

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

COMMISSIONER OF LABOR OF THE)
STATE OF NORTH CAROLINA,) DOCKET NO: OSHANC 2022-6478
)
COMPLAINANT,) INSPECTION NO: 318234622
) CSHO ID.: U4169
)
v.)
)
NCDPS, Foothills)
CORRECTIONAL INSTITUTION)
and its successors,)
)
RESPONDENT.)

FILED
FEB 26 2025
NC OSH Review Commission

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

COMMISSIONER OF LABOR OF THE)
STATE OF NORTH CAROLINA,) DOCKET NO: OSHANC 2022-6472
)
COMPLAINANT,) INSPECTION NO: 318231545
) CSHO ID.: K3723
)
v.)
)
NCDPS, RANDOLPH)
CORRECTIONAL CENTER)
and its successors,)
)
RESPONDENT.)

ORDER ON RESPONDENT'S MOTIONS TO DISMISS

The above-identified matters were consolidated for hearing on Respondent's motions to dismiss filed in each of the separate cases because there is significant

overlap in the legal issues posed by the Respondent. The matters were noticed for a prehearing conference on February 21, 2025. The parties were notified that oral arguments on Respondent's motions would be heard at the prehearing conference.

Before the Court were:

(1) Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction, pursuant to N.C. Rule of Civil Procedure 12(b)(1), in both NC OSH No. 2022-6478 (pertaining to Foothills Correctional Institution ("Foothills")) and NC OSH No. 2022-6472 (pertaining to Randolph Correctional Center ("Randolph"));

(2) Respondent's Motion to Dismiss for Lack of Personal Jurisdiction, pursuant to N.C. Rules of Civil Procedure 12(b)(2) and 12(b)(5) in Foothills and Randolph;

(3) Respondent's Motion to Dismiss pursuant to N.C. Rule of Civil Procedure 12(b)(6) for alleged failure to issue the citations in accordance with the statute of limitations, for both Foothills and Randolph;

(4) Respondent's Motion to Estop in both Foothills and Randolph;

(5) NCDPS', Foothills' and Randolph's Petitions to Intervene in each of the respective actions;

(6) Complainant's Motions to Strike jurisdictional objections in both Foothills and Randolph; and,

(7) Complainant's Motions to Strike Respondent's Motions to Estopp and Statute of Limitations defenses from the pleadings in both Foothills and Randolph.

The undersigned has reviewed the pleadings in this matter, the parties' respective submissions in support of their positions on the motions, relevant authorities, and has heard arguments of counsel at the prehearing conference held on February 21, 2025.

Subject Matter Jurisdiction

With respect to both Foothills and Randolph, Respondent contends that the Commission lacks subject matter jurisdiction because Complainant can only cite "the employer subject to inspection" and that employer is the individual facilities, not the North Carolina Department of Public Safety.¹ See, generally, 2022-6478, Resp. Mot. to Dismiss, Pet. to Intervene, Mot. to Estop and Answer (hereafter "Foothills Mot. to Dismiss"), ¶¶ 20, 21, 44, 62, 63; and, 2022-6472, Resp. Mot. to Dismiss, Pet. to Intervene, Mot. to Estop and Answer (hereafter "Randolph Mot. to Dismiss"), ¶¶ 20, 22, 42, 71. Essentially, Respondent contends that Foothills Correctional Institution and Randolph Correctional Center are distinct employers from the North Carolina Department of Public Safety and that the Commission should ignore the fact that both prisons are part of the larger state agency. No authority for Respondent's position has been offered either in the respective motions, the authorities and exhibits submitted by Respondent nor in the oral

¹ At the time that the citations in these matters were issued, the Division of Adult Correction and Juvenile Justice was part of the North Carolina Department of Public Safety. Effective January 1, 2023 the North Carolina Department of Adult Corrections became a separate cabinet agency.

argument heard on Respondent's motions. In fact, in its Answers to the specific allegations in the Complaints, Respondent concedes:

Foothill admits that NCDPS is a state agency, duly organized and existing under the laws of the state of North Carolina, responsible for adult corrections. It is also admitted that Foothills was one of many worksites under the organizational umbrella of NCDPS

and

Randolph admits that NCDPS is a state agency, duly organized and existing under the laws of the state of North Carolina, responsible for adult corrections. It is also admitted that Randolph was one of many worksites under the organizational umbrella of NCDPS;

Foothills Mot. to Dismiss, p 17, ¶4 and *Randolph Mot. to Dismiss*, p 19, ¶4, respectively.

Respondent's position has been rejected in at least one other case before the Commission. *N.C. Comm'r of Labor v. NCDPS, Caswell Correctional Center*, No. 2021-6350, Garrett, J., presiding, Sept. 21, 2022, *5-6 (citations dismissed on other grounds). In that case subject matter jurisdiction was found to have existed based upon the requirements of the Act. Hearing Examiner Garrett noted that the statute authorizes the Commission to hear all disputes alleging violations by an employer of the occupational safety and health standards adopted by North Carolina. N.C. Gen. Stat. §§ 95-126(b)(2)(e), 95-127(11), and 95-135(b). In these cases, each of the complaints properly alleges that the Respondent was an employer within the meaning of N.C. Gen. Stat. §95-127(11) who had violated one or more occupational health and safety standards adopted by NC OSH and against whom one or more

citations had been issued. See, generally, Foothills Compl., ¶¶ 4, 5, 57, 62, 63, 64, 65, 66; Randolph Compl., ¶¶ 4, 5, 31, 36, 37, 38, 39, 40.

With respect to Randolph, Respondent also alleges that subject matter jurisdiction is lacking based upon the U.S. Supreme Court's decision in *Nat'l Fed'n of Indep. Bus. (NFIB) v. DOL, OSHA*, 595 U.S. 109 (2022). In the *NFIB* case, the U.S. Supreme Court considered whether U.S. OSHA's Covid-19 vaccine, or alternative weekly testing, mandate for employees of employers with more than one-hundred employees was within OSHA's delegated authority. The Court concluded that the mandate was not within OSHA's delegated authority because the mandatory vaccines, or alternatively the weekly testing at an employee's own expense, was a significant intrusion into the lives and health of employees and was not a *workplace* safety standard. *Id.*, at 117-118.

NCDPS, Randolph was cited for an alleged failure to develop and implement a COVID-19 plan and an alleged failure to conduct a hazard assessment related to COVID-19. Randolph Compl. ¶¶ 38, 39. The regulations under which Complainant cited Respondent were Emergency Temporary Standards ("ETS") adopted by NC OSH in response to the COVID-19 pandemic. Respondent challenges subject matter jurisdiction on the grounds that NC OSH was without delegated authority to implement and enforce the ETS because the language of North Carolina's regulations mirrors those adopted by U.S. OSHA. Randolph Mot. to Dismiss, ¶¶ 76-110.

Strictly speaking, Respondent's argument is not a challenge to subject matter jurisdiction. Whether an agency has exceeded its delegated authority in a particular case is a question of statutory interpretation which should be raised as a defense to the merits of a citation issued. *Good Hope Health Sys., LLC v. N.C. HHS*, 189 N.C. App. 534, 544, 659 S.E.2d 456, 463 (2008). Nevertheless, since the basis for Respondent's challenge is easily addressed in the Supreme Court case Respondent has cited, the undersigned will address the issue as argued by Respondent.

The Supreme Court's decision in *NFIB* was narrowly focused on the vaccine / testing mandate and made a clear distinction between the vaccine / testing mandate which it found to be *ultra vires* and other workplace regulations aimed at protecting employees from exposure to COVID-19:

[Our conclusion] is not to say that OSHA lacks authority to regulate occupation-specific risks related to COVID-19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. . . . OSHA [could] regulate risks associated with working in particularly crowded or cramped environments.

Id. at 118-119. *Emphasis supplied.* The standards used by Complainant in Randolph are precisely the kinds of standards which the Supreme Court distinguished as being within the U.S. agency's delegated authority. Respondent has no authority for its assertion that NC OSH exceeded its delegated authority by implementing and enforcing the COVID-19 regulations at issue in Randolph.

Personal Jurisdiction / Insufficiency of Service of Process

Respondent's argument that the Commission lacks jurisdiction over "the employer" is premised on its contention that NCDPS and the prison worksites at which the violations occurred are separate employers. This argument is without legal authority and was rejected *supra*. Respondent presented no exhibits or affidavits challenging service of the citations pursuant to the requirements of N.C. Gen. Stat. §95-137(b)(1).

Rule 12(b)(6) Statute of Limitations

The issue of the statute of limitations is raised in Respondent's Motions to Dismiss but not specifically referenced as an affirmative defense in its Answers. Respondent cites no authority that this affirmative defense constitutes a jurisdictional bar to this action. The undersigned treats the issue as arising under Rule 12(b)(6).² The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the Complaint. Where the face of the Complaint reveals that recovery may be had under some legal theory, dismissal is precluded. *Feltman v. City of Wilson*, 238 N.C. App. 246, 251, 767 S.E.2d 615, 619 (2014). *Internal citations and quotations omitted.*

Here, the face of each Complaint reveals that the cited hazards had not been abated at the time that the respective citations were issued. Foothills Compl. ¶ 57;

² Respondent's Answers to each of the Complaints contain a boilerplate Rule 12(b)(6) affirmative defense: "Complainant's Complaint fails, in whole or in part, to state a valid claim for relief against [the Respondent]" Randolph Mot. to Dismiss, p 32; Foothills Mot. to Dismiss, p 31.

Randolph Compl. ¶ 31. Therefore, the Complaint alleges violations occurring within the six months prior to April 7, 2022 when the Randolph citations were issued and occurring within six months prior to June 9, 2022 when the Foothills citations were issued. In both cases, at the time that the citations were issued, the conditions **had not been abated**. The limitations period begins to run at the time of the *last* violation, not the first violation. N.C. Gen. Stat. §95-137(b)(3) ("No citation may be issued under this section after the expiration of six months following the occurrence of **any** violation"). *Emphasis supplied*. A violation which continues unabated is a continuing violation which tolls the statute of limitations. *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178-81, 581 S.E.2d 415, 423-24 (2003) (continued unlawful acts tolls the limitations period). Dismissal pursuant to Rule 12(b)(6) because of an alleged untimely issuance of the citations is not warranted based on the Complaints' allegations.

Respondent's Motions to "Estop"

Respondent's motions are ill-formed and do not allege a cause of action for either equitable estoppel or judicial estoppel. Respondent asks the Court to prevent the Complainant from amending either Complaint to "add, substitute, or otherwise name another Respondent." No legal basis for this request is provided.

Complainant has not made any motion to amend either Complaint. If and when Complainant does so, the propriety of any proposed amendment would be determined in accordance with Commission Rule .0102(2) and N.C. Rule of Civil Procedure 15.

Conclusion

Based on the foregoing:

Respondent's Motions to Dismiss for lack of Subject Matter Jurisdiction are DENIED in both Randolph and Foothills.

Respondent's Motions to Dismiss for lack of Personal Jurisdiction and/or Insufficiency of Service of Process in both Randolph and Foothills are DENIED.

Respondent's Motions to Dismiss based on violations occurring outside the statute of limitations in both Randolph and Foothills are DENIED.

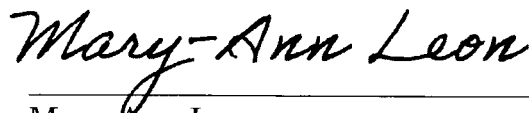
NCDPS', Randolph Correctional Center's, and Foothills Correctional Institution's Petitions to Intervene are DENIED AS MOOT.

Complainant's Motions to Strike Jurisdictional Objections in both Foothills and Randolph are DENIED AS MOOT.

Complainant's Motions to Strike Respondent's Motions to Estop and Respondent's Motions to Dismiss based on statute of limitations are DENIED AS MOOT.

These matters should be set for hearing. As discussed at oral argument, no later than March 7, 2025, Counsel for their respective clients should submit proposed hearing dates for each of the matters to the Commission.

SO ORDERED, this the 26th day of February 2025.



Mary-Ann Leon
Hearing Examiner
maleon@leonlaw.org

CERTIFICATE OF SERVICE

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

**SONYA CALLOWAY-DURHAM
NC DEPT. OF JUSTICE
PUBLIC SAFETY SECTION
PO BOX 629
RALEIGH, NC 27602**

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:

**SAGE BOYD
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 28 DAY OF February 2025.

**PAUL E. SMITH
CHAIRMAN**



**Karissa B. Sluss
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