

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
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7 CHIEF ADMINISTRATIVE OFFICER  
8 OF THE OCCUPATIONAL SAFETY AND  
9 HEALTH ADMINISTRATION, DIVISION  
10 OF INDUSTRIAL RELATIONS OF THE  
11 DEPARTMENT OF BUSINESS AND  
12 INDUSTRY,

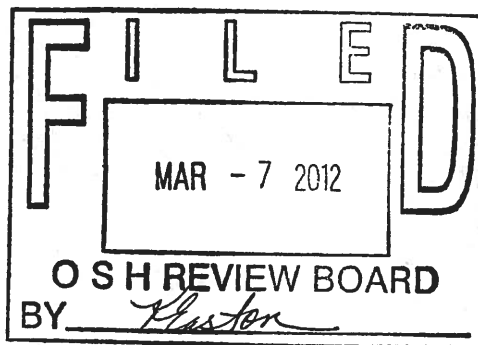
Docket No. LV 12-1509

11 Complainant,

12 vs.

13 CITY OF LAS VEGAS (ANIMAL CONTROL),

14 Respondent.



15  
16 **DECISION**

17 This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND**  
18 **HEALTH REVIEW BOARD** at a hearing commenced on the 12<sup>th</sup> day of January  
19 2012, in furtherance of notice duly provided according to law, MR.  
20 MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant,  
21 **Chief Administrative Officer of the Occupational Safety and Health**  
22 **Administration, Division of Industrial Relations (OSHA);** and MR. HOWARD  
23 MAVITY, ESQ. and MR. WHITNEY SELERT, Esq., co-counsel appearing on  
24 behalf of Respondent, **City of Las Vegas (Animal Control),** the **NEVADA**  
25 **OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

26 Jurisdiction in this matter has been conferred in accordance with  
27 Chapter 618 of the Nevada Revised Statutes.

28 The complaint filed by the OSHA sets forth allegations of violation

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1 of Nevada Revised Statutes as referenced in Exhibit "A", attached  
2 thereto.

3 Citation 1, Item 1, charges a violation of 29 CFR 1910.132(a). The  
4 complainant alleged the respondent employer failed to provide adequate  
5 personal protective equipment to employees in the City of Las Vegas  
6 Animal Control Unit. The violation was classified as Serious. The  
7 proposed penalty for the alleged violation is in the amount of Four  
8 Thousand Six Hundred Twenty Dollars (\$4,620.00).

9 Citation 1, Item 2, charges a violation of 29 CFR  
10 1910.1030(c)(2)(i). The complainant alleged the respondent employer  
11 failed to identify employees with occupational exposure to blood borne  
12 pathogens in the City of Las Vegas Animal Control Unit. The violation  
13 was classified as Serious. The proposed penalty for the alleged  
14 violation is in the amount of Four Thousand Six Hundred Twenty Dollars  
15 (\$4,620.00).

16 Citation 1, Item 3, charges a violation of 29 CFR  
17 1926.1030(f)(1)(i). The complainant alleged the respondent employer  
18 failed to provide employee Hepatitis B vaccinations. The violation was  
19 classified as Serious. The proposed penalty for the alleged violation  
20 is in the amount of Four Thousand Six Hundred Twenty Dollars  
21 (\$4,620.00).

22 Citation 1, Item 4, charges a violation of 29 CFR  
23 1910.1030(g)(2)(i). The complainant alleged the respondent employer  
24 failed to train employees as directed in the standard for exposure to  
25 blood borne pathogens. The violation was classified as Serious. The  
26 proposed penalty for the alleged violation is in the amount of Four  
27 Thousand Six Hundred Twenty Dollars (\$4,620.00).

28 Citation 2, Item 1, charges a violation of 29 CFR

1 1910.134(c)(2)(i). The complainant alleged the respondent employer  
2 failed to provide information on respirators. The violation was  
3 classified as Other and no monetary penalty proposed.

4 Citation 2, Item 2, charges a violation of 29 CFR  
5 1910.134(c)(2)(ii). The complainant alleged the respondent employer  
6 failed to establish and implement a written respiratory protection  
7 program. The violation was classified as Other and no monetary penalty  
8 proposed.

9 Citation 2, Item 3, charges a violation of 29 CFR 1910.134(e)(1).  
10 The complainant alleged the employer failed to provide a medical  
11 evaluation for employees subject to respirator use. The violation was  
12 classified as Other and no monetary penalty proposed.

13 Complainant and respondent stipulated to admission of Exhibit  
14 packages identified for complainant as Exhibit 1 and 2; for respondent  
15 Exhibit A-1.

16 Complainant presented testimony and documentary evidence with  
17 regard to the alleged violations. Mr. Scott Matthews, an OSHA Certified  
18 Safety and Health Officer (CSHO), testified as to his inspection and the  
19 citations issued to the employer.

20 Mr. Matthews conducted an inspection of the City of Las Vegas  
21 Animal Control Unit based upon a complaint after an attack by a large  
22 dog on Animal Control Officer (ACO), Ms. Cyndi Leavitt, on or about  
23 December 8, 2010. Mr. Matthews identified Exhibit 1, pages 1 through  
24 41, to include his investigative report, analyses and penalty  
25 calculations.

26 Mr. Matthews testified as to Citation 1, Item 1, charging a lack  
27 of adequate personal protective equipment (PPE). He identified Exhibit  
28 2 as the City "PPE Assessment" provided to him by the city employee

1 organization dated 1995 and revised 1998. CSHO Matthews interviewed  
2 employees within the animal control department and determined PPE for  
3 ACOs to be deficient for controlling large or aggressive dogs, such as  
4 what occurred when Ms. Leavitt was attacked, severely bitten and  
5 seriously injured during a service call to a residence in Las Vegas.  
6 Mr. Matthews testified the cited standard is **applicable** because ACOs  
7 can, and in the instance of Ms. Leavitt did, encounter an aggressive  
8 large dog and suffered serious injuries. He testified ACO Leavitt was  
9 not provided PPE for "adequate protection" as required in the cited  
10 standard. In identifying photos taken of Ms. Leavitt's injuries, bites  
11 and abrasions to her arms and shoulder Mr. Matthews testified that  
12 additional PPE should have been issued. He testified that during his  
13 investigation he did not find the kind of PPE he expected for employee  
14 protection against large aggressive dogs. Mr. Matthews interviewed  
15 eight of the twelve employees in the Animal Control Unit before reaching  
16 his conclusion. He identified the hazard **exposure** to employees as  
17 potential bites and broken bones which could result in serious injury  
18 or even death.

19 CSHO Matthews testified on the severity, probability and gravity  
20 of the violation in support of his serious classification. He  
21 calculated the proposed penalty after rendering appropriate credits in  
22 accordance with the operations manual. The proposed penalty commenced  
23 in the amount of \$7,000.00, but final assessment was in the amount of  
24 \$4,620.00. He testified the City should have taken steps to provide  
25 appropriate PPE, including heavier gloves reaching well above the elbow,  
26 which is currently provided to employees since the Leavitt incident.

27 On cross-examination CSHO Matthews testified that in reviewing the  
28 OSHA 300 forms and prior reports relating to animal attacks, he found

1 none like the severe attack on Ms. Leavitt or involving injuries similar  
2 to what she sustained. He admitted most of Ms. Leavitt's issued PPE was  
3 in her truck when she was attacked. He admitted that Ms. Leavitt, was  
4 equipped with pepper spray. He testified the intent of the cited  
5 standard and OSHA policy is to protect against instances that can be  
6 "reasonably expected" to occur. Mr. Matthews testified he cited the  
7 referenced standard because he concluded ". . . there was inadequate PPE  
8 to protect against the kind of hazards expected from aggressive large  
9 dogs . . ." In continued responses to counsel Mr. Matthews testified  
10 he found no evidence of injuries to other ACO employees from aggressive  
11 dogs.

12 CSHO Matthews responded to cross-examination as to Citation 1,  
13 Items 2, 3 and 4. He testified they were addressed and cited together  
14 because all were blood borne pathogen (BBP) related under the standards.  
15 He testified that ACOs were not included in the City BBP program, but  
16 should have been because of the probable exposure to blood similar to  
17 that which occurred in the incident involving ACO Leavitt. The City of  
18 Las Vegas does maintain a BBP policy but ACOs were not included. He  
19 testified that other City personnel are included and referenced pages  
20 14 and 15 of his investigative report identifying various department  
21 personnel included due to a potential for BBP exposure. He found no  
22 documents during his investigation that ACOs deal regularly with dead  
23 human bodies, needles, or human blood exposure during the ordinary  
24 course of their work. He responded to further cross-examination by  
25 testifying the employer must include employees in its BBP policy if  
26 there is ". . . any reasonable anticipation an employee will encounter  
27 or contact BBP . . .". CSHO Matthews testified it was his opinion that  
28 ACO employees should have been included and covered under the City BBP

1 policy, although he was told by City representatives that they did not  
2 believe there was occupational exposure of ACOs to BBP. He classified  
3 the violation as serious and rated the severity "High" because an ACO  
4 employee dealing with animals, and particularly large or aggressive  
5 dogs, could come into contact with human blood from another injured ACO,  
6 a dog owner or a person attacked by a dog and potentially contract HIV  
7 or other serious blood disorders. He testified that he followed the  
8 OSHA operations manual directives in his analysis to reach the assessed  
9 penalty.

10 At Citation 1, Item 3, Mr. Matthews testified the standard cited  
11 required the employer make Hepatitis B vaccine and vaccination series  
12 available to all employees who have occupational exposure. He testified  
13 the City provided no evidence of providing same and by excluding ACO  
14 employees from BBP policy which requires the shots be made available,  
15 as well as post exposure evaluation shows the City failed to comply with  
16 the cited BBP standard.

17 At Citation 1, Item 4, Mr. Matthews testified he found no  
18 documentation or evidence that the employer trained its employees under  
19 the cited BBP standard. The standard requires an employer to train each  
20 employee with occupational exposure (to BBPs) in accordance with the  
21 requirements of the section. Again he referenced the documentation  
22 provided by the City of Las Vegas and information received during the  
23 inspection to demonstrate that by not including employees under the BBP  
24 program the respondent failed to train for BBP exposure. He testified  
25 the City knew or should have known ACO employees can be exposed to BBP  
26 based on his own employee interviews and the incident involving Ms.  
27 Leavitt. The City should have realized ACO employees can be bitten and  
28 human blood contact made with other employees.

1 Concluding his blood borne pathogen testimony, Mr. Matthews  
2 testified he was informed during his investigation of a suicide case  
3 approximately two years previous where there was excessive human blood  
4 at the crime scene of a shotgun victim. Animals were in the area moving  
5 about the human blood. An ACO was called to remove animals from the  
6 scene. He also testified that animals are unpredictable and can become  
7 aggressive for no reason, and while employees are issued gloves, pepper  
8 spray and a bite stick, those are insufficient to protect against BBP.

9 At Citation 2, Items 1, 2 and 3, Mr. Matthews referenced employee  
10 respirator protection requirements, program protection data and medical  
11 evaluations for use. He testified the three cited respirator violations  
12 were related and all based upon the lack of a written respiratory  
13 protection program. During his investigation and employee interviews,  
14 he confirmed most employees did not have respirators, nor could they  
15 produce any respirator use or fitting information. He testified that  
16 documents from 2004 provided City Animal Control Unit employees were to  
17 be issued respirators, but none were produced and the employees did not  
18 know of any. He further testified that he was advised the City recalled  
19 old respirators previously issued and did not issue new ones. The City  
20 informed employees that Animal Control Officers were not required or  
21 intended to utilize respirators in their field of work.

22 At Citation 2, Items 2 and 3, CSHO Matthews testified there were  
23 no medical evaluations of the ACO employees to determine the ability to  
24 use a respirator. He requested documentation but none was produced.

25 Respondent counsel conducted cross-examination of Mr. Matthews as  
26 to the blood borne pathogen and respirator violations. He admitted  
27 there were a few old respirators in the possession of some employees,  
28 but was told they had been overlooked when a return of all respirators

1 was requested based upon new City policy.

2 Complainant called witness Ms. Cynthia Herald. She identified  
3 herself as a dispatch employee of the City Animal Control Department and  
4 previously an ACO for six years. Ms. Herald testified she had been  
5 exposed to blood borne pathogens as an ACO when called to a homicide  
6 scene to pick up a dog who had come in contact with human blood existent  
7 throughout the home of the deceased. Ms. Herald also testified she had  
8 been sent to a suicide crime scene where a dog was in contact with the  
9 victim covered in blood. She testified Metro Police will not retrieve  
10 or control animals at crime scenes but rather call in ACOs to remove  
11 animals. She further testified she was sent to a death scene involving  
12 a woman who suffered a brain hemorrhage and was covered in blood from  
13 "head to foot". Ms. Herald had to pull a cat away from the victim's  
14 body and the animal was covered in human blood. Ms. Herald also  
15 testified she was required as an ACO to enter homes and encountered  
16 fecal matter and urine from both humans and animals on the premises. Ms.  
17 Herald testified she received no training for entry into homes or  
18 property with human blood on the premises.

19 Ms. Herald testified that calls to control birds, hawks and feral  
20 cats are particularly problematic due to the department issued PPE. The  
21 gloves issued cannot be properly utilized to get a grip on the animals  
22 as they are not fitted for employee hand sizes, and therefore do not  
23 facilitate use for the work tasks. She testified in the affirmative to  
24 a question as to whether she ever received cuts or abrasions in dealing  
25 with animals. She testified of an incident where there were 29 cat in  
26 a home and one cat clawed her which resulted in an infection causing a  
27 green color to her leg approximately one-half an hour later.

28 Ms. Herald testified that when she was an ACO she was not



1 provided a respirator. She further testified that when she met with  
2 injured employee Leavitt in the hospital after the dog attack described,  
3 she later removed Ms. Leavitt's jacket and baton from her vehicle which  
4 contained Ms. Leavitt's blood and to which she had contact.

5 At the conclusion of complainant's case respondent presented  
6 evidence and testimony in defense of the alleged violations. Ms. Holly  
7 Jensen identified herself as Safety Officer for the City of Las Vegas  
8 and the responsible employer representative for preparation of the PPE  
9 and BBP assessments. She testified from Exhibit A-2 that the PPE  
10 assessments include ACOs. she developed and wrote the assessment policy  
11 and utilized information from a 30-year Animal Control Department  
12 employee and others to assist and identify the PPE necessary for ACO job  
13 tasks. She testified that Exhibit A-13 showed injured employee Leavitt  
14 was trained in the issued PPE. At Exhibit A-14 she identified a history  
15 of ACO workmens compensation claims and testified that out of 30,000  
16 service calls only seven dog bites occurred to employees in the Animal  
17 Control Department. She testified that Exhibit A-15 is a log of work  
18 injuries (Log 300).

19 At Exhibit A-10 Ms. Jensen testified that when the PPE hazard  
20 assessment was conducted, she spoke with many employees but not one  
21 individual ever raised an issue over omission of PPE. She testified  
22 that injured employee Leavitt had access to PPE in her truck, but only  
23 had on her utility belt and a bite stick when she encountered the  
24 aggressive large dog and suffered injuries. The same PPE equipment was  
25 fully available to her as issued to all ACOs but not carried or utilized  
26 by her when she attempted to control the large dog. She testified the  
27 PPE was adequate for Ms. Leavitt and other ACOs. It includes Kevlar  
28 gloves, pepper spray and a baton or bite stick. She testified Ms.

1 Leavitt was a seasoned ACO and well-trained, so there should have been  
2 no problem with her using her issued PPE in dealing with the animal.  
3 She further testified that if any City employees ever ask for additional  
4 PPE, it is always an open discussion for review.

5 Ms. Jensen identified Exhibit A-5 as the BBP program for any City  
6 employees whose job role would subject them to BBP. Exhibit A-19 is the  
7 City Safety Policy providing guidance for inclusion in the blood borne  
8 pathogen program. She testified the City policy and cited standard only  
9 requires the employer to **assess and identify** employees who may be  
10 subject of exposure and then protection. First, for those who may  
11 encounter "some exposure" and others for "anticipated exposure" to  
12 include them within City BBP program. She referenced the cited standard  
13 29 CFR 1910.1030(i) which provides in pertinent part:

14 "Exposure determination. (i) Each employer who **has**  
15 **an employee(s) with occupational exposure as**  
16 **defined by paragraph (b) of this section** shall  
prepare an exposure determination."

17 Ms. Jensen testified that the City followed both its own guidelines and  
18 the cited section of the standard in the analysis of the ACO job tasks  
19 and exclusion from the BBP program.

20 On continued direct examination, Ms. Jensen testified that dogs and  
21 cats do not carry human BBP for Hepatitis exposure to other humans so  
22 ACOs are not, by job description, included for protection in the  
23 assessments under the definition section of blood borne pathogens in 29  
24 CFR 1910.1030. She testified that in past years many City employees  
25 were included in the BBP program, but after revenue reductions more  
26 intense analyses were mandated in determining who should be included or  
27 excluded based upon job tasks, exposure records, 300 logs, and other  
28 data.

1 Ms. Jensen also testified that the City has an employment policy  
2 for reporting exposure to BBP, but no ACO ever reported any. She also  
3 testified that prior to the Leavitt incident, no complaints were ever  
4 filed by an ACO regarding BBP.

5 Ms. Jensen testified Ms. Leavitt and other ACOs were removed from  
6 the BBP program for the added reason that ACOs are not "first  
7 responders" and do not render first aid, therefore the likelihood of  
8 human blood exposure is very limited. She further testified as to the  
9 lack of likelihood for any general exposure of ACOs to human blood. The  
10 City utilized "blood contractor" on call to clean up blood of any kind,  
11 so there is no job related need for an ACO to ever be exposed to human  
12 blood.

13 Respondent presented witness testimony from Mr. Richard Molinari  
14 who identified himself as an ACO with 14 years experience, an employee  
15 organization representative, and the animal control department  
16 supervisor. He testified that out of 30,000 to 35,000 calls per year,  
17 approximately 700 involve aggressive dogs, but that does not mean ACOs  
18 always encounter an aggressive dog when they actually arrive at the  
19 scene. Mr. Molinari testified the basic standard PPE issued is a bite  
20 stick (baton), pepper spray, Kevlar gloves, a tranquilizer gun, for  
21 distance controls, and a "come along," which is a pole with a noose at  
22 the end. He identified Exhibit A-19 as a report showing that Ms.  
23 Leavitt was provided all of the referenced PPE before the incident and  
24 equipped to prepare and protect herself before she encountered the  
25 aggressive dog. He further testified she had been to the same address  
26 before on an aggressive dog call complaint. He testified Ms. Leavitt  
27 had all her issued PPE equipment in her truck or on her belt. He said  
28 the Leavitt incident was "very rare". He testified there is a big

1 difference between being called to a human death scene to control a dog  
2 and actually contacting human blood. He also testified ACOs are not  
3 required to render first aid or be first responders. Prior to the  
4 Leavitt incident, he had no cases of an ACO requesting additional PPE  
5 or BBP training and/or protection.

6 Mr. Molinari testified that respirator equipment is not required  
7 for ACOs; any that had been issued in prior years was recalled. There  
8 is no applicability of the respirator standards, nor any need or use for  
9 respirators by ACOs as charged in the citation.

10 Mr. Molinari concluded his direct testimony stating that in 14  
11 years as an ACO he has no recollection of any incident like the Leavitt  
12 occurrence and therefore believes there is no need for the cited  
13 additional protection of the PPE standard or inclusion in the BBP  
14 program.

15 On cross-examination Mr. Molinari testified that the Animal Control  
16 Department receives approximately 1,700 to 1,800 calls per year for law  
17 enforcement assistance from Las Vegas Metro to deal with dogs at crime  
18 scenes, fire department or other ACOs.

19 At the conclusion of the presentation of evidence and testimony,  
20 complainant and respondent presented closing argument.

21 The complainant argued the subject matter before the board was not  
22 about the Leavitt case, but rather respirators, PPE, BBP, and proper  
23 training for safety of ACOs. He agreed the City of Las Vegas did  
24 provide some level of protection for its employees as to PPE but the  
25 issue is whether it was "adequate". For example, the gloves issued  
26 could not protect against broken bones from a large dog or an arm bite  
27 higher than the department gloves which reached only to the elbow. As  
28 to BBP, ACOs were included at one time but then excluded due to City

1 policy changes when finances became difficult.

2 On the respirator issues, he argued there was not much evidence  
3 offered but there was a need for respirator use given the witness  
4 testimony; fit testing is required.

5 Counsel concluded by arguing that employee exposure to dog bites  
6 has been established by the Leavitt case, the encounters described in  
7 the testimony of Ms. Herald, and can also be inferred from the testimony  
8 and evidence of the job tasks. The violations were proven.

9 Respondent presented closing argument. Counsel argued that while  
10 it would be good to have all of the protection programs employees often  
11 like or that safety inspectors might prefer, the days of added "belts  
12 and suspenders" as a philosophy of protection must be trumped by the  
13 applicable law. He argued there must be a structure first to determine  
14 whether there is a hazard and then design PPE and BBP programs. The  
15 test of a reasonable person is what you would expect employees to  
16 encounter. He argued that the testimony established there were  
17 thousands of calls to the animal control division, but only a very few  
18 that might have required more PPE or BBP protection. He argued that  
19 while indeed there are "occasions" when an ACO has to go to a crime  
20 scene or be around human blood, the law does not require employers to  
21 design or create programs or cover employees who are not **reasonably**  
22 **anticipated** to encounter certain potential hazards.

23 Counsel argued respirators were simply not used or required in the  
24 Animal Control Department. The City should have collected the old ones  
25 much sooner, but that's why Mr. Matthews noted a few still in the hands  
26 of some employees. There were no needs, or uses for respirators, no  
27 hazards, no exposure, and therefore no need for fitting or training.  
28 He argued it makes no sense to give employees all kinds of equipment

1 that is neither required nor needed for the job task and not applicable  
2 to protect them in their work assignments.

3 Counsel concluded by arguing there was no applicability of the  
4 cited standards to the facts, there were no reasonably anticipated  
5 hazard exposures to ACO employees and the citations should be dismissed.

6 In reviewing the testimony, exhibits, and arguments of counsel, the  
7 board is required to measure same against the elements to establish  
8 violations under Occupational Safety & Health Law based upon the  
9 statutory burden of proof and competence of evidence.

10 In all proceedings commenced by the filing of a  
11 notice of contest, the burden of proof rests with  
the Administrator. (See NAC 618.788(1)).

12 All facts forming the basis of a complaint must be  
13 proved by a preponderance of the evidence. See  
Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD  
¶16,958 (1973).

14 To prove a violation of a standard, the Secretary  
15 must establish (1) the applicability of the  
16 standard, (2) the existence of noncomplying  
17 conditions, (3) employee exposure or access, and  
18 (4) that the employer knew or with the exercise of  
19 reasonable diligence could have known of the  
20 violative condition. See Belger Cartage Service,  
21 Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979  
22 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979);  
23 Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC  
24 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10  
25 (No. 76-1408, 1979); American Wrecking Corp. v.  
26 Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir.  
27 2003).

28 A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;
2. The situation was in compliance; or lack of access to a hazard. See, Anning-Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

The citations and alleged violations charged three specific areas of protection required for City employees of the Animal Control

1 Department and specifically Animal Control Officers (ACOs). The areas  
2 included personal protective equipment (PPE), blood borne pathogen  
3 exposure and protection (BBP) and personal respirator protection and  
4 use.

5 At Citation 1, Item 1, referencing 29 CFR 1910.132(a), the evidence  
6 and testimony did not establish by a preponderance of evidence that the  
7 PPE provided to ACO employees was inadequate to meet the requirements  
8 of the standard. 29 CFR 1910.132(a) requires PPE ". . . whenever it  
9 is necessary by reason of hazards or processes . . .". The weight of  
10 testimony established that ACOs are provided with adequate equipment  
11 they can safely use to protect themselves in the performance of the job  
12 task. The testimony of Ms. Jensen was that an analysis of PPE was  
13 meaningfully undertaken by conferring with long-standing department  
14 employees, the employee representative organization and supervisors in  
15 the department. Supervisor Molinari with 14 years experience testified  
16 the PPE issued to ACOs is adequate protection for the job requirements.  
17 In the reported Leavitt injury case, it was unrebutted that Ms. Leavitt  
18 did not bring all of her issued PPE when she approached an aggressive  
19 animal, but rather left a substantial portion of that equipment in her  
20 truck. Employers cannot provide equipment to protect employees from  
21 every possible unusual or extraordinary incident, but only that which  
22 can **reasonably be expected to be encountered in the performance of the**  
23 **job task.** The evidence established from the testimony of CSHO Matthews  
24 was that after reviewing previous OSHA 300 logs and workmens  
25 compensation data, no incidents like that occurring to Ms. Leavitt  
26 previously occurred. Ms. Jensen testified that out of 30,000 calls to  
27 the animal control department, only seven dog bites were reported to  
28 have occurred. Exhibit A-15 of the log of work injuries did not

1 demonstrate a need for additional PPE or requirements for the use of  
2 respirators. Mr. Molanari testified that out of 30,000 to 35,000 calls  
3 per year, approximately 700 involve aggressive dogs.

4 At Citation 1, Item 2, referencing 29 CFR 1910.1030(c)(2)(I) there  
5 was a preponderance of direct evidence and that subject of inference to  
6 support identification of ACOs for **occupational exposure** and therefore  
7 inclusion in the employer BBP program. The evidence established that  
8 it should be **reasonably anticipated** that some ACOs could come in contact  
9 with BBP. 29 CFR 1910.1030(b) defines "**Occupational Exposure**" as:

10 "**reasonably anticipated** skin, eye, mucous membrane  
11 . . . contact with blood or potentially infectious  
12 materials, may result from the performance of an  
employee's duties." (Emphasis added)

13 By focusing on the job description of an Animal Control Officer, which  
14 under strict interpretation may not indicate **regular** exposure to **human**  
15 blood or BBP, the City appeared to have simply excluded ACOs based upon  
16 medically known non-transference of animal blood to humans and the BBP  
17 definitions in 29 CFR 1910.1030 requiring BBP protection from only **human**  
18 BBP. The witness testimony from both complainant and respondent  
19 demonstrated a **potential** for ACO exposure to human blood borne  
20 pathogens. Sgt. Molinari testified:

21 ". . . there's **always the potential** . . . based on  
22 my calls for service that I've done over the years,  
23 I think I've only seen a **handful of** - you know,  
24 come across **incidences like that in regards to**  
**blood.**" (Emphasis added) Transcript, page 184,  
lines 4-8.

25 Employee Herald testified she had been to crime scenes where  
26 animals were in contact with human blood and had to then be handled by  
27 her as an ACO. Her supervisor, Mr. Molinari, did not directly refute  
28 her testimony as to the various crime scene or emergency assistance



1 incidents of potential BBP exposure. (Transcript, page 186, lines 9-14)  
2 The Animal Control Department is small (approximately 12 employees); the  
3 evidence permits an inference that supervisor Molinari would be very  
4 familiar with the unusual calls subject of the Herald testimony. No  
5 Animal Control Department employees rebutted the sworn testimony of Ms.  
6 Herald as to potential BBP exposure.

7       However, even without the testimony of Ms. Herald, the documentary  
8 evidence, testimony, job descriptions, and reasonable inferences from  
9 the direct evidence, established that it is **reasonable to anticipate** ACO  
10 contact with BBP and appropriate to include ACOs in a blood borne  
11 pathogen program. An ACO could be bitten by an aggressive dog or other  
12 animal and human blood from a wound contacted by another ACO. Similarly  
13 an ACO arriving at a site to control an aggressive dog could come in  
14 contact with an owner or other individual bitten by a dog or cat and be  
15 exposed to the hazards of human blood borne pathogens. Unrefuted  
16 evidence of approximately 1,700 animal control calls yearly to crime  
17 scenes from the Metro Police Department and/or other law enforcement  
18 assistance, warrants a reasonable inference for the potential of animals  
19 contacting human blood and the ACO controlling that animal subjected to  
20 BBP exposure.

21       As to Citations 1, Items 3 and 4, the board finds that while the  
22 referenced standards are related to Citation 1, Item 2, they are not  
23 automatically inclusive to a finding of violation at Citation 1, Item  
24 2. Citation 1, Item 2 essentially required an analysis of employee job  
25 descriptions, to reach a threshold determination of whether ACO  
26 employment work tasks **potentially** expose employees to **human** blood or BBP  
27 (**have occupational exposure**); and then inclusion or exclusion for  
28 protection in a BBP program. At Citation 1, Item 3, alleging the

1 employer failed to provide Hepatitis or other vaccinations, the standard  
2 requires, in pertinent part:

3           ". . . the employer shall make available the  
4           Hepatitis B vaccine and vaccination series to all  
5           employees **who have occupational exposure . . .**".

6 While the board finds that the City erred in its analysis of the  
7 criteria for ACO employee occupational exposure perhaps by over-emphasis  
8 on the cited standard policy and definition section in 29 CFR 1910.1030,  
9 there is insufficient evidence to prove a violation of Citation 1, Item  
10 3.

11           The evidence at Citation 1, Item 4, does not provide sufficient  
12 evidence to find a violation. Similar to the foregoing rationale at  
13 Citation 1, Item 3, training in a BBP program is indeed related to the  
14 identification of employees **with occupational exposure** for inclusion or  
15 exclusion. The cited standard provides, in pertinent part

16           ". . . the employer shall train each employee **with**  
17           **occupational exposure** in accordance with the  
18           requirements of this section."

19 However, while related to Citation 1, Item 2, the follow on alleged non-  
20 complying conditions and hazard exposure are not inherently inclusive  
21 to automatically establish a violation without substantial evidence and  
22 proof by a preponderance.

23           The evidence at Citation 2, Items 1, 2 and 3, failed to meet  
24 complainant's burden of proof to establish violations. Respirators were  
25 not used within the Animal Control Department for many years, having  
26 been recalled due to a City decision of lack of need for use by ACOs.  
27 There was no applicability of the respirator standard to the employee  
28 work tasks. There was no evidence that ACO employee job assignments  
29 required respirator use, fitting or training.

30           Based upon the facts, evidence and applicable law, the board finds

1 and confirms a violation at Citation 1, Item 2, for failure to identify  
2 employees with **potential occupational exposure** to blood borne pathogens  
3 in the animal control department of the City of Las Vegas. The standard  
4 was **applicable** to the facts in evidence. While the evidence  
5 demonstrated the City engaged in good faith efforts to comply with the  
6 scope and standard definitions in 29 CFR 1910.1030 for analysis by  
7 conducting the mandated exposure determination under 29 CFR  
8 1910.1030(c)(2)(i), it failed to properly consider all available  
9 relevant facts and data, and thereby include ACOs in the BBP program.  
10 The ACO job tasks involved the **reasonable potential for exposures** to  
11 human BBP.

12 The related citations at Citation 1, Items 3 and 4 are not all-  
13 inclusive to a finding of violation of Item 1; but rather require proof  
14 by a preponderance which was not established. The board finds no  
15 violation of Citation 1, Items 3 and 4.

16 Citation 2 charges of alleged violations with regard to the  
17 respirator referenced standards failed for lack of proof. The standards  
18 were not **applicable** to the facts in evidence. There was no evidence  
19 that respirators were either required, used, or even currently issued  
20 to employees within the department. Accordingly, there was no  
21 requirement to provide information, training or fitting for respirator  
22 use.

23 The evidence with regard to personal protective equipment,  
24 established that for the type of work **reasonably encountered** by ACOs,  
25 the issued PPE was adequate for the identified job tasks. The weight  
26 of evidence showed that on a survey of employees under an analysis of  
27 PPE needed for the workplace, no employee complaints or other evidence  
28 was discovered to support violation of the cited standard. Indeed the

1 employer issued longer gloves or those offering more dexterity after the  
2 Leavitt incident; however the failure to have that additional equipment  
3 available to a trained officer is not preponderant evidence of an  
4 insufficient personal protective program or a mandate for issuance of  
5 added specialized PPE. The weight of evidence requires that no  
6 violations be found at Citation 2, Item 1, 2 and 3.

7 At Citation 1, Item 2, the evidence does not support a  
8 classification of a **serious** violation. NRS 618.625 provides in  
9 pertinent part:

10 ". . . a serious violation exists in a place of  
11 employment if there is a **substantial probability**  
12 **that death or serious physical harm could result**  
13 **from a condition** which exists, or from one or more  
14 practices, means, methods, operations or processes  
of employment **unless the employer did not and could**  
**not, with the exercise of reasonable diligence,**  
**know** of the presence of the violation."

15 The weight of testimonial evidence reflected the employer made a  
16 good faith determination for identification of employees for inclusion  
17 or exclusion in a City BBP program, but merely failed to consider all  
18 available information and data and that which could be derived from  
19 appropriate inference to include ACO employees in the City BBP program.

20 The issue before the board as to the violation classification is  
21 not that any serious injury occurred but whether there is a reasonable  
22 potential for same to occur and then **probability** that death or serious  
23 physical harm could occur from the condition. The violation confirmed  
24 at Citation 1, Item 2, is for the **failure to identify ACO employees to**  
25 **have occupational exposure and therefore subject to inclusion in the BBP**  
26 **program.** While the unique and extraordinary case of Ms. Leavitt  
27 demonstrated she sustained injuries, the **substantial probability** for  
28 serious injuries or death from ACO exposure due to failure to identify

1 and include ACO employees in a BBP program does not warrant a serious  
2 classification. There was no preponderance of evidence in the record  
3 to support the classification of the violation as serious.

4 The Federal courts recognize the exclusive authority of the  
5 Commission (Board) to assess or adjust penalties.

6 If an employer contests the Secretary's proposed  
7 penalty, the Review Commission has exclusive  
8 authority to assess the penalty, the Secretary's  
9 penalty is considered merely a proposal. Relying  
10 on the language of Section 17(j), the Commission  
11 and courts of appeal have consistently held that it  
12 is for the Commission to determine, de novo, the  
13 **appropriateness of the penalty** to be imposed for  
14 violation of the Act or an OSHA standard. (Emphasis  
15 added)

16 The Review Commission therefore is not bound by  
17 OSHA's penalty calculation guidelines. The  
18 Commission evaluates all circumstances of a  
19 violation in light of the four factors prescribed  
20 by Section 17(j) of the Act in determining what  
21 penalty, if any, should be assessed. The Review  
22 Commission has held that the criteria to be  
23 considered cannot always be given equal weight and  
24 that no single factor is controlling in assessing  
25 penalties. Nevertheless, the gravity of a  
26 violation continues to be the primary factor the  
27 Commission considers when determining the  
28 appropriate penalty. Rabinowitz Occupational Safety  
and Health Law, 2008, 2<sup>nd</sup> Ed., pages 248-150, citing  
cases, U.S. Ladish Malting Co., 135 F.3d 484, 18  
OSH Cases 1133 (7<sup>th</sup> Cir. 1998); Reich v. Arcadian  
Corp., 110 F.3d 1192, 17 OSH Cases 1929 (5<sup>th</sup> Cir.  
1997) (citing 29 U.S.C. §§666(j), 659(a), 659(c));  
Bush & Burchett Inc. V. Reich, 117 F.3d 932, 939,  
17 OSH Cases 1897, 1903 (6<sup>th</sup> Cir.), cert. denied,  
118 S. Ct. (1997). Quality Stamping Prods. Co., 16  
OSH Cases 1927 (Rev. Comm'n 1994); Hern Iron Works  
Inc., 16 OSH Cases 1619 1621-23 (Rev. Comm'n 1994)  
(Commission gives no substantial deference to  
OSHA's proposed penalty assessment); Roberts  
Pipeline Constr. Inc., 16 OSH Cases 2029, 2030  
(Rev. Comm'n 1994), aff'd, 17 OSH Cases 1633 (7<sup>th</sup>  
Cir. 1996) (unpublished opinion); Bomac Drilling,  
Ry., 8 OSH Cases 1681 (Rev. Comm'n 1981); Delaware & H.  
Equip. Co., 7 OSH Cases 1209 (Rev. Comm'n 1979),  
aff'd, 637 F.2d 741 (10<sup>th</sup> Cir. 1980); Long Mfg. Co.,  
N.C., Inc. v. OSHRC, 554 F.2d 903, 5 OSH Cases 1376  
(8<sup>th</sup> Cir. 1977); Clarkson Constr. Co. v. OSHRC, 531

1 F.2d 451, 3 OSH Cases 1880 (10<sup>th</sup> Cir. 1976); Dan J.  
2 Sheehan Co. v. OSHRC, 520 F.3d 1036, 3 OSH Cases  
3 1573 (5<sup>th</sup> Cir. 1975), *cert. denied*, 424 U.S. 965  
4 (1976); California Stevedore & Ballast Co. v.  
5 OSHRC, 517 F.2d 986, 3 OSH Cases 1174 (9<sup>th</sup> Cir.  
6 1975). Caterpillar Inc., 18 OSH Cases 1005, 1010  
7 (Rev. Comm'n 1997), *aff'd*, 154 F.3d 400, 18 OSH  
8 Cases 1481 (7<sup>th</sup> Cir. 1998); National Eng'g &  
9 Contracting Co., 18 OSH Cases 1075, 1082 (Rev.  
10 Comm'n 1997), *aff'd*, 181 F.3d 715 (6<sup>th</sup> Cir.), *cert.*  
11 *denied*, 120 S. Ct. 578 (1999); Pentecost  
12 Contracting Corp., 17 OSH Cases 1953 (Rev. Comm'n  
13 1997); Pepperidge Farm Inc., 17 OSH Cases 1993,  
14 2013 (Rev. Comm'n 1997); Hern Iron Works Inc., 16  
15 OSH Cses 1619, 1624 (Rev. Comm'n 1994). Valdak  
16 Cor., 17 OSH Cases 1135, 1137-38 & n.5 (Rev. Comm'n  
17 1995), *aff'd*, 73 F.3d 1466, 17 OSH Cases 1492 (8<sup>th</sup>  
18 Cir. 1996) (while not exceeding the Secretary's  
19 proposed penalty, the Commission noted that the Act  
20 "places no restrictions on the Commission's  
21 authority to raise or lower penalties within those  
22 limits").

23 "The Commission . . . may reduce or eliminate a  
24 penalty by **changing the citation classification** or  
25 by amending the citation . . .". See Reich v.  
26 OSCR (Erie Coke Corp.), 998 F.2d 134, 16 OSH Cases  
27 1241 (3d Cir. 1993) (emphasis added)

28 The board finds, as a matter of fact and law, that a violation did  
occur as to Citation 1, Item 2, 29 CFR 1910.1030(c)(2)(i). The  
violation is reclassified from "Serious" to "Other than Serious". The  
proposed penalty is reduced from Four Thousand Six Hundred Twenty  
Dollars (\$4,620.00) to One Thousand Dollars (\$1,000.00).

The board further finds, as a matter of fact and law, that no  
violations did occur as to Citation 1, Item 1, Citation 1, Item 3,  
Citation 1, Item 4, Citation 2, Item 1, Citation 2, Item 2, and Citation  
2, Item 3.

It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as  
to Citation 1, Item 2, 29 CFR 1910.1030(c)(2)(i). The classification  
of the violation is "Other than Serious" and the proposed penalty in the

1 total sum of One Thousand Dollars (\$1,000.00).

2 The Board directs counsel for the complainant, to submit proposed  
3 Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL**  
4 **SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel  
5 within twenty (20) days from date of decision. After five (5) days time  
6 for filing any objection, the final Findings of Fact and Conclusions of  
7 Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
8 **REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and  
9 Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL**  
10 **SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the  
11 **BOARD.**

12 DATED: This 7th day of March 2012.

13 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
14 REVIEW BOARD

15 By /s/  
16 JOE ADAMS, CHAIRMAN