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MSHA V. FMC WYOMING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 25, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. WEST 86-43-RM
WEST 86-45-RM
FMC WYOMING CORPORATION WEST 86-110-M

BEFORE: Ford, Chairman; Backley, Doyle and Lastowka, Commissioners

DECISION

BY: Ford, Chairman; Backley, and Lastowka, Commissioners

At issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982)(the "Mine Act"), is whether FMC-Wyoming Corporation' violation of 30 C.F.R. 57.5002 was significant and substantial in nature and caused by its unwarrantable failure to comply with the mandatory safety standard. 1/ Also at issue is whether FMC violated 30 C.F.R. 57.18002 by failing to designate a "competent person" to examine a working place at least once each shift for conditions which may adversely affect safety or health, or by failing to keep a record of such examinations. 2/ Commission Administrative Law

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1/ 30 C.F.R. 57.5002 provides:

> Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures.

2/ 30 C.F.R. 57.18002 provides in part:

> (a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such

Judge August F. Cetti answered these questions in the negative. 10 FMSHRC 822 (June 1988)(ALJ). For the reasons explained below, we vacate that portion of the judge's decision concerning the significant and substantial nature of the violation of section 57.5002 and remand the matter to the judge for further consideration. In addition, we reverse the judge's unwarrantable failure finding and his conclusion that FMC did not violate section 57.18002.

The material facts are not in controversy. FMC operates a trona mine located near Green River, Sweetwater County, Wyoming. At an adjacent plant FMC processes trona into various products. The "Sesqui" powerhouse, which is part of the processing plant, houses three turbines that generate electricity for the plant. FMC overhauls the turbines every five years. The No. 3 turbine was scheduled for overhaul in November 1985, and on November 4, 1985 a work crew began to dismantle the turbine. It took three days to remove insulation from the turbine, and the debris lay scattered about the immediate area and on the floors of the powerhouse for approximately two weeks while the overhaul was completed.

To overhaul the turbine, the work crew first removed the turbine cover. Underneath the cover was blanket-type insulation containing asbestos. This insulation was removed in pieces and the blankets were dropped over a handrail near the turbine for temporary storage. Next, the crew disassembled the halves of the turbine. In order to gain access to the bolts holding the halves together, the workers removed two other types of insulation containing asbestos. The first layer of insulation was mortar-like and was imbedded in chicken wire. It had to be chipped away and the chicken wire had to be cut. As it was removed, pieces of the insulation fell down either side of the turbine to the ground floor of the powerhouse.

Underneath this mortar-like insulation were "bricks" of additional insulation held in place by baling wire. The bricks were soft and "chalky." As the baling wire was cut, the bricks fell to the ground floor of the powerhouse.

When the mortar-like insulation was being removed by the workers, dust was created as the workers used hammers and chisels to break up and loosen the material. Tr. 168, 214-216, 232, 243-44. Further, when pieces of the insulation fell to the floor more dust was created. In addition, when members of the work crew walked through the debris, dust was stirred up, and when the powerhouse doors were opened for ventilation purposes, the wind created a literal "dust storm." Tr. 174, 198, 233, 241. 10 FMSHRC at 824-25. Members of the work crew asked their foreman, John Wilfong, if the insulation they were handling contained asbestos and whether it was safe to handle. Tr. 80, 220-235,

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conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

245-246. Wilfong responded that "he didn't believe there was," (Tr. 80) that there was "not enough to worry about," (Tr. 220) and that "there was no problem, there was no asbestos in it." Tr. 177.

Previously FMC had analyzed the insulation. In July 1985, FMC had determined that the blanket wrap insulation contained 90 percent asbestos and the non-blanket wrap insulation contained 35 percent asbestos. Pet. Exh. M.5, Tr. 278-283. The results of this analysis were recorded in a memorandum dated July 1, 1985. The memorandum was authored by FMC's industrial hygienist, Carl Watson, and was circulated to FMC's supervisors, including Mike Hruska, who supervised the work crew's foreman, John Wilfong. Pet. Exh. M-5. In an earlier memorandum dated, June 11, 1985, Watson had reported similar results from analysis of other samples of the insulation.

FMC did not conduct dust surveys at any time during the overhaul of the turbine. 10 FMSHRC at 824. Nor was an FMC industrial hygienist on hand to observe the work and to recommend protective equipment as required by FMC's policy. 3/ On November 18, 1985, FMC's industrial hygienist, Carl Watson, visited the work area. Watson came to the powerhouse to check on the work of another crew removing asbestos containing insulation from a different area of the powerhouse. When Watson noticed the blanket insulation draped over the handrail and the other insulation lying on the floor, he gave his opinion to the crew foreman that the insulation could contain asbestos and that it should be properly bagged and protective measures taken.

On November 19, 1985, an inspector of the Secretary of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the powerhouse. The inspector observed a clean.up crew at the turbine wearing protective clothing and masks. In addition, he observed Watson collecting samples of the insulation. The inspector collected samples of the bagged material. Subsequent analysis of the inspector's samples established that the insulation contained asbestos. 10 FMSHRC at 825.

3/ An FMC memorandum dated May 17, 1985, states the following regarding degrees of exposure to asbestos and commensurate protective measures.

> (b) Moderate exposure. Examples would be grinding asbestos impregnated gaskets off pipe flanges, removing asbestos containing insulation from boilers, pipes and turbines, removing or installing asbestos containing packing glands, replacing or repairing brakes or brake drums or lining, and drilling or cutting transite pipe. Anytime these jobs are being performed, the Industrial Hygienist should be called to observe the job and to recommend protective equipment.

Pet. Exh. 4 (emphasis added).

On November 23, 1985, the inspector took two enforcement actions that are contested here. The inspector issued to FMC a citation pursuant to section 104(d)(1) of the Act, 30 U.S.C. 814(d)(1), stating that FMC's failure to make surveys to determine if the workers were over-exposed to asbestos violated section 57.5002. This citation included the inspector's findings, made pursuant to section 104(d), that the violation was of a significant and substantial nature and resulted from unwarrantable failure by the operator.

In addition, the inspector issued to FMC an order of withdrawal pursuant to section 104(d)(1) of the Act alleging that FMC violated section 57.18002. See n.2, supra. The order stated that FMC management failed to notify the workmen that they would be working with asbestos and that there was no record of examinations of the work area. Again, the inspector made associated significant and substantial and unwarrantable failure findings.

FMC contested the validity of the citation and order, the special findings associated with the section 104(d)(1) citation, and the civil penalties proposed by the Secretary for the alleged violations. FMC argued that it had not violated section 57.5002, that the standard's requirement to conduct exposure surveys "as frequently as necessary to determine the adequacy of control measures" should be read in conjunction with the regulatory exposure limits for contaminants. 4/ FMC asserted that because the Secretary did not establish that the exposure limit for asbestos dust had been exceeded during the asbestos removal operation, the Secretary had not established the violation of section 57.5002.

FMC also argued that to prove a violation of section 57.18002 the Secretary must establish either that no competent person inspected the working place or that no record of the examination was made. FMC asserted that the Secretary had proven neither.

The judge concluded that FMC had violated section 57.5002. The judge, noting that without dust surveys having been performed while the work was in progress there was no way to determine whether an employee in the work area actually was overexposed to contaminants, rejected FMC's argument that proof of a violation is conditioned on establishing an exposure to airborne contaminants in excess of the regulatory limits. 10 FMSHRC at 826.27. The judge found that a reasonably prudent person would have conducted dust surveys to determine what control measures would be adequate to prevent the possible overexposure of the workers to asbestos during the three days the maintenance crew removed the insulation from the turbine. 10 FMSHRC at 826. The judge further found, without explanation, that the violation was not of a significant and substantial nature.

Regarding the inspector's unwarrantable failure finding, the judge concluded that because FMC had a policy at the time the citations were issued regarding asbestos identification and cleanup and because workers

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4/ See 30 C.F.R. 57.5001.

in another part of the plant had taken protective measures while removing asbestos-containing insulation, FMC was not indifferent to the hazards of airborne asbestos and its failure to comply with section 57.5002 was due to ordinary negligence. 10 FMSHRC at 828. The judge therefore modified the section 104(d)(1) citation to a citation issued pursuant to section 104(a) of the Act, 39 U.S.C. 814(a), and assessed a civil penalty of $600 for the violation.

Finally, the judge found that FMC had not violated section 57.18002 because the Secretary failed to prove that there was no examination of the working place by a competent person or that no records of the examinations were made. 10 FMSHRC at 830. The judge therefore vacated the section 104(d)(1) withdrawal order in which the violation was alleged.

On review, the Secretary argues that the judge erred in three respects: (1) in concluding that FMC's violation of section 57.5002 was not of a significant and substantial nature; (2) in concluding that the violation was not due to FMC's unwarrantable failure to comply with the standard; and (3) in concluding that FMC did not violate section 57.18002. We consider each of these challenges in turn.

I.

A violation is properly designated as being of a significant and substantial nature if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). In Consolidation Coal Co., 8 FMSHRC 890, 897-98 (June 1982), aff'd, 824 F.2d 1071 (D.C. Cir. 1987), the Commission explained that adapting the National Gypsum/Mathies test to a violation of a mandatory health standard results in the following formulation of the elements necessary to support a significant and substantial finding:

> (1) The underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

The administrative law judge cited the general applicability of this test, but provided no justification for his conclusion that the violation was not of a significant and substantial nature. Compare FMC Wyoming Corp., 8 FMSHRC 264, 275.276 (February 1986)(ALJ Lasher) (applying all elements of significant and substantial test to mandatory health standard involving asbestos exposure).

Commission Procedural Rule 65, 29 C.F.R. 2700.65, requires that a judge's decision include findings of fact, conclusions of law, and

supporting reasons. 5/ Compliance with these requirements is essential to the fulfillment of our statutorily mandated review function. Without some explanation and justification for conclusions reached by a judge, we cannot effectively perform our function. See Youghiogheny & Ohio Coal Co., 7 FMSHRC 1335 (September 1985); The Anaconda Co.. 3 FMSHRC 299 (February 1981). In view of the total lack of explanation in support of the judge's conclusion that the violation of 30 C.F.R. 57.5002 was not significant and substantial, we vacate the judge's decision with regard to his significant and substantial finding and remand the matter for the entry of a decision that accords with Commission Procedural Rule 65. In so doing, we express no opinion regarding the merits of the significant and substantial issue.

II.

"Unwarrantable failure" means "aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2015 (December 1987). In concluding that FMC did not unwarrantably fail to comply with section 57.5002, the judge found that FMC was not indifferent to the health hazards associated with airborne asbestos in that it had in place at the time of issuance of the citation a policy regarding asbestos identification and cleanup and that in another part of the powerplant a different work crew removing asbestos-containing insulation had protective clothing and equipment. 10 FMSHRC at 828.

These facts are overwhelmed by other evidence of record establishing FMC's aggravated conduct regarding its failure to provide dust surveys during the overhaul of the turbine. FMC's written asbestos policy expressly identified the asbestos-containing nature of all three types of insulation in the turbine being overhauled, as well as the need to take steps to prevent workers' exposure to asbestos. Pet. Exhs. 4, 5, 6. FMC's policy specifically called for the presence of an industrial hygienist and protective equipment when asbestos-containing insulation was removed from a turbine. Pet. Exh. 4. During the removal of the insulation, however, a hygienist was not present and the workers were afforded no protection. Watson, FMC's industrial hygienist, apparently did not become aware that insulation was being removed from the turbine until he inadvertently observed the work on November 18, 14 days after the crew had begun dismantling the turbine.

Further, the maintenance supervisor, Mike Hruska, stated that he

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5/ Procedural Rule 65 states in part:

> (a) Form and content of the Judge's decision. The judge shall make a decision that constitutes his final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record....

had been told by the FMC maintenance superintendent to suspect that all insulation at the plant contained asbestos. Tr. 317; see also Pet. Exh. M-7 ("when in doubt, assume a material to be, or contain asbestos"). Yet, Hruska ordered no surveys to be taken in the work area. In addition, and importantly, despite the recognition by FMC of the potential asbestos hazard associated with the removal of the insulation from the turbine, the supervisor of the work crew, Wilfong, when asked by a member of the crew if there was asbestos in the insulation, without any apparent further inquiry into the legitimate and serious concerns raised by the work crew, erroneously responded that asbestos was not present. Tr. 220, 235, 246.

In light of the egregious nature of this evidence, we find no substantial support for the judge's contrary conclusion that the violation was not the result of FMC's unwarrantable failure to comply. In fact, that FMC had a policy in place regarding asbestos identification and cleanup and that another crew in a different part of the plant was protected while engaging in similar work, in our view heightens, rather than excuses, FMC's lack of care with respect to this violation. We therefore conclude that FMC exhibited aggravated conduct exceeding more than ordinary negligence regarding the violation and the judge's finding of no unwarrantable failure is accordingly reversed.

III.

Finally, the Secretary asserts that the judge erred in concluding that she did not prove that FMC had violated section 57.18002. The pertinent requirements of 30 C.F.R. 57.18002 are three-fold: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator. The judge concluded that the Secretary failed to prove that there was no examination of the working place by a competent person or that no records of the examinations were made. The judge noted that FMC had introduced into evidence an MSHA program directive clarifying the record keeping requirements of the standard and requiring that the record of examinations include: (a) the date and shift; (b) the person(s) conducting the examination; and (c) the working place examined. The directive states that "citations of violations of this standard are to be issued only where there has been a failure to conduct an examination of a work place or a failure to record that an examination was done." 10 FMSHRC at 830. The judge further noted that FMC also introduced into evidence a log of the examinations of the powerhouse for safety or health hazards during the period of the turbine's overhaul and that the log complied with the directive by showing the date and shift on which the examinations were conducted and the names of the persons conducting the examinations and the work places examined. Id.

The Secretary contends, however, that by focusing on the directive and the record of the examinations, the judge ignored the question of whether the person conducting the examination was competent, and we agree. According to the Secretary, the program directive concerns the requirements for the recording of the examinations required by section

57.18002; it does not concern the competence of the person designated to conduct the examinations. We agree.

30 C.F.R. 57.2 defines "competent person" as "a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned." As with many safety and health standards, sections 57.18002(a) and 57.2 are drafted in general terms in order to be broadly adaptable to the varying circumstances of a mine. Kerr-McGee Corp., 3 FMSHRC 2496,97 (November 1981). We conclude that the term "competent person" within the meaning of sections 57.18002(a) and 57.2 must contemplate a person capable of recognizing hazards that are known by the operator to be present in a work area or the presence of which is predictable in the view of a reasonably prudent person familiar with the mining industry. See e.g., Ozark-Mahoning Co., 8 FMSHRC 190, 191 (February 1986); U.S. Steel Corp., 6 FMSHRC 1908, 1910 (August 1984); Compare, 29 C.F.R. 1926.32(f). The question is whether FMC designated such a person to examine the turbine workplace. We find the evidence overwhelming in the record that it did not.

The hazard posed by the turbine's asbestos-containing insulation was well known to FMC. FMC's policy stated as much. Yet, Wilbur Hastings, the only FMC employee designated as an examiner under this standard who testified, stated that he had not seen FMC's memorandum regarding the presence of asbestos in turbine insulation, that he was unaware of the presence of asbestos-containing material in the turbine, and that he had no training in asbestos recognition. Tr. 520-23. Thus, although FMC knew that asbestos was present in the turbine insulation it nonetheless designated as a shift examiner a person to whom this knowledge had not been communicated, nor had Hastings been trained to suspect that asbestos reasonably might be present. Without this knowledge, Hastings cannot be said to have had the ability and experience fully qualifying him to examine the work place around the turbine for conditions which might adversely affect safety and health.

In sum, we conclude that Hastings was not a "competent person" within the meaning of section 57.18002(a), that substantial evidence does not support the judge's conclusion that FMC complied with the regulation, and that FMC, by assigning Hastings to examine the workplace, violated the regulation.

IV.

Accordingly, we vacate the judge's decision regarding the finding that the violation of section 57.5002 did not significantly and substantially contribute to a mine health hazard and we remand the matter for reconsideration and entry of new findings, conclusions and the reasons for them. In addition, we reverse the judge's conclusion that the violation of section 57.5002 was not the result of FMC's unwarrantable failure to comply and remand for reassessment of the penalty. Finally, we reverse the judge's conclusion that FMC did not violate section 57.18002 and we remand to the judge for the assessment of an appropriate civil penalty. 8/

8/ Commissioner L. Clair Nelson did not participate in the consideration of this matter.

Commissioner Doyle, concurring in part and dissenting in part:

In its decision, the majority vacates the judge's finding that the violation of section 57.5002 did not significantly and substantially contribute to a mine health hazard and remands the matter for further analysis by the judge. I concur with that part of the decision.

I must respectfully dissent, however, from the majority's finding that FMC unwarrantably failed to comply with section 57.5002 because I find substantial evidence in the record to support the judge's conclusion to the contrary. In addition, I would affirm the judge's determination that FMC did not violate section 57.18002.

In addressing whether FMC's conduct amounted to an unwarrantable failure to comply with section 57.5002's requirement that dust surveys be conducted as frequently as necessary in order to determine the adequacy of control measures, the judge took notice of and applied the Commission's explication of that term in Emery Mining Corp., 9 FMSHRC 1997 (December 1987). The judge correctly concluded that indifference or aggravated conduct beyond ordinary negligence must be present for a finding of unwarrantable failure. Emery, supra, 9 FMSHRC at 2003-2004.

The judge, in rejecting a finding that unwarrantable failure was involved, cited several considerations that led him to conclude that FMC was not indifferent to the hazard of asbestos at its plant. Among these considerations were the fact that FMC had shown an awareness and attention to the hazard and had undertaken a program for its identification and cleanup. FMC had analyzed various samples to determine where asbestos might exist, including samples of the insulation on the turbine involved in this case. The judge noted that FMC's industrial hygienist had distributed to senior management a memorandum identifying the plant's asbestos hazards. The judge also cited the absence of knowledge on the maintenance foreman's part of an asbestos hazard with respect to the turbine and the lack of evidence that, had the industrial hygienist been aware of the work being done on the turbine, the policy would not have been implemented. 10 FMSHRC at 828. The judge weighed the evidence presented and articulated his reasons for finding that FMC's conduct did not reach the level of unwarrantable failure.

The Commission has previously acknowledged that a judge's findings are not to be lightly overturned and that reversal of those findings requires a conclusion that there is either no evidence or dubious evidence to support the challenged findings. Secretary v. Consolidation Coal Company, 11 FMSHRC 966 at 974 (June 1989). In my view, the evidence cited above and relied upon by the judge constitutes "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion" and, accordingly, I would affirm the judge's finding that FMC did not

unwarrantably fail to comply with the standard, See Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Chaney Creek Coal Corp. v. FMSHRC, 866 F.2d 1424, 1431 (D.C. Cir. 1989). 1/

The majority also concludes that the judge erred in finding that FMC did not violate section 57.18002 and its requirement that a competent person examine each working place at least once each shift. The judge based his determination on an MSHA Program Directive dated November 20, 1979 (the "Program Directive"), that addresses the recordkeeping requirements of the standard. The Program Directive provides that citations were to be issued under the standard only where there was a failure to conduct an examination or a failure to record its occurrence. Significantly, the directive provides that violations of the standard were not to be cited where a hazard is already covered by another standard, thus avoiding a situation wherein an operator is cited for the violation of a safety standard and also cited for violation of section 57.18002, based on the examiner's failure to identify the violative condition. The judge found that the Secretary's Program Directive correctly interpreted the standard and that there was no failure either to make an examination or to record the fact thereof. Thus, he concluded that there was no violation of section 57.18002. 10 FMSHRC at 830. Because of that conclusion, the judge did not reach the question of, and made no findings of fact as to, the competence of any of those charged by FMC with making the shift examinations in question.

The Secretary's Petition for Discretionary Review did not challenge the judge's determination that the Program Directive represents a correct interpretation of the standard. Neither did it challenge his conclusion, based on that interpretation, that there is no violation of section 57.18002 where an inspection is performed and the hazard in issue is addressed by another standard, as it was in this case by section 57.5002. Absent a challenge by the Secretary to these conclusions reached by the judge, I believe that the judge's decision, based on those conclusions, must stand. 2/

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1/ The majority uses FMC's own company policy addressing the handling of asbestos hazards as a basis for heightening the degree of care FMC owed, thus suggesting that operators are less accountable if they do nothing with regard to asbestos than if they attempt to identify its presence and deal with it. I believe such an approach discourages, rather than encourages, responsible conduct.

2/ The Commission did not order review of this determination, sua sponte. pursuant to section 113(d) of the Mine Act, 30 U.S.C. 823 (d) (1982).

The Secretary's Petition for Discretionary Review argues only that FMC failed to designate a competent person to examine the work place. The majority addresses the Secretary's argument and makes its own factual determination that a competent person was not assigned. This finding was based, in part, on the fact that Wilbur Hastings testified that he had no training in asbestos recognition and it was made despite the testimony of the Secretary's own expert witness that there is no such training and that, in many instances, asbestos cannot be identified by visual observation alone. Tr. 159, 160, 555, 556.

When the dismantling of the turbine was begun, FMC's awareness of asbestos in the plant should have triggered testing by means of a dust survey pursuant to section 57.5002. It did not, and FMC was properly cited for violating section 57.5002. The majority concludes, however, that since "FMC knew that asbestos was present in the turbine insulation," it should have designated only examiners who were "trained to.suspect that asbestos reasonably might be present" (slip op. at 8) (emphasis added). The majority's conclusion would suggest that operators could, depending on the type and conditions of their mine, be required to train pre-shift and on-shift examiners to recognize everything from quartz dust to radon daughters. The Mine Act and the regulations issued pursuant to it recognize that some hazards, such as airborne contaminants, are not susceptible to accurate visual identification. Rather than rely on examiners to recognize these hazards, specific technical testings requirements are set forth. I am of the opinion that the inability of an examiner to visually recognize those types of hazards does not necessarily make the examiner incompetent within the meaning of section 57.18002.

For the reasons set forth above, I would affirm the judge's conclusions that FMC did not unwarrantably fail to comply with section 57.5002 and that it did not violate section 57.18002.

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