BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	**ORDER REGARDING RESPONDENT'S MOTION TO DISMISS**
COMPLAINANT,	)	
v.	)	
	)	**OSHANC NO.'s:** 2022-6438, 2022-6486, 2022-6492, 2023-6531
	)	**INSPECTION NO.'s:** 318230059, 318244522, 318247434, 318253200
HARRIS TEETER, LLC	)	**CSHO ID:** Y3077, A3277 A3277, E1150
and its successors,	)	
RESPONDENT.	)	

THIS MATTER is before the Commission on Respondent's Motion for Involuntary Dismissal Or, In The Alternative, Motion for Adverse Inference Against Complainant filed August 12, 2024, with a memorandum in support thereof including Exhibits A – N which filing was made during the ongoing hearing of the above four consolidated cases.

At the request of the court during the proceeding of the hearing, counsel were asked to brief the question of the definition of "official inspection file," words similar to which are found in N.C. Gen. Stat. §95-136(e) and 136(e1). Subsequently, the court's request was clarified that it should have referred to "official inspection *report*" or "official inspection *reports*." This clarification was made *after* counsel's filings on August 21, 2024, and August 23, 2024.

Respondent proffered a Memorandum Regarding The Definition of Official Inspection File including Exhibits A-I which was filed August 21, 2024. Complainant filed its Objection To and Response in Opposition To Respondent's Motion for Involuntary Dismissal or Adverse Inference on August 23, 2024 and included Exhibits A-G. The Opposition filing from Complainant notes that it is responsive to both the Respondent's initial memorandum and its memorandum concerning the definition.

In response to Complainant's Objection, Respondent moved for the opportunity to Reply to Complainant's Objection. The motion was granted with this court authorizing the filing of a Reply as well as authorizing a Surreply should Complainant wish to respond further. On September 9, 2024, Respondent filed its Reply In Support of Definition of Official Inspection

File including Exhibits A-G and a Case Law Index 1-6. No Surreply was filed and oral argument was heard after the conclusion of the hearing on November 25, 2024.

Arguing for the Respondent movant was Travis W. Vance and for the Complainant was Stacy A. Phipps. The motion is ripe for decision.

Movant's (Respondent's) Position

Respondent moves the court for the relief requested based on Complainant's having shredded the field notes taken by its Compliance Safety and Health Officers who inspected Respondent's facility for the four cases that are consolidated. Respondent contends that the CSHO's field notes should not have been destroyed and should have been included in the "official inspection reports," hereafter OIR, which Complainant produced pursuant to Respondent's request. Respondent contends the shredding and failure to produce the field notes puts too much authority in the hands of the CSHO to determine what is and is not relevant for preservation in OSHA EXPRESS, hereafter OE.[1] Respondent contends that it has been deprived of due process of law by the destruction of the field notes.

Respondent was entitled, based on N.C. Gen. Stat.§95-136(e) and 136(e1), to request the OIR for each case ten days prior to the hearing. At the hearing, during the testimony of the CSHO's, Respondent learned that all the officers shredded their field notes after having transferred what they believed were pertinent and relevant contents of the notes to OE. During the testimony of one of the CSHO's, the court learned that three pages of his field notes had been overlooked for shredding and were found shortly before the hearing. As a result, the notes were shredded but not until Complainant's counsel had scanned a copy of them to preserve their contents. Given that the witness testified that everything relevant had been preserved in OE, Complainant agreed to and did produce the preserved three pages.

Respondent contends that Complainant's destruction of the notes was intentional and illegal because Complainant knew or should have known that North Carolina's Public Records Act, hereafter PRA, N.C.G.S. §132, including N.C.G.S. §121-5, requires the preservation of public records. Further, Respondent notes that once the Commissioner receives a Notice of Contest, if not sooner, the Complainant is on notice of the threat of litigation and should do nothing to destroy field notes to avoid interfering with the employer's defense. Respondent relies upon testimony of Complainant's Complaint Desk Supervisor and his intake officers who testified that they preserve their intake notes for two plus years. Respondent questions the justification for treating Complaint Desk notes differently from CSHOs' field notes.

Respondent contends that disposal of field notes worked a prejudice on the Respondent particularly in this case because none of the inspectors in the four cases took any signed witness statements; thus, the inspection files and the field notes taken by the inspectors are original

[1] OE is understood to be a software application used by Complainant to aggregate data for its compliance investigations.

source notes on which citations were based. Respondent contends that it was prevented from preparing more fully for the hearing and conducting more effective cross-examination of the CSHO's by not having the field notes produced. Respondent asserts that points captured in the three pages of overlooked field notes that were not destroyed and were produced during the hearing are not completely reproduced in OE, and OE is the document source from which Complainant assembles and produces the OIR. Consequently, Respondent believes there are untold discrepancies between the field notes and OE that they cannot identify because all the other field notes in the four cases no longer exist.

Complainant's Position

Complainant contends that Respondent has seized on an unjustified procedural issue when there were real employee safety issues at Respondent's refrigerated warehouse for which penalties have been properly imposed. It contends that the field notes that Respondent calls public records are not public because they are transitory. Transitory records are defined as having little or no long-term documentary or evidential value to the agency creating them. CSHO's take field notes but they transfer the relevant, non-transitory, information in those notes over to OE and they, CSHO's, are the ones with experience and training to know what should and should not be transferred. The notes that are not transferred are shredded. Complainant disavows any intent to hamper or prejudice Respondent's ability to defend itself and adds that Respondent has superior access and opportunity to speak to its employees and consult their records for its defense.

Complainant also focuses its defense on what the two cited sections of the OSH Act say. N.C. G.S. §95-136(e) says that the employer is entitled to ". . . a copy of the official inspection report which is the basis for citations . . . ." Complainant contends that if information in the field notes is supportive of the citations then it is transferred into OE and that is what the statute says should be given to the employer. The only other thing said in the statutes about the information to be given to the employer is found in N.C.G.S. §95-136(e1). Complainant notes that it is responsible for providing witness statements to the employer should they meet any one of the following conditions:

> "(i) the witness statements the Commissioner intends to use at the enforcement hearing,
>
> (ii) the statements of witnesses the Commissioner intends to call to testify, or
>
> (iii) the statements of witnesses whom the Commissioner does not intend to use that might support an employer's affirmative defense or otherwise exonerate the employer...."

N.C.G.S. §95-136(e1)

Complainant contends that it took no "witness statements," thus it had nothing to produce pursuant to the provisions of N.C.G.S. §95-136(e1).

Complainant distinguishes the situations faced by Complaint Desk Intake Officers who take notes upon receiving referrals from the federal OSH web site or from telephone calls. These intake duties are distinguished from the Inspectors who go to the field and take notes as they investigate on-site the alleged safety violations. CSHO's who go to the field to inspect an employer's site have a finite time horizon during which they must have an opening conference, an investigation, and a closing conference; and during the process they must identify what, if any, citations should be imposed. From their observations and the notes they take on-site, they judge what is relevant to their proposed citations and then ignore the irrelevant. Counsel argues that the CSHO's goal is to put things into OE that support the citations, and there is no need for the CSHO to put exculpatory evidence into OE because if there is such evidence then no citation is issued.

Complainant also contends that the taking of formal witness statements is impractical for CSHO's, e.g. some employees have concerns for the privacy of what they say to a CSHO; getting a formal statement ready for an employee to sign is burdensome; language translation can be a problem; and the awkwardness of employees being pulled from production activities to talk to an inspector can be a problem. In the usual investigation, counsel argues there are no formal witness statements, except in fatality cases. When there are witness statements, they are placed in OE. Counsel contends there are no witness statements in field notes and emphasizes this point by noting that CSHO's are provided specific forms for the taking of witness statements so if witness statements are taken, they go into a form and then from there they are transferred to OE.

Complainant notes that it has treated the field notes of CSHO's in the same way since the *inception* of North Carolina's OSH program. The issue contested of the field notes is, in its opinion, a diversion from the hearing process to evaluate the appropriateness of the safety standard violations found and imposed on Harris Teeter.

What are field notes?

The court has one three-page example of field notes that were taken by one of the CSHO's who inspected the Respondent in this consolidated case. Those notes show observations and jottings seen and heard by the CSHO as he conducted one of the four inspections (Exhibit E, Reply). To this reviewer, the three pages are evidence of data collection of an investigator soliciting and gathering information for analysis. No one testified that the three pages of notes were anything out of the ordinary or atypical. They include notes from discussions with employees. Some notes may include all of what an employee said. Some may include only part of what was said. There is nothing in the notes to explain why the CSHO spoke to the employees he chose. Other parts of the three pages produced show what appear to be conversation details that may have been from discussions with managers. In particular, there appears to be a headnote labeled "Opening," the notes of which appear to take a page or more of the three pages. In summary, the three pages appear to be documentary and observational. In just two instances ('finished up' and 'Don't

think so' on *Id.* at p.1) does the CSHO put quotation marks around any clauses or phrases to be certain to preserve exact words used by someone he spoke to or heard.

Field notes have been routinely discarded or shredded for decades by Complainant's employees. The discarding or destruction occurred either after proposed citations had been recommended to the CSHO's supervisors or after CSHO's had determined that no citations should be issued. The fact that a practice has been engaged in for decades without issue does not ensure that it is a proper or legal practice. Also, see footnote 2, p.10 for a possible contributing reason that the issue of the contents of the OIR did not arise earlier.

Respondent highlighted two passages in the Complainant's Field Office Manual (FOM) that refer to "notes" (Exhibit I, Respondent's Memorandum Regarding The Definition of Official Inspection File). While the FOM is only for guidance, it is useful to see its reference to note-taking: 1) Under the topic, "Other Opening Conference Topics" and referring specifically to the use of photographs/Videos/[and]Audio Recordings, it says "CSHO's should inform the participants that a video camera and/or an audio recorder may be used to provide a visual and/or audio record, and that the video and sound recording may be used in the same manner as *handwritten notes* and photographs in inspections" (emphasis added); and 2) under the topic of recording all facts of apparent violations, the FOM says, "All *notes*, observations, analyses, and other information will be either recorded on the violation worksheet, have its location noted on the worksheet or be attached to it" (emphasis added) (Field Office Manual, Chap. III, Inspection Procedures, pp. 25-26; 40. In both instances, the CSHO is being told to alert the employer to the fact that audio/visual recordings may be used just as handwritten notes could be used and the CSHO is also being told to preserve his or her notes. Thus, the FOM Inspection Procedures guide places some importance on CSHO note-taking in the field.

Finally, the responsibility of the CSHO was to transfer notes from the inspection into OE. Respondent compared the contents of OE and the three overlooked pages of notes that were preserved and found discrepancies, for example, that 1) parts were on order for a door repair that had been delayed; and 2) "Finally the mfr called back to let H.T. know their curtain is being repaired (teeth)." These two points were summarized for OE and the summary omitted that Respondent had "finally" heard from the door manufacturer and that "parts were on order." The omission of the two points was potentially significant as the violation is for the failure of the employer to keep the floor maintained in a clean, and to the extent feasible, dry condition." The door was a large opening into the freezer part of the warehouse. While the information excluded does not necessarily rise to the level of being exculpatory, it suggests that the employer had been waiting for an indefinite period of time to hear from the manufacturer and the fact that parts were on order shows that some action had been taken that possibly justified delay in the repair. Complainant certainly could argue that it was feasible for Respondent to have done more to protect its employees, but the message that was transferred into OE did not describe or explain the waiting that Respondent had had to do. Respondent argues that not having seen that the field

notes memorialized these facts interfered with, or detracted from its preparation for its cross-examination of the CSHO.

One explanation for what might be omitted from OE could be testimony on the last day of the hearing from Scott Mabry, the Chief of Staff for the Department of Labor. On cross examination, he conceded that information that supports an employer's affirmative defense-and not supporting the four elements of a violation-"can be destroyed" without being preserved in OE.

In conclusion, field notes are the collection and documentation of facts observed or heard during the course of, and recorded in handwriting, of a CSHO's inspection, and they can include data that supports the Respondent. In addition, the FOM suggests that they have significance and that they should be preserved.

Does North Carolina Rule of Evidence 1006 require disclosure of field notes?

Rule 1006 of the North Carolina Rules of Evidence allows a party to present a chart, summary or calculation of voluminous writings. The rule recognizes that voluminous evidence can sometimes not be conveniently examined in court so a chart, summary or calculation is used. The presenter must make the underlying data available to the opposing side in a reasonable manner to give assurance that the data has been presented fairly.

There is no way to know how voluminous the field notes were that formed the basis for the citations since all but three pages of the notes were destroyed. The Respondent asks the court to treat the inspection files, i.e. the "official inspection report," the OIR, as a "summary or compilation document." The Rule does not use the word "compilation." Whether that word usage would change the meaning of the Rule does not need to be addressed because this hearing officer finds that Respondent is force-fitting Rule 1006 to the facts. The OIR provided to Respondent was not a chart or calculation nor did it, or even could it, claim to be a summary to more conveniently present voluminous writings. Had it been the summary that Respondent labels it, then the data, including the field notes, supporting it would have been required to be produced in a reasonable manner. Since the OIR produced was not a summary, Complainant had no obligation under Rule 1006 to do anything. The Rule does not fit these circumstances.

Are field notes transitory public records and not necessary to preserve?

Complainant argues that field notes that need to be preserved are retyped into OE if they are deemed relevant and important by the CSHO. After the sifting and retyping of the field notes is completed, and recommendations for or against citations are issued, the routine practice of CSHO's was to shred field notes in their entirety. However, nothing in the OSH Act instructs Complainant to destroy field notes. Respondent contends that practice is improper considering the Complainant's obligations under the Public Records Act, N.C.G.S.§ 132, *et seq.*

The PRA and the North Carolina Archives and History Act, N.C.G.S. §121, *et seq.,* provide for a schedule applied to the OSH Division of the North Carolina Department of Labor. The schedule

defines when destruction or disposal of public records may be accomplished so that if the agency follows the schedule, it will not be deemed to have violated the PRA.

The schedule that is applied to public records of Complainant's inspections allows "transitory" records to be destroyed. Transitory records are defined as "records that [have] little or no documentary or evidential value . . . ." (Quoted in Complainant's Objection, p. 7). Complainant relies on the 'transitory' identification it applies to field notes because the functional schedule refers permissively to the destruction of:

> "Drafts and working papers, including notes and calculations, are materials gathered or created to assist in the creation of another record. All drafts and working papers are public records subject to all provisions of General Statute §132, but many of them have minimal value after the final version of the record has been approved and may be destroyed after final approval if they are no longer necessary to support the analysis or conclusions of the official record."

https://archives.ncdcr.gov/documents/functional-schedule-revised-2021/open (quoted in Complainant's Objection, p.8)

To clarify the meaning of "drafts and working papers," the schedule gives four examples of them, which Complainant repeats, to illustrate what it means:

> "Drafts and working papers for internal and external policies,
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> Drafts and working papers for internal administrative reports, such as daily and monthly activity reports,
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> Drafts and working papers for internal, non-policy-level documents, such as informal workflows and manuals, and
>
> Drafts and working papers for presentations, workshops, and other explanations of agency policy that is already formally documented."

Id.

The court is not persuaded that field notes have little or no documentary or evidential value. It is obvious that at least some selected portions of the field notes in the three pages preserved are recounted in OE so their evidential value is established. Given that the notes are reviewed by the CSHO to see what needs to be preserved that supports the citations contemplated shows that they document facts that could be important to the inspection; thus, the notes can hardly be labeled as having no documentary or evidential value. Nevertheless, the above four factors should be analyzed.

First, it does not appear that the field notes are oriented toward internal or external policies of the Complainant. Second, while they could be considered internal reporting in that the CSHO uses them to prepare his or her narrative or the citations, there is nothing about them that resembles

daily or monthly reports. Third, while the wording of "internal, non-policy-level documents" is not readily understandable, the 'such as' reference to "informal workflows and manuals" rules out the third item as a category because field notes do not appear to be related to 'informal workflows and manuals.' Fourth and last, field notes such as are at issue here could not be described as "for presentations, workshops and other explanations of agency policy that is already formally documented."

Finally, with regard to the question whether the notes should or must be preserved, the schedule that the parties agree controls whether the notes must be preserved, states in a footnote appearing at the bottom of the page that relates to "Inspections," "No destruction of records may take place if audits or *litigation* are pending or reasonably anticipated" (emphasis added). This instruction is so fundamental to counsel that handle litigation, it should make counsel extra cautious before any document is shredded.

In summary, Complainant's description of the CSHO's field notes as transitory, to justify destruction of them under the PRA is not supportable. The field notes reflect the observations made and the data collected by Complainant's investigators when they are inspecting employers for safety issues. Its need for preservation is apparent, especially if there is reasonable expectation that the employer will contest the citation(s). Having concluded that the field notes should be preserved requires us to move now to whether the documents retained must be disclosed.

However, before looking at disclosure, a preservation practice that Respondent argues shows inconsistency within the Department of Labor needs examination.

Is there justification to preserve Complaint Desk notes and not CSHO field notes?

During the course of the hearing, some of Complainant's Complaint Desk employees testified. These intake employees receive referrals from federal OSHA and they receive telephone and email complaints directly. Not all the complaints they receive are safety-related. For example, out of thousands of calls received in 2023, the Complaint Desk is reported to have processed more than 3,500 complaints and additional ones went unprocessed because they were deemed invalid. Complainant notes that unlike the field notes taken by CSHO's, the notes taken by intake staff are not shredded until two years after the year the intake was done. The reason given for intake notes being saved is two-fold: 1) there are no "case files" to incorporate their information into at that stage, and 2) the department wants to be able to respond to media inquiries as to why OSHA didn't take action on a safety issue when they are told that a certain issue was reported to OSHA. Often, in those cases, Complainant can point to some aspect of the report taken by the intake staff that was missing critical contact information to allow for the follow up that normally would be done (See Complainant's Memorandum, pp. 15-16).

Qualitatively, it is apparent that the job of a desk-bound intake employee is very different from a CSHO who goes to the employer's work site to conduct an opening conference, an inspection and a closing conference. When a CSHO inspector begins to prepare his or her recommended citations, s/he has to select the information that is considered relevant from the site visit to the citation(s) to be issued, thus there is information to be preserved in OE and there is information

that is not preserved, i.e. not put into OE, therefore shredded. The question in this reviewer's mind is why the information from the on-site inspection is any less important to preserve than whatever notes may have been taken by a desk intake officer. When intake gets a valid complaint that needs to be investigated, its information is put into OE for an inspection. Complainant's concern for being able to respond effectively to the media seems legitimate, but is there justification for the different treatment between the Complaint Desk and the field notes taken by CSHOs? Resolution of the question is not necessary for decision of the motion.

Can Complainant decline to disclose field notes because it has a deliberative process privilege?

As Complainant notes, "... record retention is not the same as record disclosure ... just because something exists doesn't mean that Respondent can have it" (Complainant's Memorandum, p. 13). Complainant contends that despite the ruling of the North Carolina Supreme Court that the PRA provides no deliberative process privilege (*News & Observer Publishing Co. v. Poole,* 330 N.C. 465 (1992)), the federal courts have recognized such a privilege. Complainant argues that this court should follow the federal example. In particular, the privilege provides that some documents can be withheld from public disclosure when they would show "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" (*Stone & Webster Constr., Inc.,* 2012 OSAHRC LEXIS 31, *6 (O.S.H.R.C. May 23, 2012)(quoted in Complainant's Memorandum, p. 11).

The problem with Complainant's application of such a privilege is that a review of the three pages that we have of the field notes taken by one of the three CSHO's involved in this case does not show any expression of "advisory opinions, recommendations or deliberations" of the CSHO, except to the extent that the choice the CSHO made in choosing facts to be memorialized for his later use was an expression of what he considered most important from his observations and collection of data. There is no suggestion, though, in the three pages produced that he is *communicating* the facts to any other person. Testimony at the hearing suggested that when the CSHO recommends a citation, then there is communication with the District Supervisor that could justifiably subject associated documents to such a privilege, but that communication appears to be *after* an inspection visit has been completed. As noted previously, the contents of the one example we have of the three pages of field notes seems to best be described as data collecting and documentary, not seeking or stating 'advisory opinions, recommendations and deliberations.' The OSHA Commission in *Stone & Webster* noted from its reference to another case that 'purely factual' material is not appropriate for shielding. *Id.* at 3. The *Stone & Webster* Commissioners were considering the production of draft 1B's, not field notes. Absent from Complainant's Opposition memorandum is any discussion of the contents of the three pages of field notes. Conclusory statements that a particular law or precedent applies without tying those legal arguments to the facts is not persuasive. The deliberative process privilege does not apply.

Do the provisions of N.C.G.S. §95-136(e) and 136(e1) restrict what Complainant may disclose?

N.C.G.S. §136(e) provides, as previously highlighted, for ". . . a copy of the official inspection report[2] which is the basis for citations . . . ." to be available to the employer per the terms of the follow-on section, N.C.G.S. §136(e1). N.C.G.S. §136(e) by its language allows Complainant to disclose upon request the materials that constitute the "basis for the citations." In practice, the CSHOs review their files and determine what is relevant and supportive of the proposed citations they intend to recommend. After entering supportive data into OE and preparing proposed citations, the CSHO recommends the proposed citations to the District Supervisor. At about this time or soon thereafter, field notes are routinely shredded by the CSHO. As noted previously, the field notes from all four cases against this employer were shredded by the three inspectors with the exception of the overlooked three pages preserved by Complainant's counsel (after having been discovered shortly before hearing). The decision to preserve or shred materials is in the hands of the CSHO.

Neither the follow-on section, N.C.G.S.§95-136(e1), nor the precursor, defines what is meant by "official inspection report" other than to say that 1) the materials are the "basis for the citations" and 2) "witness statements" get separate treatment. What constitutes a witness statement is also undefined. As stated earlier, the N.C.G.S. §95-136(e1) section of the OSH Act lists three types of witness statements that should be made available to employers:

> "(i) the witness statements the Commissioner intends to use at the enforcement hearing,
>
> (ii) the statements of witnesses the Commissioner intends to call to testify, or
>
> (iii) the statements of witnesses whom the Commissioner does not intend to use that might support an employer's affirmative defense or otherwise exonerate the employer...."

N.C.G.S. §95-136(e1)

As can be seen, the follow-on section expands the type of evidence that must be shared with the employer somewhat in that it requires in paragraph (ii) that statements made by witnesses Complainant intends to call to testify must be provided and in (iii) that statements of witnesses whom the Complainant does not intend to call that might support an employer's affirmative defense or otherwise exonerate the employer must be made available. Thus, it is possible that a witness called by Complainant could have made a statement that the employer did not know

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[2] Examples of the certification given to the employer when the Complainant makes a disclosure based on N.C.G.S. §95-136(e) are found on the first page of each of the C-1, C-2, C-3, C-4 exhibits. The certifying language does not track the wording of the statute. Instead, it refers to the employer being given a "true copy of the *original case file*" as opposed to the "official inspection report." This raises a question of whether the individual certifying for the Complainant understood what the Complainant was obliged to disclose, as the two wordings could have significant differences in meaning. The certification did *not* say that its disclosures constituted the 'basis for citations.'

about, so the statute requires that the employer know, if a timely written request is made, about any statement. Likewise, if the Complainant has any other statements that it does not plan to use and the additional statements might support an employer's affirmative defense or otherwise exonerate the employer, then those statements must be disclosed. These provisions in (ii) and (iii) expand what must be disclosed beyond what is "the basis for citations," but they expand what must be disclosed only to the extent that witness statements exist.

Complainant interprets "statements" as being written, but the only time 95-136(e1) uses the modifier 'written' or 'writing' is in 1) the employer's request must be in *writing*; 2) statements that are in *handwriting* may be converted to typed form; and 3) witnesses may sign *written* releases to allow information within a statement to be released. Nothing is stated to clarify whether audio recorded statements are included. Further, nothing in either 136(e) or 136(e1) of the statute addresses the written notes of the CSHO. The principle, and often sole, witness to testify for the Complainant is the CSHO. Arguably, the notes taken by the CSHO during the opening and closing as well as during the inspection are his or her written statements. Complainant emphasized in the hearing that when witness statements are taken there is a form they use. Its use is rare for the reasons discussed earlier. In the final analysis, there is a persuasive argument that field notes are written statements belonging to the prosecuting witness, and therefore to be disclosed upon proper written request, but that is not the basis on which this decision will rest.

Does due process of law require disclosure of field notes?

The issue presented is novel for North Carolina. Despite what Complainant argues, the issue is not novel for at least two jurisdictions. Neither of the jurisdictions' decisions are binding on North Carolina, but they provide helpful comparisons to this case. The earliest case is *Secretary of Labor v. Frazee Construction Company,* 4 OSAHRC188 (1973). The case involved notes taken and a written report made by the SOL's representative during or following several inspections of the job site, but the representative only retained possession at the hearing of a portion of the notes. Respondent moved the court to order disclosure. The Complainant refused repeatedly to produce either the notes or the report the judge ordered and also refused to allow an *in camera* review by the judge. After what the Occupational Safety and Health Review Commission noted was remarkable restraint on the part of the judge, the judge granted Respondent's motion to dismiss. The Commission reviewed the decision of the judge below and affirmed the decision, and in its opinion stated:

> "Administrative agencies like the Department of Labor's Occupational Safety and Health Administration are primarily regulatory, and even though they do not impose criminal penalties, their procedures in conducting an investigation and initiating an action against a respondent are not exempt from constitutional limitations of procedural due process. In any search for justice, the obligation to produce the raw data from which a witness has testified is essential to test the accuracy of a witness' preception as well as his ability to

observe; to probe his truthfulness; to question his memory and narration, to expose the basis of any opinions he has expressed; as well as to reveal any exculpatory information which may aid the cross-examiner in the presentation of his case."

Id. at p.2.

In the case at hand, only three pages of notes from the four inspections of Respondent's work site exist because each inspector confirmed that their notes were shredded. It is therefore impossible to test fully the inspectors' perceptions and preceptions, their abilities to observe, their truthfulness, their memory and narration, the basis for their opinions and any exculpatory information they possess.

It is apparent that the provisions of the North Carolina OSH Act that have been addressed earlier in this decision, the terms of N.C.G.S. §95-136(e1), were geared toward some of the concerns addressed by the *Frazee* Commission. Those concerns included providing to Respondent, in advance of the hearing, the "witness statements" that Complainant intended to use, statements of witnesses to be called, and statements of witnesses who Complainant did not intend to call whose statements might support an employer's affirmative defense or otherwise exonerate the employer. The statute, as interpreted by Complainant, only required production of formal statements taken using Complainant's witness form. CSHO's could avoid having their field notes disclosed by not taking formal written statements from witnesses and following Complainant's policy of destruction after citations had been recommended. The *Frazee* Commission, in deciding the appeal of the Secretary of Labor for the decision of the ALJ below, took a broader view of the investigator's notes than what Complainant in this case advocates. In fact, the Commission used even stronger language than previously quoted:

> "This action is in the nature of a prosecution and complainant is the moving party thereby incurring the duty to see that justice is done. It is therefore unconscionable to allow the prosecution to deprive the respondent of anything which might be material to its defense. The Judge acted properly in suggesting an *in camera* inspection to determine whether the notes and memoranda so qualified."

Id. at p.3.

The question becomes whether the dictates of the North Carolina statutes (N.C.G.S. §95-136(e1) and 136(e)) limit the constitutional boundaries of due process. Before considering this question, Respondent contends that another case should be considered for guidance, *Oregon Occupational Safety & Health Division v. Don Whitaker Logging, Inc.*, accessed on January 28, 2025 at https://www.oregon.gov/web/Orders/1992/oshA/sh91182.htm. In this case, the Defendant conceded the validity of one of three citations but moved to dismiss the other two citations at the hearing based on the testimony of the Safety Compliance Officer. Regarding one of the two remaining citations, the SCO reported that he had given his field notes to his supervisors for review and two pages of the field notes had been irretrievably destroyed by the supervisors, and

copies of the notes had not been given to the Defendant before the destruction. This violated a provision in Oregon's statutes that requires the maintenance of records of inspections. In ruling that the citation in question must be dismissed, the Referee ruled that:

> ". . . a valid investigation is an essential element of a valid OROSHA citation. In turn, a valid investigation includes documentation of relevant matters and the preservation of all documentation, including original documentation, *in part for the benefit of the employer.* See ORS 654.120(1). In this case, original field notes were destroyed by OROSHA, without first providing a copy to the employer. Consequently, OSHA's investigation in this matter is invalid due to its past failure and present inability to provide required documents to the employer. Because a valid investigation is an essential element of any OSHA citation, and because the SCO's testimony revealed this element can not be proved, Citation No. 2 for violation of OAR 437-80-330(7) must be dismissed."

Id. at p.4 (emphasis added).

One case cited by the Commission in *Frazee* was an earlier decision of the United States Supreme Court, *Jencks v. United States,* 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). That decision involved the prosecution, criminally, of a defendant for filing a false noncommunist affidavit with the National Labor Relations Board. The District Court convicted the defendant and the Fifth Circuit affirmed and granted certiorari. Justice Brennan, ruling for the Court, held that the government had to produce for inspection all reports of two government witnesses which touched upon their testimony at trial and the defendant was entitled to inspect the reports to decide whether to use them in his defense. Justice Brennan wrote:

> "We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

Id. at 1013.

While *Jencks* was a criminal prosecution, its principle has been applied in the administrative arena. *See, e.g. United States v. Bostic,* 336 F. Supp.1312, 1314 (D.S.C. 1971), *aff'd,* 473 F.2d 1388 (4th Cir. 1972), *cert. denied,* 411 U.S. 966 (1973). Fundamentally, the premise of *Jencks* is that defense counsel is entitled to access to information created by a witness because no one is better suited nor more fairly situated to determine relevance of information of the witness than the defendant or his counsel.

In the *Don Whitaker* case, the actual issue of due process is not directly addressed. Instead, the issue was similar to a due process issue in that the court was concerned about the provision of records "for the benefit of the employer." In that respect, the two cases spoke in those two jurisdictions to the overall fairness of the hearing process to prove citations were proper.

Regarding whether North Carolina's statute, N.C.G.S. §95-136(e1), limits or overrules the due process provisions of the North Carolina and United States Constitutions, Respondent cites what it calls a "well-recognized rule" in North Carolina that, "where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality" (*Baxter v. Danny Nicholson, Inc.*, 363 N.C. 829, 690 S.E.2d 265, 267 (2010)(quoting *In re Banks,* 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978)). Here, the undersigned finds that the application of due process simply expands the evidence available to the Respondent to include preservation and disclosure of the field notes of the CSHO inspector. Without access to the field notes, Respondent could not properly prepare for its cross-examination of the CSHOs. It was denied due process of law. Thus, because the field notes were shredded and no longer exist, the Court is left with no choice but to dismiss all four actions in this consolidated case.

WHEREFORE, for the reasons stated herein, the actions are hereby DISMISSED.

This the 31st day of January, 2025.

Reagan H. Weaver
Hearing Examiner

CERTIFICATE OF SERVICE

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

TRAVIS W. VANCE
FISHER & PHILLIPS
227 WEST TRADE ST STE 2020
CHARLOTTE, NC 28202

By depositing a copy of the same in the United States Mail, by certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

STACEY A. PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602

By depositing a copy of the 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

via email.

THIS THE 5 DAY OF February 2025.

PAUL E. SMITH
CHAIRMAN

Karissa B. Sluss
Docket Administrator
NC Occupational Safety &
Health Review Commission
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