UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET NO. 99-1752
FIELDBROOK FARMS, INC., Respondent.	:	

Appearances: Esther D. Curtwright, Esquire
Office of the Solicitor
U.S. Department of Labor
New York, NY
For the Complainant

Michael R. Moravec, Esquire
Phillips, Lyle, Hitchcock, Blaine & Huber, LLP
Buffalo, NY
For the Respondent

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"). From February 24, 1999 through August 18, 1999, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's work site in Dunkirk, New York. On August 23, 1999, OSHA issued to Respondent citations alleging various willful, serious and other-than-serious violations of safety standards appearing in Title 29 of the Code of Federal Regulations ("C.F.R."). Respondent timely contested the citations. After assignment to an Administrative Law Judge ("ALJ") on October 13, 1999, the matter was designated for mandatory settlement proceedings under Rule 120, 29 C.F.R. § 2200.120 and,

on December 21, 1999, reassigned to a settlement judge. As a result of those proceedings, the parties settled all issues with the exception of the alleged two willful violations.[1] The case was reassigned to the initial ALJ on August 7, 2000 and an order approving the settlement agreement was issued on October 13, 2000. The matter was then assigned to the undersigned ALJ on October 18, 2000. A hearing was held on April 17 and 18, 2001 in Buffalo, New York. No affected employees sought party status. Both parties have filed post-hearing briefs.

Jurisdiction

It is undisputed that at all relevant times Respondent has been an employer engaged in the production of ice cream and frozen desserts. In addition, Respondent admits it handles goods and/or materials which have moved in interstate commerce. I thus find Respondent was engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of section 3(5) of the Act. Accordingly, the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and the subject matter.

Factual Background

On June 28, 1996, Fieldbrook Farms ("Fieldbrook") acquired Dunkirk Ice Cream ("Dunkirk"). (Tr. 32, 221.) Respondent hired Rosemary Olow as director of human resources and Zenon Olow as plant manufacturing manager in February 1997.[2] (Tr. 190, 223.) As director of human resources, Ms. Olow was hired in part to put together a system of procedural and operating manuals for Fieldbrook. (Tr. 215-18.) Ms. Olow also shared safety duties with the vice-president of operations. (Tr. 190-92, 209-11.) The vice-president of operations supervised Leslie Guichard, who was primarily responsible for safety programs. (Tr. 179, 190-92, 201.) In August 1997, Fieldbrook hired Charles Davis as vice-president of operations. (Tr. 146-47.)

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[1]All 11 alleged serious items of Citation 1 were settled, as were all 10 items alleged as other-than-serious violations in Citation 3. Only the two items in Citation 2, which both allege violations of OSHA's occupational noise standard, remain in contest.

[2]Rosemary Olow and Zenon Olow are wife and husband. Ms. Olow was promoted to vice-president of human resources in 1998, the position she held at the time of OSHA's inspection. (Tr. 192.) Mr. Olow was promoted to corporate director of safety on August 31, 1999. (Tr. 223.)

In October 1997, Respondent hired Richard Dill to replace Leslie Guichard as the safety director/human resource manager. (Tr. 31, 179.) Mr. Dill reported to Ms. Olow, rather than to the vice-president of operations. (Tr. 197.) Ms. Olow testified that Fieldbrook did not have any written programs when Mr. Dill was hired and that she directed him to become familiar with the facility and create the necessary safety and health programs. (Tr. 219-21.) According to Ms. Olow, Mr. Dill began putting a number of programs in place by writing policies and operating procedures. (Tr. 218-19.) As his supervisor, she discussed with Mr. Dill his activities and the programs he was in charge of. (Tr. 197.) On November 4, 1997, shortly after Respondent hired Mr. Dill, James Tippett, a senior loss prevention consultant for Wausau, Fieldbrook's insurance carrier at that time, visited and evaluated the facility. (Tr. 12, 15-16.) At all times during his visit, either Mr. Dill or another Fieldbrook representative accompanied him. (Tr. 17.) Mr. Tippett spoke to Respondent about various issues related to lowering losses and injury history. (Tr. 19.)

From 1997 to 1998, Ms. Olow, Ms. Guichard and Mr. Dill received numerous letters from consultants about employee audiometric testing. (Tr. 59-61, 66-67; C-10-12, 14.) On October 26, 1998, Mr. Dill scheduled employees to be tested on November 25, 1998, by Enviro-Health Technologies, Inc. ("Enviro-Health"). (C-14.) In November 1998, however, Fieldbrook canceled the scheduled audiometric testing. (Tr. 43; C-14.)

On February 24, 1999, OSHA attempted to inspect the facility, but Fieldbrook at that time would not allow the inspection. (Tr. 30-31.) OSHA's industrial hygienist ("IH") returned to the facility two days later to evaluate the company's OSHA 200 logs and other information related to worker injuries and hours worked. (Tr. 40.) When OSHA returned to the facility at 9 a.m. on March 9, 1999 for a full inspection, Fieldbrook representatives would not allow OSHA to begin the inspection until 2 p.m. when James Greco, Respondent's chief executive officer, gave permission to allow the inspection. (Tr. 32-33.) During the inspection on March 22, 23 and 26, 1999, OSHA conducted noise sampling of the facility and dosimeter testing of employees. (C-6.) Thereafter, in May 1999, Respondent's insurance company also conducted noise sampling and dosimetry testing, and those tests confirmed OSHA's findings. (Tr. 51-53; C-7.)

Subsequent to its insurer's testing, Respondent implemented a hearing conservation program that included audiometric testing and training of employees. (Tr. 189, 228.)

Discussion

The issue in this case is whether the two items in Citation 2 are properly characterized as willful violations. Those items allege, respectively, violations of 29 C.F.R. § 1910.95(g)(1), for failing to establish and maintain an audiometric testing program, and 29 C.F.R. § 1910.95(k)(1), for failing to institute a training program for all employees whose noise exposure equaled or exceeded an 8-hour time-weighted average ("TWA") of 85 decibels ("dBA"). In particular, Item 1 alleges that 12 specific employees tested by OSHA were found to have been exposed to noise levels exceeding the permissible exposure limit of 85 dBA on an 8-hour TWA. Extrapolating from the 12 tested employees, the IH based the citation on the belief that approximately 240 employees were exposed to excessive noise. (Tr. 54-55, 81-82, 116-18.) In exactly the same language, Item 2 alleges that the same 12 employees as well as additional exposed employees were not provided with a training program for protection against excessive noise. The Secretary has proposed a civil penalty of $49,500 for each item. It is Respondent's position that these violations "do not constitute willful violations, but should be classified as serious and that the penalties for such violations are excessive and must be reduced." (R. Brief, p. 1.) The determination of both of these issues, that is, the classification of the violations and the penalties for those violations, rests within the sound discretion of the Commission.[3]

Although the Act does not define the term, the Commission has defined a willful violation as one committed "with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987) (citing *Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (No. 79-3831, 1984)); *see also, Falcon Steel Co.*, 16 BNA OSHC 1179, 1181 (No. 89-2883, 1993) (consolidated). The Commission further elaborated that

> [a] willful violation is differentiated by a heightened awareness–of the illegality of the conduct or conditions–and by

[3]*See* section 10(c) of the Act, 29 U.S.C. § 659(c).

> a state of mind–conscious disregard or plain indifference. There must be evidence that an employer knew of the applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard....It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate the hazard, even though the employer's efforts are not entirely effective or complete.

Williams Enter., 13 BNA OSHC at 1256-57.

Fieldbrook does not dispute that it knew of the cited standards in this case.[4] Rather, it argues that it reasonably did not believe that it was in violation of the standards. (R. Brief, p. 9.) In support of this argument, Respondent refers to some of the factors listed in Appendix G of 29 C.F.R. § 1910.95–the lack of employee complaints, the lack of worker compensation claims, and "normal conversation" in the plant.[5] (Tr. 153-59, 162, 168-69.) Although Respondent did not have any employee complaints or worker compensation claims dealing with hearing loss, the company's argument that it reasonably did not believe it was in violation of the standards, is far outweighed by reliable, probative evidence showing that Fieldbrook was well aware of its obligations under the Act.

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[4]The record clearly reflects that at the very least Ms. Olow and Mr. Dill had knowledge of OSHA's hearing conservation requirements. (Tr. 77-78, 194.) The unrebutted testimony of the IH established that Mr. Dill was knowledgeable of the OSHA standards because he had worked as a health and safety manager for a local food manufacturing plant that had a hearing conservation program which he coordinated. (Tr. 77-78.) In addition, Ms. Olow testified that she administered the hearing conservation program at her former place of employment. (Tr. 194.) Although the record is not as clear as to the extent of Mr. Davis' knowledge of OSHA's hearing conservation requirements, Mr. Davis testified that he was aware of hearing conservation programs from his previous employment even though he was not involved with the program itself. (Tr. 157.)

[5]Appendix G states as follows:

> Factors which suggest that noise exposures in the workplace may be at this level include employee complaints about the loudness of noise, indications that employees are losing their hearing, or noisy conditions which make normal conversation difficult. The employer should also consider any information available regarding noise emitted from specific machines. In addition, actual workplace noise measurements can suggest whether or not a monitoring program should be initiated.

Rosemary Olow testified that soon after her employment with Fieldbrook began she became aware that Dunkirk had conducted annual audiometric testing of employees. (Tr. 211.) She admitted that Enviro-Health, the company that had tested Dunkirk employees every year for the previous three years, contacted her in 1997 about audiometric testing. *Id.* She also admitted that she "kept asking" Leslie Guichard, Fieldbrook's safety officer at the time, about the calls, and that she was told that audiometric testing was a "very informal process."[6] (Tr. 202-04, 211; C-12.) At one point, Ms. Guichard brought to Ms. Olow a "sealed box" which Ms. Olow assumed were the previous test results. (Tr. 62-65, 211-12; C-13.) Ms. Olow claimed, however, that she did not examine the contents of the box.[7] (Tr. 212). This claim is simply not credible in view of Ms. Olow's position at the facility and her admitted knowledge of Dunkirk's then existing annual audiometric testing program.[8] Those test results clearly establish that in previous years someone with managerial authority at the facility instituted an annual audiometric testing program for a reason–most likely that someone thought it was necessary at the facility. (C-13).

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[6]The IH testified on record without any objections that she spoke with Enviro-Health representatives who told her they had repeatedly contacted Fieldbrook about the need for audiometric tests. (Tr. 127.) The IH further testified that these representatives also told her that Ms. Olow had said that she would schedule audiometric testing in the last quarter of 1997 and that she requested quotes for the testing. (Tr. 127.) Although Ms. Olow does not remember speaking to Enviro-Health in this regard, she stated that she may have referred Enviro-Health to Ms. Guichard and Mr. Dill. (Tr. 193-94.) I specifically find the IH's testimony regarding her conversations with Enviro-Health to be reliable, and find that Ms. Olow did indeed have a conversation with Enviro-Health about scheduling audiometric testing in the last quarter of 1997. In addition, Ms. Guichard herself received two letters from consultants about hearing and noise testing in March of 1997, which was approximately a year from the last audiometric test. (C-10-11.) From the substance of those letters, I find that Ms. Guichard also requested estimates for audiometric testing.

[7]The unexamined "sealed box" defies both logic and the simple human experience of curiosity.

[8]As a general matter, I find Ms. Olow's testimony to be far from credible in many aspects. Not only were there inconsistencies with the testimony of others and with the documents on record, but there were also many inconsistencies within her own testimony. In addition, she denied any knowledge of matters well within the scope of her job duties and responsibilities. Especially revealing were her claimed lapses of memory as to parts of some events while remembering other facets of the same subject or transaction. As it will be evident from the discussion *infra*, Ms. Olow's testimony was, at times, simply unreasonable or inherently improbable.

Yet, despite her knowledge of the repeated prior testing, and without any reason to believe that such testing was no longer necessary, Ms. Olow failed ensure that Dunkirk's practice of testing employees' hearing was continued as required.

In addition to the foregoing, the evidence demonstrates that Wausau, Fieldbrook's insurance carrier, informed company representatives in November 1997 that the facility would likely need to implement a hearing conservation program. (Tr. 12, 15-16.) Mr. Tippett, the senior loss prevention consultant for Wausau, testified that he and Mr. Dill discussed at length the noise levels at the plant and the possible need for a hearing conservation program. (Tr. 19.) Mr. Tippett further testified that he sent a confirmation report of his visit that stated he was "reasonably confident that [Fieldbrook] will be required to have a formal hearing conservation program." (Tr. 17, 24; C-3.) Respondent does not question the credibility of Mr. Tippett's testimony that he sent a copy of the report to company, but claims that its witnesses never saw the report. (R. Brief, p. 4.) Respondent suggests that, because it was not among the other documents he provided to OSHA, Mr. Dill did not receive a copy of the Wausau report. (Tr. 51, 57, 59-67.) I am not persuaded by Respondent's suggestion. The report on its face shows not only that it was addressed to Mr. Dill but also that copies were sent to both Ms. Olow and William Wells, Fieldbrook's president. (C-3.) I find it highly unlikely that none of these individuals received the report and equally unlikely that Ms. Olow, who deals regularly with Fieldbrook's insurers, was unaware of Wausau's visit and evaluation of the facility.[9] I find that the discussions on noise levels and hearing conservation that Mr. Dill had with Mr. Tippett were

[9]Although Mr. Davis was not an official recipient of the Wausau report, I find it improbable that he was not aware of the report or aware of the noise readings conducted at the facility as he claims. (Tr. 151.) The CO's testimony clearly contradicts Mr. Davis' claims. According to the CO, Mr. Davis told him that Mr. Tippett had taken noise readings and that Fieldbrook had been working with Wausau for about a year. (Tr. 33-34, 36.) I find the CO's testimony to be reliable and that Mr. Davis was at the very least aware of the Wausau noise readings.

sufficient to alert Respondent to its obligation to test and train its employees as required by the cited standards.[10]

Mr. Dill's actions following the Wausau visit provide further support for a conclusion that Respondent was well aware that it was required to conduct audiometric testing. About a month after Wausau's visit to the plant, Mr. Dill received a letter from a particular company with respect to the acquisition of an audiometric testing booth. (C-14.) Contrary to Respondent's assertion that it often received "pitch" letters from consultants, this letter was clearly a response to an inquiry Mr. Dill had made. In addition, approximately a year later, Mr. Dill received a letter from Enviro-Health that confirmed his scheduling of audiometric testing for November 25, 1998. (C-14.) Based upon Mr. Dill's background and experience, his duties at Respondent's facility, his conversation with Mr. Tippett and all of the documents on record, the only rational explanation for these actions is that Mr. Dill believed that employee exposure to noise was such that Fieldbrook was required to comply with the occupational noise standard.

Ms. Olow's testimony regarding the cancellation of the audiometric testing scheduled for late 1998 also establishes the extent of Respondent's awareness of its obligations under the standard. As indicated above, on October 26, 1998, Mr. Dill scheduled employees to be tested by Enviro-Health on November 25, 1998, but he canceled the test soon thereafter.[11] (Tr. 43; C-14.) Ms. Olow at first asserted that she was not aware that Enviro-Health was trying to conduct audiometric testing in 1998. (Tr. 197.) She then admitted that Mr. Dill told her he was scheduling audiometric testing in 1998 and that she may have asked him about the cost, but she claimed that she did not ask him why testing was necessary or what the noise levels were.[12] (Tr.

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[10]Mr. Dill did not testify at the hearing. In light of his responsibility for the facility's safety and health programs, however, I conclude that he was a managerial employee such that his knowledge may be imputed to Fieldbrook.

[11]There is no evidence that this testing was ever rescheduled. On the first day of the OSHA inspection, however, Mr. Dill arranged for testing to be done at the facility. (C-14).

[12]Ms. Olow testified that Mr. Dill had to clear expenditures over $500 or $1000 with her. (Tr. 198-99.) Enviro-Health quoted the cost of audiometric testing at $7.25 per person for 200 employees. (C-14.) At this rate, Mr. Dill would have had to obtain Ms. Olow's approval, as the total cost of the

197-99, 209.) I find it difficult to believe that Ms. Olow would ask about the cost of audiometric testing without also asking why the expenditure was necessary, and Respondent's assertion that it was not aware that noise levels in the plant triggered the standard's requirements cannot be reconciled with Ms. Olow's admission that she knew about the testing and the fact that it was canceled. Moreover, Respondent admits to canceling the test in 1998, but it gives no explanation for the cancellation. (R. Brief, pp. 3-4.) The only explanation on record is the IH's testimony that Mr. Dill gave many reasons for not conducting audiometric tests, including high butter and cream prices. (Tr. 43, 76-77.) The IH also stated that Mr. Dill told her that Ms. Olow knew that audiometric testing needed to be done, but that she would not let him schedule it because it was too expensive. (Tr. 126.) In view of the record and Fieldbrook's failure to provide an explanation, I find that the company canceled the testing for cost reasons.

Respondent's argument that it did not reasonably believe that it was in violation of the OSHA standard is further undermined by other evidence of record. Charles Davis, the vice-president of operations, told both the CO and the IH to wear ear plugs when they entered the facility, and his testimony about why they needed to wear ear plugs at the start of the inspection is inconsistent with Respondent's assertion that ear plugs are necessary only in the compressor room. (Tr. 34, 41-42, 150-51.) Respondent's assertion is also inconsistent with the IH's testimony that she saw signs indicating the need for hearing protection at the entrances to both the compressor room and the "half- gallon" room. (Tr. 122.) In addition, Mr. Dill gave the IH a binder of programs that included documents on hearing conservation. (Tr. 57-59, 70-74.) Respondent asserts that these documents were not adopted by Fieldbrook, pointing out that the company name on the binder is not Respondent's official name. Respondent fails to explain, however, why Mr. Dill, an official of the company, would have given these documents to OSHA if Fieldbrook had not in fact adopted them as company documents. (Tr. 57-59, 70-74, 187-88; C-15.) All of these facts contradict Respondent's claim that it did not reasonably believe that it was in violation of the cited OSHA standards.

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tests would have been at least $1,450, not including the value of employees' time.

In considering this matter, it might be viewed that, standing alone, none of the above incidents showing Respondent's knowledge should result in the finding of a willful violation. I am cognizant of the fact that had the evidence established only one, or perhaps fewer of the above incidents, Respondent's noncompliance with the cited standards might be viewed as simply negligent. Taken as a whole, however, the cumulative evidence on this record leads me to conclude that Fieldbrook was very much aware of its obligations under the Act and that despite repeated warnings and advisories that it was required to comply with the cited standards it chose not to do so. While the requirements of the cited standards are not rhadamanthine, Respondent nonetheless decided not only to take no action towards compliance, but rather elected to stop the annual employee hearing testing program which had been underway. Moreover, as set out above, the record shows that the reason the company did not provide the required audiometric testing of its employees was due to the cost of the testing. Finally, the record shows that Respondent did not arrange for resumption of audiometric testing at the facility until the first day of the OSHA inspection which it had delayed. Only then did Mr. Dill contact Enviro-Health in that regard. (C-14.) Based on the above, I find that Respondent acted "with intentional, knowing or voluntary disregard for the requirements of the Act" and that the violations in this case were willful.[13] Items 1 and 2 of Citation 2 are therefore affirmed as willful violations.

The Secretary has proposed a penalty of $49,500 each for Items 1 and 2, for a total proposed penalty of $99,000. When the Secretary's proposed penalties are contested, as is the case here, section 17(j) of the Act, 29 U.S.C. § 666(j), expressly grants to the Commission the sole authority to assess penalties giving "due consideration" to four factors: the employer's size, prior history of violations, good faith, and the gravity of the subject violation. The Act does not establish any particular relative weight to assign to these factors. *Roberts Pipeline Constr., Inc.*,

[13]In a similar case, the Commission found that the failure to provide annual audiograms was willful because the employer had had several letters from and discussions with its insurer about the need for a hearing conservation program. *Great Lakes Packing Corp.*, 18 BNA OSHC 2138, 2142 (No. 97-2030, 2000). Although Fieldbrook may not have received as many specific warnings about the need for a hearing conservation program, the notice Fieldbrook received from its insurer, along with the other evidence of record, warrants the willful classification of the violations in this case.

16 BNA OSHC 2029, 2030 (No. 91-2051, 1994.) However, of these factors, gravity normally is the most significant factor. *Natkin & Co.*, 1 B NA OSHC 1204, 1205 (No. 401, 1973); *see also, J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993); *Orion Constr., Inc.*, 18 BNA OSHC 1867 (No. 98-2014, 1999). The record shows that Fieldbrook was given credit for prior history. (Tr. 83.) The record, however, is ambiguous as to Respondent's size.[14] As to good faith, I find that a credit for good faith is not appropriate based on the record. Finally, I find the gravity of the violation to be relatively low.[15] In determining an appropriate penalty, I also note that an employer who willfully violates the Act or any standard promulgated pursuant to the Act "may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000." Section 17(a) of the Act, 29 U.S.C. § 666(a), *amended by* Omnibus Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101 (1990). For these reasons, I conclude that a penalty of $32,000 for each item is appropriate.[16]

Findings of Fact

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

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[14]Because Respondent's business is seasonal, busy in March and slow in August or September, the number of employees fluctuated depending on the time of year. (Tr. 116-17.) Although the IH estimated that a minimum of 240 employees were exposed to the hazardous condition, the Secretary has failed to clearly establish how many employees Respondent employed and how many employees were actually exposed. (Tr. 55, 116-17, 134, 138.)

[15]While I find that loss of hearing is a serious injury, the risk of such an impairment to Respondent's employees was minimal. Although audiometric tests of some employees in 1999 and 2000 initially showed standard threshold shifts, subsequent retests of these employees indicated no standard threshold shifts. (Tr. 229-30.)

[16]Respondent urges that a single penalty is appropriate for both items. However, the Commission has held that violations are duplicative only when they require the same abatement. *J.A. Jones Constr. Co.* 15 BNA OSHC at 2207. The abatement of the two items in this case is clearly different.

Conclusions of Law

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Act.

2. The Commission has jurisdiction over the parties and the subject matter.

3. Respondent was in willful violation of 29 C.F.R. § 1910.95(g)(1), as alleged in Citation 2, Item 1, and a civil penalty of $32,000 is appropriate for this violation.

4. Respondent was in willful violation of 29 C.F.R. § 1910.95(k)(1), as alleged in Citation 2, Item 2, and a civil penalty of $32,000 is appropriate for this violation.

ORDER

1. Citation 2, Item 1 is AFFIRMED as a willful violation.

2. Citation 2, Item 2 is AFFIRMED as a willful violation.

3. A total civil penalty of $64,000 is assessed.

/S/

Michael H. Schoenfeld
Judge, OSHRC

Dated: 8/27/01
Washington, D.C.