BEFORE THE SAFETY AND HEALTH REVIEW BOARD

OF NORTH CAROLINA

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 93-2820

v.

ORDER

SUMTER BUILDERS, INC.,

RESPONDENT.

This matter is before the undersigned on Respondent's Motion for Leave to Conduct Discovery. Respondent seeks unredacted witness statements. The Commissioner opposes the Motion. The Commissioner asserts that N.C.G.S. § 95-136(e)(1) prohibits the release of witness names and statements to Respondent. For the reasons set forth below, the Respondent's Motion is GRANTED with certain limitations and restrictions.

I. Statutory Restrictions on Disclosing Witness Names and Statements

On July 9, 1993 the North Carolina General Assembly ratified House Bill 504 which, inter alia, amended N.C.G.S. § 95-136 by adding section (e1) as follows:

> The names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections or investigations conducted pursuant to this Article that would name or otherwise identify the witnesses or complainants, shall not be released to any employer or third party. A witness or complainant may, however, sign a written release permitting the Commissioner to provide information specified in the release to any persons or entities designated in the release. Nothing in this section shall be construed to prohibit the use of the name or statement of the witness or complainant in enforcement proceedings or hearings held pursuant to this Article. The Commissioner may permit the use of names and statements of witnesses and complainants and information obtained during the course of inspections or investigations conducted pursuant to this Article by public officials in the performance of their public duties.

(emphasis added).

Based on this statute, the Commissioner releases witness statements to Respondents for use in enforcement proceedings,[1] but redacts from those statements the names of the witnesses and any information from which the names of the witnesses can be derived.[2] This is what happened in this matter. The Commissioner provided to the Respondent all witness statements in its possession but redacted the names of the witnesses and redacted any information in those statements from which the names of the witnesses could be derived. The Respondent seeks discovery of the redacted information for use in this enforcement proceeding. The Commissioner argues that the statute prohibits such discovery.

This statute is plain and unambiguous. Where a statute's language is clear and unambiguous, judicial construction is unnecessary. The plain and definite meaning of the statute controls. McGladrey. Hendrickson & Pullen v. Syntek Finance Corp., 330 N.C. 602, 411 S.E.2d 585 (1992).

Using the plain language of N.C.G.S. § 95-136(e)(1), the Legislature states that the Commissioner can never release witness names and statements from which witness names can be derived.[3] The statute then lists three clear and unambiguous exceptions to this blanket prohibition. The first exception is that the witness herself can

authorize release of her name and statement to individuals she authorizes. The second exception is that the prohibition does not apply, at all, to the use of such names and statements in NCOSHA enforcement proceedings. The third exception is that witness names and statements may be used by public officials in the performance of their public duties.

Only the second exception to the blanket prohibition of release of witness names and statements applies in this matter. The Legislature explicitly allows the use of witness names and statements in enforcement proceedings.[4] The Legislature did not limit who could use those witness names and statements in enforcement proceedings. Thus, the Commissioner, the Respondent, other named parties, and the Board are all permitted to use witness names and statements during enforcement proceedings. This is consistent with the Legislature's overall structure of NCOSHA enforcement proceedings which are designed to give effect to the OSH Act, to allow an efficient determination by the Safety and Health Review Board of contested factual issues and legal conclusions, and to assure due process to employers and other parties.

The only way any party other than the Commissioner can use such names and statements in enforcement proceedings is for the Commissioner to supply those names and statements to those parties. Such use by other parties is allowed by statute, but not required.

There is no statute or Board Rule requiring the voluntary disclosure of witness names and statements by the Commissioner for use in enforcement proceedings.[5] However, discovery is permitted as part of the enforcement proceedings before the Board. See Safety and Health Review Board Rules of Procedure .0404. Where discovery of witness names and statements is requested and allowed pursuant to Board Rule .0404, N.C.G.S. § 95-136(e)(1) does not prohibit such discovery.[6] On the contrary, that statute explicitly permits the disclosure of such information for use in the enforcement proceeding. A means for such disclosure is through the discovery process.[7]

II. Discovery of Witness Names and Statements

Having determined that N.C.G.S. § 95-136(e)(1) does not prohibit the discovery of witness names and statements as part of NCOSHA enforcement proceedings, the undersigned must now determine whether the requested discovery should be permitted and, if so, under what terms.

Board Rule .0404(a) states:

> Except by order of the Board or the hearing examiner, discovery depositions of parties, intervenors, or witnesses, discovery inspections by parties or intervenors, and interrogatories, and requests for documents and things, directed to parties or intervenors shall not be allowed.

Thus, depositions, interrogatory discovery and requests for production of documents and things are permitted under Board Rules only if such discovery requests are pre-approved by the Board or its hearing examiners. In considering discovery requests, the Board and its hearing examiners should consider, among other things, burdensome expense, prior opportunity of a party to acquire the information sought, the complexity of the case, and other relevant factors. Rule .0404(c).

Discovery requests should not be allowed where they are sought to merely delay the proceedings, seek irrelevant or unnecessary information, or designed to impose an undue burden on the other party. Narrowly tailored discovery that allows the parties to narrow issues, avoid surprise at a hearing, or is otherwise designed to permit the fact finder to reach a just decision, should be considered for allowance. The party seeking discovery carries the burden of establishing the necessity of the discovery sought. See Brooks v. H.B. Zachary Co., 2 NCOSHD 341 (RB 1982).

As a general proposition, witness names and statements that will be used at a hearing should not come as a surprise to other parties. Knowing witness names and statements that will be submitted at a hearing would generally be beneficial to a party in preparing its defense or affirmative case. Where both parties are able to

present a prepared case at the time of hearing, the ability of the fact finder to make a reasoned decision is enhanced.

There are limitations. The Legislature recognizes that employees are sometimes subject to reprisal by employers when they testify at an NCOSHA hearing, or when statements given by such employees are used at hearings by the Commissioner. Thus, the Legislature enacted N.C.G.S. § 95-130(8)-(10) prohibiting retaliation and discrimination against employees who testify or otherwise participate in an NCOSHA investigation.

When witness names and statements are permitted to be discovered, disclosure of such information should be limited in an effort to prevent any such retaliation or the appearance of the possibility of such retaliation.

Furthermore, discovered material can only be permitted to be used during NCOSHA enforcement proceedings. This is so because, Respondent, or others, cannot disclose information which the Commissioner could not otherwise disclose pursuant to

N.C.G.S. § 95-136(e)(1). In other words, merely because the Commissioner discloses witness names and statements to a Respondent pursuant to Board Rule .0401 for use in an enforcement proceeding, does not then allow the Respondent to use that information for any purpose whatsoever. The Respondent is then bound by the same terms the Commissioner is pursuant to N.C.G.S. § 95-136(e)(1). It cannot disclose release the witness names and statements to any other party. It cannot use the witness names and statements for any purpose other than NCOSHA enforcement proceedings.

Therefore, any request for discovery in which the names of witnesses and witness statements is either sought or given, should only be allowed, if at all, under a protective order. The protective order must state that such information is confidential, subject to the provisions of N.C.G.S. § 95-136(e)(1), that no copies will be made, that at the close of all enforcement proceedings the material will be returned to the Commissioner or destroyed, that it will only be used for enforcement proceedings under the OSH Act, and that it will not be disclosed to anyone unless they have read the protective order and signed an undertaking.

The undertaking should recite the non-discrimination provisions of N.C.G.S §95-130(8), the person signing the undertaking must confirm that she has read the nondiscrimination provisions and the protective order, understands them and will abide by them. Only two people other than Respondent's attorneys should normally be permitted to sign undertakings. Only individuals signing the undertaking may be permitted to see the discovered material. Individuals signing the undertaking may not disclose the discovered material or information found in the discovered material to any person who has not signed an undertaking. Individuals signing the undertaking may not discuss the information in the discovered material with anyone who has not signed an undertaking.

THEREFORE it is ORDERED that Respondent's Motion to Conduct Discovery is GRANTED under the following terms:

1. The Commissioner must produce the unredacted witness statements for any witness or statement the Commissioner has used or will use in the enforcement proceedings. This means that witness statements that were not used in the drafting of the citation or the complaint are not subject to discovery unless the Commissioner intends to rely on those statements, in any form whatsoever, to prove its affirmative case.

2. Discovery will only be permitted under an approved protective order with undertakings. Respondent has the responsibility of drafting a proposed protective order and undertakings for the undersigned's approval. The protective order and undertaking should reflect the limitations set forth in this Order. Respondent should work with the Commissioner in drafting the protective order and undertaking in an effort to reach a consensus on acceptable language. The proposed protective order and undertaking should be submitted to the undersigned for approval within ten days of this Order. If the Commissioner objects to the proposed protective order and undertaking as filed he will have five days to submit his objections.

3. After approval of a protective order, the Commissioner must respond to the Discovery, as set forth in paragraph 1 above, within ten days of receipt of the appropriate undertakings.

. This the 6th day of December, 1993.

J. B. KELLY, Chairman,
Safety and Health Review Board of
North Carolina

FOOTNOTES

[1] Enforcement proceedings begin with the notification to the employer of the issuance of a citation and continue through the contest, if any, to the Review Board and conclude with a final Order from the Board or the State Courts. See N.C.G.S. § 95-137(b).

[2] This statute does not distinguish between supervisory and non-supervisory witnesses.

[3] This prohibition also applies to requests for information pursuant to N.C.G.S. § 132-6 at the conclusion of enforcement proceedings. N.C.G.S. § 95-136(e).

[4] The Legislature, having created the enforcement proceedings for NCOSHA, knew that employers contesting citations would have their contest adjudicated before a quasi-judicial agency -- the North Carolina Safety and Health Review Board. Such proceedings include the right to formal pleadings, discovery, and an evidentiary hearing to assure due process rights. It is consistent with Legislative intent to allow discovery of witness names and statements during enforcement proceedings to ensure due process is served.

[5] N.C.G.S. § 95-136(e)(1) does not prohibit voluntary disclosure to a Respondent for use in an enforcement proceeding. Nor does the statute require voluntary disclosure to a Respondent for use in an enforcement proceeding.

[6] The Commissioner argues that one of his purposes in seeking limitations on the disclosure of witness names and statements is to protect employees from reprisal should their names be disclosed to employers. Actions that subvert witness confidentiality may not only lead to possible reprisals but may hinder the Commissioner's efforts to interview potential witnesses while conducting inspections and investigations. The undersigned is cognizant of these concerns, and they may be well founded. These concerns are addressed, however, in the method of disclosure, not in the interpretation of a clear and unambiguous statute.

[7] This decision is consistent with Hardin v. Guaranteed Systems. Inc., No. 93 CvS 977 (Superior Ct., NC, Rockingham County, filed Sept. 13, 1993). In Hardin, the plaintiff sought witness names and statements from the Department of Labor for use in civil litigation, not OSHA enforcement proceedings. Because such use and disclosure of witness statements and names is not among the three exceptions to the blanket prohibition of disclosing witness names by the Department, plaintiff's request was denied. In this matter, the disclosure of witness names and statements falls into one of the three exceptions enumerated by the Legislature.