

BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE)
STATE OF NORTH CAROLINA)
)
COMPLAINANT,)
)
v.)
)
NC DEPARTMENT OF PUBLIC SAFETY-)
ADULT CORRECTION and its successors)
)
RESPONDENT.)
_____)

ORDER

OSHANC NO. 2021-6424

FILED

SEP 27 2022

NC Occupational & Safety
Health Commission

THIS MATTER is before the undersigned on the respondent's motion to dismiss contained in its answer dated April 21, 2022. The complainant filed a response to the motion to dismiss on May 2, 2022.

The complainant is represented by Sage A. Boyd, Assistant Attorney General; the respondent is represented by Sonia Callaway-Durham, Special Deputy Attorney General.

The undersigned understands that there are other matters before the Review Commission involving the respondent or some of its component agencies. The undersigned further understands that some of the same issues raised in this motion to dismiss, particularly concerning jurisdiction over the person of respondent and of the subject matter of the citations, have been raised in some of these other matters. Specifically, the undersigned has been following the events and decisions in the case *Commissioner v. NCDPS, Caswell Correctional Center*, 2021-6350.

Because of these understandings, the undersigned entered an order on May 31, 2022 asking the parties to submit briefs on the issues raised by the motion to dismiss. That order also asked the parties to address certain specific issues identified in the order. The briefs were due within thirty (30) days of the order date. Both parties submitted briefs. The respondent's brief contained a motion to deem the brief timely filed. The undersigned considers both briefs timely and both briefs were considered when the undersigned was preparing this order.

It appears to the undersigned that pursuant to N.C. Gen. Stat. §95-135, the North Carolina Occupational Safety and Health Review Commission has the authority to hear contested citations, penalties and abatement periods issued by the Occupational Safety and Health Division of the North Carolina Department of Labor. That statute also provides that all occupational safety and health standards promulgated under the federal act are adopted in North Carolina. The Occupational Safety and Health Act of North Carolina (the "Act") applies to all employers pursuant

to N.C. Gen. Stat. §95-128. N.C. Gen. Stat. §95-127(11) defines an employer as a “person engaged in a business who has employees, including any state or political subdivision of a state....” In *Brooks v. North Carolina Department of Transportation*, 115 N.C. App. 163 (1994), the North Carolina Court of Appeals held that the state and its agencies can be issued citations for violations of the Act, which are enforceable by proceedings before the Safety and Health Review Board, now Commission. As a result, the undersigned believes that subject matter jurisdiction exists in this forum over the respondent.

The complainant conducted an inspection of the respondent’s facility located at 5701 Executive Center Drive, Suite 325, Charlotte, North Carolina. During the inspection, complainant’s compliance officer interacted with Rhonda Walton, the assistant manager of the Judicial District 26 office of the Adult Correction Division of the North Carolina Department of Public Safety (“NCDPS”). A copy of the citations was served on that office and a notice of contest was interposed timely on December 3, 2021 by Dr. James W. Coon, Jr., who is the safety director for the entire organization of NCDPS.

The respondent contends that NCDPS is such a large organization that the Secretary that heads that organization can not supervise each individual office, but the briefs show that there is a chain of command throughout respondent’s organization and apparently it works, since Dr. Coon, who is in Raleigh, provided respondent’s responses in this matter involving a Charlotte office. He had previously requested in behalf of the named respondent an informal conference with complainant in this case. Both he and Ms. Walton are shown in the organizational chart for NCDPS. I do not believe either party would contend that everyone in the organization of NCDPS is not paid by the State through that Department. Typically, you can determine the employer by who has control of the employees and who pays them. In this situation, that would be NCDPS.

The respondent was properly served with the citations by certified mail, which is typically the way a respondent is served with citations in these cases. Because service is allowed by law in that way, respondent cannot claim that it should be served in a different way. Respondent also claims that it and the complainant had made a prior agreement in 2004 and also in June, 2021 that it would be cited and served in accordance with the objections it raises here. Obviously, given the response by complainant to the motion, it does not agree with respondent’s version of these agreements. It is unclear to the undersigned that such agreements would be enforceable here.

The undersigned has been handling these matters for over thirty (30) years as a hearing examiner and the size and structure of the organization, as with NCDPS, is determined by that organization. The provisions of the Act make no distinctions on size, except with reference to penalty credits. As a result of the above analysis, the undersigned believes that personal jurisdiction exists in this forum over the respondent, as it is named in the citations.

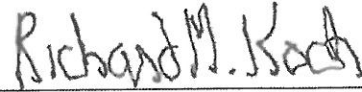
It does not appear to the undersigned that the respondent in its brief addressed the issue raised in the May 31, 2022 order that federal guidance and federal case law mandate that the complainant issue citations against individual NCDPS facilities as opposed to either NCDPS or its divisions. Under the circumstances, the undersigned has to assume that that mandate does not exist.

In its brief, respondent raises a motion to estop complainant from moving to amend. In view of the decision in this order, that motion is moot.

Since both complainant and respondent are part of the government of the same State, it would serve the interests of that government and its citizens if they could agree on these primarily procedural matters and avoid the substantial expenditure of time and money that has been involved here, particularly since the amount in controversy is only \$6,300.00.

For the above referenced reasons, IT IS ORDERED that the respondent's motion to dismiss is DENIED.

This 27th day of September, 2022.

Handwritten signature of Richard M. Koch in black ink, written over a horizontal line.

RICHARD M. KOCH
HEARING EXAMINER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this date served a copy of the foregoing ORDER upon:

SONYA CALLOWAY DURHAM
NC DEPARTMENT OF JUSTICE
PUBLIC SAFETY SECTION
PO BOX 629
RALEIGH NC 27602-0629

By depositing a copy of same in the United States Mail, Certified Mail, return receipt requested, at Raleigh, North Carolina, and upon:

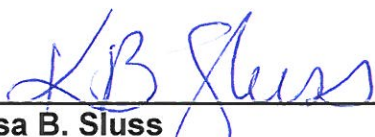
SAGE BOYD
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of same in the United States Mail, First Class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

By email to carla.rose@labor.nc.gov .

THIS THE 5 DAY OF October 2022.



Karissa B. Sluss
Docket and Office Administrator
NC OSH Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
NCOSHRC@labor.nc.gov
TEL.: (919) 733-3589