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 2023-6600
COMPLAINANT,	)	INSPECTION NO: 318262532
	)	CSHO ID.: D1115
v.	)	
ADENA CORPORATION *and its successors*,	)	
RESPONDENT.	)	

ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent has moved the Court, pursuant to Rule .0102(2) of the Rules of Procedure of the Safety and Health Review Commission of North Carolina and Rule 56 of the North Carolina Rules of Civil Procedure for an Order entering a final judgment against the Complainant based upon Complainant's verified admission that its investigator(s) failed to preserve handwritten notes taken contemporaneously during its investigation of alleged violations of Occupational Safety and Health Standards. Respondent filed its motion on or around July 14, 2025. Complainant did not file a response to the motion.

LEGAL STANDARD

"As a general principle, summary judgment is a drastic remedy which must be used cautiously so that no party is deprived of trial on a disputed factual issue." *Johnson v. Trs. of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 681, 535 S.E.2d 357, 361 (2000). Summary judgment should not be granted unless the movant's right to judgment as a matter of law is unequivocal. *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (1988).

Respondent has included with its motion Complainant's verified responses to Respondent's Requests for Admission and the redacted investigative file produced to Respondent pursuant to N.C. Gen. Stat. §95-136(e1). *Resp. Ex.'s B & C.* Complainant's responses to the Requests for Admission reveal that Complainant failed to preserve handwritten notes made by Complainant's Compliance Safety & Health Officers conducting the investigation of the alleged violations. The failure to preserve those notes is a violation of the procedural requirements of N.C. Gen. Stat. §95-135(e1).[1] Respondent contends this violation is irrefutable evidence that its

[1] N.C. Gen. Stat. §95-136(e1) requires that, ten days prior to the enforcement hearing, Complainant provide all witness statements of the Commissioner's testifying witnesses, witness

constitutional right to due process under the law has been violated and that dismissal of the citations is the only permissible sanction for the admitted violation, entitling the Respondent to judgment as a matter of law.

After careful review of relevant legal precedent, the undersigned finds that Respondent is not entitled to judgment as a matter of law based upon its legal theory that summary judgment is required as a sanction against Complainant's procedural violation.

Furthermore, reviewing the entire record that Respondent has submitted with its motion, as the Court is required to do, the undersigned concludes that there are genuine issues of material fact regarding liability and that resolution of these disputed facts do not necessarily require consideration of any witness statements to which the handwritten notes may be relevant. *Seay v. Allstate Ins. Co.,* 59 N.C. App. 220, 222, 296 S.E.2d 30, 31 (1982) (trial court is required to "consider all of the papers before it on hearing the motion in order to make an appropriate disposition of the motion"); *Kidd v. Early*, 289 N.C. 343, 366-67, 222 S.E.2d 392, 408 (1976) (Even if the opposing party makes no response, summary judgment should be denied when the evidence submitted by the movant contains materially disputed facts).

In this case, the investigative file submitted by Respondent cites to photographs taken by Complainant's officer(s) as well as corroborating photographs taken by another law enforcement agency. The file also includes relevant observations of the investigating campus police officer, a written statement by another witness, and a prior safety inspection report. Resp. Ex. C, pp 51, 58, 66-68, 108, 111-112, 549, 554-568 (including photographs labeled "Adena photo," numbered 16, 33, 53, 70, and 72-74). Taken together, this evidence meets the legal standard to deny Respondent's motion. *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (1988) (summary judgment should be denied "when there is more than a scintilla [of evidence] to support the [nonmoving party's] prima facie case.")

COMPLAINANT'S PROCEDURAL VIOLATION OF N.C. GEN. STAT. 95-136(e1) DOES NOT MANDATE A GRANT OF SUMMARY JUDGMENT FOR THE RESPONDENT

The mere violation of procedure does not mean that due process has been denied. *Goodrich v. Newport News Sch. Bd.*, 743 F.2d 225, 227 (4th Cir. 1984)(where minimal due process for notice and opportunity for hearing are provided, violation of procedure does not by itself "sustain an action for redress of procedural due process"). Whether a litigant has been denied the due process that is required by the U.S. Constitution is a fact-based inquiry which requires, *inter alia*, consideration of the procedures afforded to the litigant and whether such

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statements upon which the Commissioner intends to rely, and, all witness statements containing potentially exculpatory statements. The investigating officers' handwritten notes would generally be expected to contain information required to be produced under this statute. See, e.g., *Comm'r v. Harris Teeter*, NC OSHRC, No. 2022-6348, et seq (consolidated), Jan. 31, 2025, Weaver, ALJ presiding at *11; *Comm'r v. Industrial Services Group, Inc.*, NC OSHRC, No. 2021-6369, Apr. 4, 2025, Leon, ALJ presiding at *13; *Comm'r v. Teijin Automotive Technologies*, NC OSHRC, No. 2023-6575, 2023-6590 (consolidated), Jun. 23, 2025, Leon, ALJ presiding, at *4-5.

procedures, under the circumstances of the case provided the litigant with adequate notice of the charges against it and a meaningful opportunity to be heard in order to confront the government's evidence. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (The requirements of due process in the federal constitution are "flexible and call for such procedural protections as the particular situation demands").

To determine whether procedural violations create a risk that a litigant will be erroneously deprived of its constitutionally protected interests Courts must engage in an analysis of the three factors identified in the U.S. Supreme Court's decision in *Mathews v. Eldridge*:

> [R]esolution of the issue [of] whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. . . . More precisely . . . identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976). Thus, the analysis required by *Mathews v. Eldridge* requires consideration of the ***procedures used at the hearing*** and of ***the potential value of the evidence*** if the violation had not occurred.

Respondent's memorandum of law in support of its motion urges the Court to enter summary judgment on the grounds that the U.S. Supreme Court's decision in *Jenks v. United States*, 353 U.S. 657 (1957) compels dismissal. Respondent's position, which it attributes to *Jenks*, is that a court can never be in a position to assess the probability that the investigator's missing notes would have a case-determinative outcome and that a court must, therefore, default to the conclusion that the evidence would have been exculpatory. However, U.S. Supreme Court precedent following *Jenks*, and the subsequent application of the *Jenks* progeny to OSHA cases do not support the Respondent's position that Complainant's failure to preserve the handwritten notes should automatically result in a dismissal of the citations.

In *Jenks*, the Court of Appeals held that Jenks was required to establish a foundation that the witness's prior statements were inconsistent with the witness's testimony at the hearing. While the Supreme Court specifically rejected this requirement, it still articulated a requirement for a defendant to provide some foundation for disclosure of the documents, noting that its precedent proscribed "any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up." *Id.*, at 667.

North Carolina appellate courts follow the same rule. *State v. Byrd*, No. COA17-288, 2017 N.C. App. LEXIS 910, *12, 256 N.C. App. 399, 806 S.E.2d 76 (Nov. 7, 2017) ("Due process does not permit a fishing expedition for immaterial evidence"). Citing *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970).

Since *Jenks*, the U.S. Supreme Court has described the threshold requirement of ***constitutional materiality*** that a litigant must demonstrate was infringed by the government's failure to produce documents. In *California v. Trombetta*, the Court held that:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, . . . evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

467 U.S. 479, 488-89 (1984). The requirement was further delineated in *Arizona v. Youngblood*, where the Court distinguished the requirements for demonstrating deprivation caused by the destruction of exculpatory evidence as compared to evidence that can be categorized as "potentially useful." If the State fails to disclose material exculpatory evidence a defendant need not show there was bad faith. Fundamental fairness is lacking and a due process violation has occurred. On the other hand, where evidence not produced is only "potentially useful," the defendant must show bad faith on the part of the state in order to establish a procedural due process violation. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Ariz. v. Youngblood*, 488 U.S. 51, 58 (1988). Where a litigant alleges that "no one knows" what the missing evidence "would have shown," but the destruction was not the result of the government's bad faith, a due process violation is not established. *Ward v. Pruitt*, No 21-1260, 2021 U.S. App. LEXIS 30658, *7-8, (10th Cir. Oct. 14, 2021).

North Carolina has adopted the threshold requirements articulated in *Trombetta* and *Youngblood*. *State v. Hunt*, 345 N.C. 720, 725, 483 S.E.2d 417, 420 (1997) (adopting the *Youngblood* test requiring that evidence be apparently exculpatory if no bad faith is shown). Accord. *State v. Lewis*, 265 N.C. 488, 500, 724 S.E.2d 492, 501 (2012) (Citing *Youngblood* for the proposition that "the unavailability of evidence does not constitute a denial of due process unless the defendant shows bad faith on the part of the state," and rejecting Defendant's due process claim because it did not meet the constitutional threshold established in *Youngblood* and *Trombetta*). See also *State v. Larkin*, 285 N.C. App. 425, 876 S.E.2d 914 (2022) (affirming that the *Youngblood* test is applied by N.C. Courts and rejecting defendant's argument that it should be abandoned based on North Carolina's state constitution).

Finally, even in the context of defendants facing punishment for violations of criminal law, U.S. Supreme Court precedent does not permit the declaration that there is an automatic due process violation and requires adjudication procedures to be exhausted. In *Jenkins v. McKeithan* the Court stated:

> whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. We think it inappropriate to rule on the extent to which the Commission's procedures may run afoul of the Due Process Clause on the basis of the record before us, barren as it is of any

> established facts. That issue is best decided in the first instance by the District Court in light of the evidence adduced at trial.

395 U.S. 411, 430 (1969). *Internal citations and quotations omitted.* Similarly, in *United States v. Marion*, 404 U.S. 307, 325 (1971), the Court rejected defendant's due process claims as premature where the claim was based upon what could happen at trial and "no actual prejudice to the conduct of the defense [was] alleged or proved."

None of the foregoing requires the Respondent in this case to make a particular showing as to what the missing notes might contain. The statute governs what must be disclosed. The foregoing does, however, illustrate that (1) even in the criminal law context, missing evidence or procedural violations do not automatically result in a cognizable due process claim; (2) at a minimum, an automatic dismissal at the summary judgment stage requires a showing of bad faith on the part of the government; and (3) whether a future proceeding will be a constitutionally adequate opportunity to be heard cannot be determined on the basis of speculation.

In this case, applying the *Trombetta* and *Youngblood* rules adopted by North Carolina, the undersigned finds that automatic dismissal is precluded on summary judgment because Respondent has made no showing of bad faith on the part of the government. Respondent's argument, supported by the Complainant's responses to Requests for Admission, demonstrate only that the failure to take steps to preserve the notes in question were the result of a department-wide policy, predicated upon a mistaken interpretation of the law, baked into the training of employees. See, Resp. Ex. C, *Responses to Requests for Admission* #49, #57, #58, #81, #84; Resp. Mem. of Law, pp 4-5.

At the enforcement hearing, a showing that there is a constitutionally material due process violation will require Respondent to show that the government's case is supported by evidence which unfairly deprives the Respondent an opportunity to be heard. This is not particularly burdensome: If the government's only evidence in support of any element of an alleged violation is an out-of-court witness statement where all contemporaneous records of the statement are unavailable due to the government's failure to preserve the evidence, then Respondent has been denied a fair opportunity to be heard on that element. If, on the other hand, the government's proof of a violation is based upon witness statements where contemporaneous records are provided, or, based on photographic evidence or other properly authenticated, non-hearsay documentary evidence that was properly disclosed, then Respondent has the same opportunity as the government to cross-examine witnesses using that evidence.

Rather than being inapposite to the foregoing rules, the OSHA cases cited by the Respondent actually illustrate that these principles have been followed by OSHA commissions. The dismissals cited by the Respondent are not the result of an automatic, default rule. Instead, they resulted from adjudicators' analyses of the facts and circumstances of each case. Adjudicators arrived at their respective conclusions considering the totality of the available procedures and whether, as a result, fundamental fairness was denied to a Respondent, thereby creating a significant risk of erroneous deprivation of constitutionally protected interests.

In *Frazee Construction Company*, 4 OSAHRC 188, 188-190, 1973 OSAHRC LEXIS 201, *1-3 (Aug. 8, 1973), the Commission affirmed the Administrative Law Judge's decision to vacate a citation because of the Complainant's refusal to disclose certain documents. At the hearing, the investigator admitted during cross-examination that he had made written notes and memoranda during the inspections conducted. He testified that he only had a portion of the notes in his possession. The "complainant was adamant and unremitting in refusing any examination of its memoranda and notes," including refusing a total of three times to even allow an in-camera review of the documents by the judge. Because of the position taken by the Complainant, Respondent moved to dismiss the complaint and to strike the testimony of the witness. The Administrative Law Judge granted both motions in his final decision and order. *Id*., at 190. Thus, in Frazee, the dispositive fact was not that some portion of the investigator's notes had not been preserved; the dispositive fact was that the Complainant refused to disclose the notes which were in its possession at the hearing.

In affirming the ALJ's decision, the Commission noted that the investigator's notes were essential for examining the witness ***as to matters upon which the witness offered testimony***. *Id*., at 190-191. In other words, the violation impacted the fairness of the proceeding because the witness had already testified on direct examination. The Commission noted, "The action of the complainant's counsel in refusing to disclose the memoranda in its possession frustrated [the] search for truth." *Id*., at 195.

Similarly, *Sec'y of Labor v. Bethlehem Steel Corp*., 9 BNA OSHC 1321 (O.S.H.R.C. Feb. 19, 1981) was remanded to allow Respondent to review a memorandum prepared by the Complainant's investigator. The Commission cited the rule adopted in *Massman-Jahnson Luling*, No. 76-1484, 1980 OSAHRC LEXIS 467, *34, 8 OSHC (BNA) 1369 (May 2, 1980). In *Massman-Jahnson Luling*, the Commission held that the Administrative Law Judge had erred in ordering that witness statements be disclosed prior to the hearing. The grounds for withholding the statements in *Massman-Jahnson Luling* were distinguishable and not relevant here.[2] Nevertheless, following a *Jenks* analysis, the *Massman-Jahnson Luling* Court adopted the following rule:

> [W]hen a witness has completed testifying for the Secretary on direct examination, the Secretary shall, upon motion by a respondent, turn over to it all the witness's prior statements that are in the government's possession and that relate to the subject matter of the witness's testimony.

This rule was applied in the *Bethlehem Steel* case regarding the investigator's memorandum. The relevant conclusion is that a due process violation would be found if, after a witness testifies, the government refuses to disclose witness statements in its possession that are relevant to the testimony offered.

Airlift Int'l Inc., 1981 OSAHRC LEXIS 264, OSHR Docket No. 12569, *4-5 (May 18, 1981) followed the same rule, noting, as well, that the obligation to produce investigative

[2] The Complainant contended it was permitted to withhold the witnesses' prior statements pursuant to the informer's privilege.

materials pertains to those statements "that relate to the subject matter of the witness's testimony." The Commission in *Airlift* explained that a remand to allow Respondent the opportunity to review the witness's prior statement was necessary because apart from the investigator's testimony there was "insufficient independent evidence to affirm a violation." *Id.*, at *5. The Commission contrasted *Airlift* with a prior holding where the unavailability of the compliance officer's notes for use by the employer in cross examination was held to be harmless error because ***evidence independent of the compliance officer's testimony established the violation***. *Blakeslee-Midwest Prestressed Concrete Co.,* No. 76-2552, 1977 OSAHRC LEXIS 151 at *9-11 (Oct. 26, 1977). Thus, *Airlift* is consistent with this decision: a due process violation will not be found where Complainant can establish a violation without relying on out-of-court witness statements that are withheld from the Respondent. Having reviewed the record submitted by the Respondent, the undersigned finds that summary judgment is precluded because there are genuine issues of material fact evinced by documentary evidence not tied to anticipated witness testimony. *Supra*, p 2.

Whether withholding a witness statement is reversible error was also addressed in *Edison Lamp Works*, No. 76-484, 1979 OSAHRC LEXIS 180, *4-8, fn 2 (Sept. 26, 1979). Although Respondent cited a *concurring opinion* in *Edison Lamp Works*, No. 76-484, 1979 OSAHRC LEXIS 180, *4-8, (Sept. 26, 1979) to support its argument that OSHA cases require dismissal for failure to disclose the compliance officer's notes, *the actual holding* in the case does not stand for that proposition. ("In view of our disposition, the question raised by respondent with regard to the compliance officer's notes is moot"). *Id.*, at *4, fn2 The citations in *Edison Lamp Works* were dismissed because the physical evidence used to identify the alleged hazards did not support a violation of the respective standards. *Id.*, at *5-6. Finally, the holding in *Cent. Transp., LLC*, is consistent with the U.S. Supreme Court precedent that a request to dismiss a citation on due process grounds prior to an evidentiary hearing is premature. *Cent. Transp., LLC* 2015 OSAHRC LEXIS 83, Nos. 14-1452, 14-1612, 14-1934, *21, (Dec. 7, 2015) (denying motion to strike premised on due process argument where due process claim found to be speculative).

Respondent also cites *Comm'r of Labor v. Harris Teeter*, No 2022-6438, 6486, 6492, 6531 (consolidated), NC OSHRC, (Jan. 31, 2025), Weaver, J., presiding, and *Oregon Occupational Safety & Health Division v. Don Whitaker Logging, Inc.*, Oregon Workers Comp. Bd., (1992), Brown, J. presiding (Resp. Ex. G) in support of its motion. *Harris Teeter* is not precedential authority but is worth briefly reviewing for the facts discovered at the hearing. Ultimately, the citations were dismissed when the investigator revealed that he had destroyed his field notes but had inadvertently kept three pages of the notes. The three pages were produced to the Respondent. Within the three pages was a statement which the hearing officer found potentially exculpatory. (Resp. Ex. #5, p 5). The hearing examiner's decision was made *after* Complainant's witness had testified to matters reflected in the unavailable notes. The *Oregon Occupational Safety & Health Division* opinion dismissed two of the citations because a violation of Oregon's statute had occurred. No due process analysis was undertaken.

Finally, Respondent argues that dismissal is the only permissible sanction for Complainant's procedural violation because the Court lacks inherent power to apply lesser

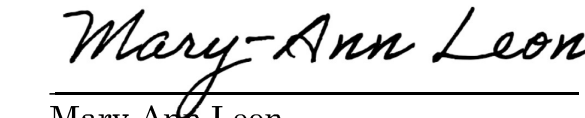
sanctions. Resp. Mem. of Law, pp 18-20.[3] Respondent's assertion is based upon its contention that *Jenks* compels an automatic dismissal for a procedural violation. Based on the U.S. Supreme Court precedent (cited *supra* at pp 3-5), Respondent has not met the criteria established for dismissal.

In addition, the Court's inherent power to establish sanctions is not limited to attorney misconduct, as Respondent asserts. See, e.g., *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674, 360 S.E.2d 772, 776 (1987) (holding that a court has inherent power to impose sanctions for failure to comply with a court order); *Thompson v. Hanks of Carolina, Inc.*, 109 N.C. App. 89, 93, 426 S.E.2d 278, 281 (1993) (applying *Daniels* in the context of N.C. Gen. Stat. §1-109, holding that, although dismissal is permitted by statute, the Court retains its inherent authority to impose lesser sanctions); *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984)(rejecting the Court of Appeals' holding that dismissal was required for a procedural violation and holding, instead, that while dismissal is a permissible sanction, "this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice"). Similar to the Rules of Civil Procedure at issue in *Daniels* and *Harris*, the N.C. Safety and Health Review Commission's Rules provide that the failure to proceed as provided by the Commission's Rules may result in a declaration of default and a decision against the offending party. N.C. SHRC, Rule .0309. The Commission's rule provides that the decision to dismiss citations for a Complainant's failure to follow procedural rules is left to the discretion of the Hearing Examiner and/or the Review Board.

In summary, Respondent has not established that it is entitled to judgment as a matter of law. This case is about the death of an employee under circumstances that the North Carolina Occupational Safety & Health Rules were designed to prevent. There are disputed facts regarding why the employee's death occurred. Therefore, an evidentiary hearing is required to resolve the issues of liability asserted by the Complainant.

Based on the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED that Respondent's Motion for Summary Judgment is DENIED.

SO ORDERED, this the 27th day of October 2025.



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[3] Respondent also takes issue with the interpretation of the evidence used to support an element of a violation affirmed in the case it is attempting to distinguish, *Comm'r v. Teijin Automotive*. Whether evidence was correctly interpreted is not an issue here.

CERTIFICATE OF SERVICE

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

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THIS THE 27 DAY OF OCTOBER, 2025.

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