency of the proceeding did they reiterate that claim, challenge Complainant's evidence on that point, or proffer any affirmative evidence in support of that denial such as the results of their own inspections or scientific tests conducted.[15] Rather, their response to Complainant's Motion for Accelerated Decision, which was based in part on the fact that the subject premises contained lead-based paint triggering their disclosure obligations, stated "[t]he Respondents concede liability in this matter as to the inadvertent failure to properly complete the lead disclosure forms required by both Federal law and the EPA regulations." *See,* ¶ 1 Respondents' Response to EPA's Motion for Accelerated Decision on Liability dated June 7, 2004. Furthermore, at no time during the hearing did Respondents raise an issue as to the accuracy of the inspectors' findings of lead-based paint in the dwellings. Rather, Ronald Hunt testified that upon receiving each RDPH notice of lead paint in the dwelling he promptly hired a "licensed" contractor and "abated the property with the Lead Block paint" at substantial cost to himself and his friends and family. Tr. 206-209. Thus, the only evidence in the record as to whether there was lead-based paint in the subject dwellings is the uncontroverted evidence on this issue submitted by the Complainant that there was.

Thus, in terms of deciding the weight to be given the reports and testimony in light of the inspectors' lack of certification, the issue really is whether the evidence still suffices to meet Complainant's burden of presentation and persuasion to prove the truth of the matter by a "preponderance of the evidence" as required by 40 C.F.R. § 22.24.

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[15] The fact that Respondents did not aggressively pursue their initial claim that the premises lacked lead paint is completely understandable. The dwellings at issue were built in the early 1900s, and lead paint was available until 1972. Tr. 192-93. When asked by this Tribunal at the hearing about the amount of lead paint in the subject dwellings, Mr. Sims testified that, in his opinion, lead paint was probably applied to them numerous times "from the first date [the dwellings were built] . . . because it was durable. It went on as the best paint you could buy, and that's why they used it . . . until 1972," when it was banned for use in residential housing. Tr. 192-93. He also testified that he found lead paint in almost all the 200-300 inspections he had done of target housing in Richmond for RDPH. Tr. 196.

"Preponderance of the evidence" with respect to the burden of proof in administrative actions, "means the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." *Hale v. Department of Transp., FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985); *American Grain Trimmers, Inc. v. Office of Workers' Compensation Programs*, 181 F.3d 810, 817 (7th Cir. 1999) (term "preponderance of the evidence" relates to degree of proof which must be adduced by proponent of rule or order to carry its burden of persuasion in administrative proceeding; if that degree is preponderance, then initial trier of fact must believe that it is more likely than not that the evidence establishes the proposition in question).

However, evidence lawfully received in an administrative proceeding need not be accepted as true merely because it is admissible. *McMorrow v. Schweiker*, 561 F. Supp. 584 (D. N.J. 1982). Moreover, a mere scintilla of evidence is insufficient to prevail on an issue. *See, Brady v. Southern R. Co.*, 320 U.S. 476, 479 (1943) (more than a scintilla of evidence is required in an action against a railroad company before the case may properly be left to the discretion of the trier of fact); *United States v. McGahee*, 257 F.3d 520, 526 (6th Cir. 2001) (although more than just a scintilla of evidence is required, the verdict can be based entirely on circumstantial evidence and need not completely rule out other possibilities).

Furthermore, although the reports of the inspectors are arguably hearsay, as noted by Complainant in its Post Remand Brief at 12, n 22, a fact finder in an administrative adjudication may consider relevant and material hearsay, and hearsay may constitute substantial evidence supporting a finding of fact in an administrative proceeding. *Great Lakes Div. of National Steel Corp.*, 5 E.A.D. 355, 368-70 (EAB 1994) (hearsay meeting the requirements of Rule 22.22 is admissible; government records are admitted as an exception to the hearsay rule); *Johnson v. United States*, 628 F.2d 187 (D.C. Cir. 1980); *Hoska v. U. S. Dept. of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982) (hearsay can constitute substantial evidence in administrative proceedings); *Rocker v. Celebrezze*, 358 F.2d 119 (2nd Cir. 1966) (hearsay is generally admissible in administrative hearing and if reliable may be given such probative force as is warranted); *Williams v. U.S. Dept. of Transp.*, 781 F.2d 1573 (11th Cir. 1986) (hearsay is admissible in administrative hearings and may constitute substantial evidence if found reliable and credible).

Deciding whether hearsay testimony constitutes substantial evidence in an administrative decision requires consideration of: (1) independence or possible bias of the declarant, (2) type of hearsay material submitted, (3) whether statements are signed and sworn to as opposed to anonymous, oral, or unsworn, (4) whether statements are contradicted by direct testimony, (5) whether declarant is available to testify and, if so, (6) whether party objecting to statements subpoenas the declarant, or whether declarant is unavailable and no other evidence is available, (7) credibility of declarant if a witness, or of witness testifying to hearsay, and, (8) whether hearsay is corroborated. *R.P. Carbone Const. Co. v. Occupational Safety & Health Review Commission*, 166 F.3d 815, 819 (6th Cir. 1998)

Upon consideration of various factors and despite the fact that the inspectors were

uncertified at the time of the inspections, I find the evidence submitted by Complainant constitutes substantial evidence supporting a finding that Respondents' subject premises contained lead-based paint. In reaching this decision, I note that there is no evidence in the record of bias for or against either party in regard to the RDPH inspectors. Further, the 1995 Virginia Regulations suggest that, although they were uncertified, by having previously completed course work, the inspectors were at least minimally trained in conducting lead paint inspections, in that the prerequisite course for a lead inspector/risk assessor certificate required 40 hours of training "with a minimum of eight hours devoted to hands-on training which includes site visits." 18 VAC 15-30-380. Moreover, in order to complete such training, the applicants had to successfully pass a written examination and hands-on skills assessment conducted to "test the trainees's knowledge and retention of topics covered during the course" and "the ability of the trainee to demonstrate satisfactory performance of work practices and procedures" as specified in the Regulations. 18 VAC 15-30-390. The course for lead inspectors covered, *inter alia*, information on lead paint, its health effects, federal, state and local applicable regulations, lead paint inspection methods, paint and dust sampling methodologies, visual inspection, and identification of lead-based paint hazards. 18 VAC 15-30-480. The standards trainees were expected to meet involved testing for the presence of lead paint in all painted surfaces using documented methodologies "which incorporate adequate quality control procedures" including the collection of paint chips and the use of x-ray fluorescence spectroscopy to test for the presence of lead paint in accordance with the manufacturer's and HUD guidelines. 18 VAC 15-30-510 to 530.

Moreover, the reports of the various inspectors, wherein they conclude lead paint above the legal limit exists in the various dwellings, *is supported* by the written results of their XRF fluoroscopy examination, the methodology for lead paint detection the inspectors were trained to use. Such examinations revealed various areas which did or did not test positive at the K-Shell and/or L-Shell levels for lead paint and stated the level of lead-based paint found. *See,* C's Hrg. Exs. 21, 22, 23, and 24. For example, as to the Barton Avenue property Mr. Sims' inspection report and testimony evidenced that he performed the XRF test on 135 points all over the dwelling including the hallway, living room, kitchen, bedroom, porch, *etc.* C's Hrg. Ex. 24; Tr. 166-68. The results of the test varied from negative (no lead-based paint) to positive, and the positive results themselves varied, for example, at the K-Shell level from 1.400 to 23.225

mg/cm2.[16] C's Hrg. Ex. 24. As indicated above, Respondent stipulated to the accuracy of these test results obtained by Mr. Sims. Tr. 167.

Further, while the one-page "Lead-Based Materials Report" and test results reports are unsigned, the inspectors all signed the "Official Notices of Violation - Lead Based Paint" issued to Respondents to which the reports and the tests results were attached. *See*, C's Ex. 21-24. Moreover, Mr. Sims confirmed his findings of lead-based paint in the Barton Avenue premises with his direct, uncontroverted, credible personal testimony at the hearing. Tr. 161, 163.

Therefore, I find the evidence proffered by Complainant proves, by a preponderance of the evidence, that the four subject dwellings all contained lead-based paint above the legal limit at the time of the initial inspections.

Moreover, in addition to testifying that Barton Avenue had lead-based paint beyond the legal limit, Mr. Sims also testified at the hearing regarding the three subsequent "drive-by inspections" he performed at the premises, including the one he conducted the day before the hearing, during which he observed no abatement efforts had been undertaken in regard to the outside of the premises. Tr. 171-174. Mr. Sims testified that he knew what lead block looked like when he saw it - "the characteristics of lead encapsulant or Lead Block paint makes a surface appear to be glossed or shiny . . . its consistency is glue . . . it fills in cracks." Tr. 173-74. He said that out of the 200-300 inspections he had performed for RDPH, he had seen lead block applied approximately 20 times. Tr. 197. Further, he knew that lead block had not been applied to the outside of the Barton Street property in that he saw the paint was in the same condition as before "flaking, it's chipping and it has irregular shaped surface area on the wood itself." Tr. 176. Based upon this, he opined that, contrary to Respondents' assertion, a lead block product had not been applied to the areas of lead paint, up to and as of the day before the hearing and no compliance letter had been issued for the property.[17] Tr. 173-177. At the time of these latter

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[16] Additionally, in some cases, the inspectors' XRF test results are supported by laboratory tests subsequently performed on paint samples the inspectors obtained from the dwelling. *See e.g.,* C's Hrg. Ex. 21 (Summary analysis of 57 assay samples reported regarding 1124 N. 28th St., 41 of which were positive) and C's Hrg. Ex. 24 (Summary analysis of 115 assay samples reported on 3015 Barton Avenue, 66 of which were positive). This would be consistent with Mr. Sims testimony at the hearing to the effect that "the Commonwealth of Virginia was requiring us to conduct the inspection as a preliminary inspection XRF with verification of those results submitted by paint sample to an independent laboratory for verification." Tr. 164. However, he did not testify in detail about the verification and the identity of the laboratory or method of testing, and other details are not provided in the documents in evidence.

[17] In support of their claim that abatement had been undertaken at the Barton Avenue property, Respondents made the point that the City of Richmond had never initiated any enforcement action against them based upon the inspection, although they had no direct evidence

(continued...)

inspections and his hearing testimony, Mr. Sims held a valid Virginia individual certification or license as a lead inspector.

For various reasons set forth in the Initial Decision issued in this matter, I credited the testimony of Mr. Sims to find that no abatement activities had been undertaken at the Barton Avenue property. Nothing Complainant has submitted subsequently leads me to alter my decision in this regard.

Complainant argues in its brief that Respondents' disclosure obligations under the Lead Disclosure Rule, which they were found in this action to have violated, are unaffected by the inspectors' lack of certification at the time of inspection. Complainant states that the inspection reports, even if created by non-certified inspectors, gave Respondents "notice" of lead-based paint in the premises and were "records or reports *pertaining to* lead based paint and/or lead based paint hazards" and therefore Respondents were obligated nevertheless to disclose their knowledge and provide the reports to prospective tenants under the Disclosure Rule, 40 C.F.R. §§ 745.113(b)(2), 745.107(a)(4), 745.113(b)(3), and 745.115(a)(2). C's PRB at 10-11. Complainant is correct that the applicable regulations do not limit the type of records or reports pertaining to lead paint which need to be disclosed to those created by "certified or licensed" inspectors or others. The sections broadly require lessors to disclose records and reports "*pertaining to*" lead paint as well as "disclos[ing] any additional information available *concerning* lead-based paint. . ." *See e.g.* 40 C.F.R. § 745.107(a)(3). Moreover, as discussed above, at the time the Respondents were required to make the disclosures, they were unaware that the state inspectors lacked the requisite certification, and even thereafter, past the time they became so aware, they apparently never gathered any evidence suggesting that the conclusions in the reports about the presence of lead paint were erroneous. Therefore, regardless of whether the reports were issued by state "certified" or uncertified inspectors, the Respondents in this case were obliged to disclose the fact that lead paint had been found in the premises and provide prospective tenants with copies of the report.[18]

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[17](...continued)
tying the lack of enforcement to compliance and no documentary evidence that abatement had occurred at the property either. Tr. 180. The newly discovered evidence concerning the RDPH inspectors lacking the requisite certification, could equally as well explain why no action on the violation was taken by City regardless of whether abatement occurred.

[18] In its Post-Remand Brief, Complainant goes so far with this argument as to suggest that a landlord would be obliged to provide prospective tenants with tests results regarding the presence lead paint *even if the landlord knew them to be inaccurate* and suggests that in such case the landlord's only recourse would be to explain such inaccuracies at the time the erroneous tests results are provided. C's PRB at 13, n. 24. This issue need not be decided in this case. The argument suggests not only that a landlord who receives an erroneous report as to the presence of lead paint would be legally obliged to distribute that report, but also that where a landlord

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Having found that the lack of certification does not effect this Tribunal's decision on liability, the issue then is whether the inspectors' lack of certification affects *the penalty* in this case, perhaps on fairness grounds or "as justice may require." There is case precedent for reducing the penalty for improper withholding by the Agency of material information. *See e.g., Bollman Hat Co.*, 1998 EPA ALJ LEXIS 18, *41-50 (EPA ALJ 1998), *penalty affirmed,* 8 E.A.D. 177 (EAB 1999) (penalty reduced by 25 percent to account for EPA's failure to disclose to the respondent and presiding judge its use of a settlement policy to calculate penalty reductions). However, there is no evidence in the record that Complainant intentionally withheld information on this matter from Respondent. It appears that neither Respondent nor this Tribunal at any time asked for a specific disclosure regarding the status of the inspectors' licenses at the time of the inspections. It also appears that Complainant acted in good faith and voluntarily disclosed the issue at the moment it came to its attention, albeit that was at the time the case was on appeal.[19] Further, as indicated above, such information on the inspectors' licensure was not uniquely under the control of the Complainant as was the case with the penalty calculation in *Bollman Hat.* Rather, the information was in the hands of third-parties, the DPOR or the inspectors, equally accessible to both parties. Furthermore, Respondent had an opportunity at hearing to inquire, at least as to Mr. Sims, with regard to his license status at the time of the inspection and did not do so. Respondents have not claimed they suffered any detriment from the fact that they were unaware of the status of the inspectors' certifications. Therefore, I find there is no evidence that the Complainant or its counsel acted in bad faith in this case.

Further, there is no evidence that the inspectors acted in bad faith in this case by, for example, intentionally conducting inspections at a time they knew they were not legally certified to do so or falsely testifying. From the history of the Virginia statute (Va. Code Ann. § 54.1-503(B)) and Regulations set forth above, it appears that the date the law requiring certification actually became effective and enforceable was fairly murky. The statute as initially passed in Virginia in 1994 suggested a January 1, 1995 effective date, but then the Board's Regulations establishing the process for actually obtaining the certifications were not issued in a timely enough manner to meet such deadline, perhaps because the Board was still waiting for EPA to issue its regulations to the 1992 Residential Lead-Based Paint Hazard Reduction Act which directed EPA, in April *1994*, to promulgate regulations regarding lead-based paint activities

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[18](...continued)
receives an erroneous report evidencing *no* lead paint in the premises, the landlord would be *legally required* to give the tenant that erroneous report "pertaining to" lead paint, and then verbally explain that in fact there really is lead paint in the premises, counting on a prospective tenant to properly weigh the conflicting written and oral representations. Simply put, this seems wrong for many, many reasons, not the least of which is that requiring someone to make what they know to be a false "disclosure" cannot be legally or morally justified.

[19] Complainant indicates in its Post Hearing Brief at 4, n. 3, that it followed intra-agency policy and conducted a credentials check for Lonnie Sims prior to his testifying at the hearing, but did not discover the issue regarding his licensure at the time of the initial inspection.

training, certification and accreditation requirements, work practice standards, and a Model State Program, which states would be encouraged to reference and *use as guidance to develop their own federally authorized lead-based paint activities program. See*, 15 U.S.C. §§ 2681-2692.

Then the Virginia statute was amended so the effective date became undeterminable until the Board issued its Regulations, which it finally did in October of *1995*. However, those Regulations were issued on an "emergency" basis under the Commonwealth's Administrative Process Act, without prior proposed publication and notice, and the "Final Regulations" did not become effective until a year later on November 13, *1996*. *See*, C's PRB Ex. 9; 13 Virginia Register Issue 2, at 97-212 (October 14, 1996). Furthermore, it appears that Virginia did not receive federal authorization to administer its lead-based paint program until at least December 19, 1997. *See,* C's PRB Ex. 9. In fact, in its Post Remand Brief, Complainant suggests that EPA did not provide for federal accreditation of state lead-paint inspection programs until August 31, *1998*, and did not prohibit individuals from doing lead-based paint inspections without proper certification until March 1, *2000*.[20] C's PRB at 4 (citing 40 C.F.R. §§ 745.225(a)(2), 745.266(a)(5) and 745.227(a)).

Complainant submitted with its Post-Remand Brief a letter from Mr. Sims, dated February 16, 2006, in which he states that:

> As to the question about license and qualifications, during the period of the inspection Barton Ave properties [sic], I had met all regulatory requirements for training and education for Lead Base [sic] Paint Inspector/Risk Assessor.
>
> And any inspection done that time [sic] were done with the understanding that we (I) was within the regulatory guidelines set forth by the Richmond City Health Department protocol, and the Commonwealth of Virginia Laws governing lead based paint activities.

C's PRB Ex. 14.

Though there is no evidence to this effect in the file, it is reasonable to presume that the other unlicensed inspectors (Mr. Asante and Mr. Yan), both of whom were employed and continued to be employed by RDPH, were under similar mis-impressions regarding the requisite licensing requirements at the pertinent time in that, since the licencing requirements have become

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[20] The 2003 proposed amendments to the Virginia Lead-Based Paint Regulations issued by the Board also states that Virginia applied to EPA for authorization to conduct its own lead-based paint program on October 30, *1998* and was formally advised of its approval by letter dated February 19, *1999*, which is consistent with Complainant's dates. *See*, 18 Va. Reg. Issue 24 (Aug. 12, 2002).

clear, they have obtained and consistently maintained their requisite licenses.[21] C's PRB Exs. 2-6. The Complainant has also proffered evidence that although the licensing issue for these inspectors has been brought to its attention, the Board/DPOR has not taken any action against the inspectors for performing unlicensed inspections.[22] C's PRB Ex. 10-13.

Furthermore, Mr. Sims did not testify untruthfully regarding his licensure at the hearing. When asked about what lead inspection training he had, he stated in the present tense "I'm a licensed and certified lead paint inspector." Tr. 160-61. He also said he was aware in *1998* of the funding problems at RDPH because "we are a small group people within the Commonwealth of Virginia as far as who is licensed and trained to do this type of work," but such time would have been after he received both his initial and individual certifications. Tr. 158-59. He never testified that he was "certified" or "licensed" in 1997 when he performed his initial inspection of the Barton Avenue dwelling and in fact, he suggested in his testimony at the hearing that the position he held at that time with RDPH, as compared to the one he was holding presently, did not require licensure. *See,* Tr. 155-57 (in response to a question about the difference between his current position with RDPH as a "property maintenance inspector" and his initial position with RDPH as a "environmental inspector," Mr. Sims stated, "[m]y [current] position is licensed and we have to be certified and trained by the state.").

Thus, I find there is no evidence that Mr. Sims or the inspectors acted in bad faith in connection with the inspections or this proceeding.[23]

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[21] Additionally, it should be noted that who exactly was covered by the certification requirement was not utterly clear in that the Virginia statute requiring certification exempted out certain lead-based paint inspectors operating in Virginia who were federally regulated. *See*, Va. Code Ann. § 54.1-501.1 ("[t]he provisions of this chapter shall not apply to any employer, or any employees of such employer, regulated by the federal Occupational Safety and Health Act, and under the enforcement authority of the Occupational Safety and Health Administration."). Mr. Sims testified at hearing that RDPH received its funding for lead inspection through grants from the federal government, specifically "HUD," the U.S. Department of Housing and Urban Development (tr. 158), which jointly enforces the federal Lead Disclosure Act with EPA (C's PRB Ex. 8) and this federal funding and connection between RDPH and HUD/EPA may have added into the confusion as to the applicability of the Virginia certification requirement to the RDPH inspectors.

[22] In addition to criminal penalties for performing unlicensed inspections provided by the Virginia statute, a regulant who violates the Regulations is subject to disciplinary action by the Board. 18 VAC 15-30-810. However, the 2003 Regulations allow the Board in its discretion to "waive the requirements of this chapter when in its judgment it finds that the waiver in no way lessens the protection provided by this chapter . . . . " 18 VAC 15-30-41.

[23] With regard to inspectors testifying, Virginia regulations state that --

(continued...)

Therefore, I find no basis in this proceeding to alter the penalty determinations previously made in this case based on the newly discovered evidence regarding the inspectors' lack of licensure.

CONCLUSION

Upon assessing the significance of the information submitted in the Complainant's status reports filed with the EAB on November 18, December 9, and December 21, 2005, and Post Remand Brief, concerning the status of inspectors who conducted inspections at the subject properties, I have determined that this information does not warrant any alteration in the prior determinations or conclusions made in this case as to liability or penalty as set forth in the July 2, 2004 Order on Accelerated Decision and in the Initial Decision issued in this case on March 8, 2005.

Susan L. Biro
Chief Administrative Law Judge

Dated: June 26, 2006
Washington, D.C.

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[23](...continued)

When serving as an expert or technical witness, the regulant shall express an opinion only when it is based on an adequate knowledge of the facts in issue and on a background of technical competence in the subject matter. Except when appearing as an expert witness in court or an administrative proceeding when the parties are represented by counsel, the regulant shall issue no statements, reports, criticisms, or arguments on matters relating to practices which are inspired or paid for by an interested party or parties, unless one has prefaced the comment by disclosing the identities of the party or parties on whose behalf the regulant is speaking, and by revealing any self-interest.

18 VAC 15-20-410(B). There is no evidence that Mr. Sims ran afoul of this provision in his testimony in this case.

In the Matter of Ronald H. Hunt, et al., Respondent
Docket No. TSCA-03-2003-0285
TSCA Appeal No. 05-01

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Remand**, dated June 26, 2006, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Legal Staff Assistant

Dated: June 27,2006

Original and One Copy by Pouch Mail to:

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Copy By Pouch Mail To:

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