United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. STONE & WEBSTER CONSTRUCTION, INC., and its Successors, Respondent.	OSHRC Docket No. 10-0130
SECRETARY OF LABOR, Complainant, v. BARTLETT NUCLEAR, INC., and its Successors, Respondent.	OSHRC Docket No. 10-0169

ON BRIEFS:

Elizabeth Kruse, Trial Attorney; Michael D. Schoen, Senior Trial Attorney; Madeleine T. Le, Counsel for Safety and Health; James E. Culp, Regional Solicitor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Dallas, TX
For the Complainant

Kenneth D. Kleinman, Esq.; Stevens & Lee, PC, Philadelphia, PA
For Respondent Bartlett Nuclear, Inc.

McCord Wilson, Esq.; Rader & Campbell, PC, Dallas, TX
For Respondent Stone & Webster Construction, Inc.

DECISION AND ORDER

Before: ROGERS, Chairman; and ATTWOOD, Commissioner.

BY THE COMMISSION:

At issue before the Commission is the Secretary's petition for interlocutory review ("PIR") challenging multiple orders issued by Administrative Law Judge Patrick B. Augustine relating to the Secretary's assertion of the deliberative process privilege. In several discovery orders, the judge rejected the Secretary's privilege claim as the basis for withholding specific documents, and required the Secretary to disclose these documents to the respondents, Stone & Webster Construction, Inc. ("Stone") and Bartlett Nuclear, Inc. ("Bartlett"). The judge also issued a show cause order demanding that the Secretary show why her failure to comply with his discovery orders should not result in dismissal of the citations issued to the respondents by the Occupational Safety and Health Administration ("OSHA"). After thoroughly considering the matter, we vacate all of the judge's discovery and show cause orders issued between March 5 and 9, 2012, and on March 21, 2012, and remand these consolidated cases to the judge for further proceedings consistent with this decision.

BACKGROUND

On December 22, 2010, the Secretary submitted a privilege log to the respondents indicating that "Draft OSHA 1Bs" were being withheld from discovery under the deliberative process privilege.[1] More than a year later, in February 2012, counsel for the Secretary and respondents exchanged various emails concerning whether the Secretary would be willing to disclose these particular documents. According to the respondents, the Draft OSHA 1Bs could be relevant to their preemption defense that the Nuclear Regulatory Commission ("NRC"), rather than OSHA, has jurisdiction over the conditions alleged in the citation items. The respondents had intended to use these documents during depositions of NRC officials scheduled for March 7, 2012. The Secretary informed the respondents that the documents were privileged and would not be disclosed, but agreed to participate in a conference call with the respondents and the judge to discuss this issue.

[1] An "OSHA 1B" is a worksheet typically prepared by a compliance officer concerning a workplace inspection.

During the conference call on March 2, 2012, the respondents orally moved to compel disclosure of the Draft OSHA 1Bs. The judge gave the parties until the end of the day to offer case law, via email, for his consideration before ruling on the respondents' motion. The parties complied and two days later, on Sunday, March 4, the judge issued an order granting the respondents' motion and ordering the Secretary to disclose the documents to the respondents by the close of business on Tuesday, March 6—that is, within one business day of his order. The next day, the judge issued another nearly identical order that superseded his March 4 order.

On March 6, 2012, the parties participated in a second conference call with the judge, during which the Secretary's counsel informed the judge of her intent to file a motion for reconsideration, explaining that she believed compliance with the judge's order would result in waiver of the deliberative process privilege. The judge gave the Secretary's counsel until the close of business that day to file the motion. Also during the conference call, the respondents' counsel raised grievances concerning certain alleged conduct by the Secretary's counsel. These grievances were further discussed in a March 6 email that Bartlett's counsel sent to the Secretary's counsel and the judge. Later that day, the Secretary filed her motion for reconsideration and also requested a six-day stay of the case in the event the motion was denied.

On March 7, 2012, the depositions of NRC officials occurred as scheduled. That same day, the judge issued two more orders. In the first order, the judge (1) chastised the Secretary for failing to comply with his discovery orders and, based on this conduct, invited the respondents to file a motion for sanctions within seven days; (2) instructed the Secretary to respond to that yet-to-be-filed sanctions motion by March 24; (3) noted that his March 5 discovery order remained in effect; and (4) gave the respondents seven days to respond to the Secretary's motion for reconsideration. In the second order, the judge explicitly accused the Secretary's counsel of engaging in contumacious conduct, and ordered the parties to appear for a show cause hearing on March 28, during which the Secretary's counsel would be given an opportunity to show why the contested citations should not be dismissed.

On March 9, 2012, the judge issued an order granting the Secretary's request to withdraw her motion for reconsideration and vacating the portion of his March 7 order pertaining to that motion. Having been informed by the Secretary of her intent to consider seeking interlocutory review, the judge also granted the Secretary's request for an immediate stay, though he excluded

the March 7 show cause order from the stay. Three days later, on March 12, the Secretary filed her PIR with the Commission, and the respondents filed a motion for sanctions with the judge.

On March 21, 2012, the judge issued an order vacating the date of the show cause hearing, but not the show cause order itself. The Commission stayed the consolidated cases in their entirety later that same day and, on April 2, granted the Secretary's PIR.

DISCUSSION

Deliberative Process Privilege

The deliberative process privilege, which originated at common law, "allows the government to withhold documents and other materials that would reveal 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' " *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citation omitted). This privilege, however, "does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations." *Id.*; *see Montrose Chem. Corp. of Cal. v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974) (noting that when "a summary of factual material on the public record is prepared by the staff of an agency administrator, for his use in making a complex decision, such a summary is part of the deliberative process, and is exempt from disclosure . . . ."). "In deciding whether material is protected under this privilege, [the courts] consider whether the material is 'predecisional' and whether it is 'deliberative.' " *Hinckley v. United States*, 140 F.3d 277, 284 (D.C. Cir. 1998).

In his March 5, 2012 order, the judge rejected the Secretary's claim that the Draft OSHA 1Bs are protected under deliberative process privilege. Although recognizing that these documents are predecisional because they are "part of the file provided to the [Area Director] to consider in approving the issuance of citations," the judge concluded that they are not deliberative. In reaching this conclusion, the judge stated that the OSHA 1B allows the OSHA compliance officer to reduce to writing "facts generated from the investigation[,]" and that "[i]ts purpose is not designed to protect the deliberative *process* of OSHA in formulating [] policy[,] as there is no agency process information contained therein and no new policy being made."

We find that the judge applied the deliberative process privilege too narrowly. As noted by the D.C. Circuit, it is not simply "policy" matters that are protected from disclosure, but rather

any " 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions . . . are formulated.' " *In re Sealed Case*, 121 F.3d at 737 (citation omitted). Indeed, the purpose of this privilege " 'is to prevent injury to the quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private." *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)). The privilege "recognizes 'that were agencies forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.' " *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827, 854 (3d Cir. 1995) (citation omitted). Therefore, under applicable precedent, predecisional materials pertaining to the government's decision to cite, *or not to cite*, an employer for a particular alleged violation are within the scope of the privilege.

In addition to rejecting the Secretary's privilege claim, the judge concluded in the alternative that the Secretary had waived the privilege by disclosing information contained in the Draft OSHA 1Bs to both NRC and the respondents. The judge based his waiver analysis on the following findings: (1) OSHA interacted with the NRC on two occasions "to discuss the underlying facts of the inspection, the hazards identified and the intent of OSHA to charge the Respondent's with violations of OSHA regulations"; and (2) Stone produced evidence showing that, at its closing conference, OSHA had disclosed "the type of violation, the classification, the proposed regulation, measurements, exposure and number of people exposed." In her March 2, 2012 email to the judge, the Secretary argued that information included in the Draft OSHA 1Bs "differ[ed] substantially" from information provided to the respondents during their closing conferences, "including such major differences as the characterization of the violation[s] . . . , dates, and descriptions of the hazards." Although the judge did not conduct an *in camera* review of the Draft OSHA 1Bs, he nonetheless concluded that "significant facts in [these documents] were disclosed to NRC and to the Respondents."

We find that the judge made several errors in his waiver analysis. The government waives the deliberative process privilege only if an authorized disclosure of a document is voluntarily made to a "non-federal" party. *See, e.g, Florida House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 946 (11th Cir. 1992) (discussing waiver in context of Freedom of Information Act, 5 U.S.C. § 552); *Sherman Indus., Inc., v. Sec'y of Air Force*, 613 F.2d 1314, 1320 (5th Cir. 1980) (same). Thus, any information that OSHA released to NRC

would not constitute a waiver because NRC, a federal agency, is not a "non-federal" party. In addition, the "release of a document only waives [the deliberative process privilege] for the document or information specifically released, and not for related materials." *See, e.g., In re Sealed Case*, 121 F.3d at 741; *Mobile Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989). In the absence of an *in camera* review, the judge had no way to assess whether the information included in the Draft OSHA 1Bs was "specifically released" to the respondents during their closing conferences or, as the Secretary contends, differed in certain respects from what was released. Moreover, accepting *arguendo* that information released during the closing conferences was identical to information ultimately included in the Draft OSHA 1Bs, this would not establish that the Secretary waived the privilege. Regardless whether OSHA revised its original view of the proposed violations between the time it held the closing conferences and completed the Draft OSHA 1Bs, OSHA's process during this predecisional period remained deliberative. *See Mobil Oil Corp.*, 879 F.2d at 703 (noting that agency need not show to what extent draft differs from final document because to do so would "expose what occurred in the deliberative process between the draft's creation and the final document's issuance"); *Russell v. Dep't of Air Force,* 682 F.2d 1045, 1049 (D.C. Cir. 1982) (holding that "a simple comparison between the pages sought and the official document would reveal" agency decision maker's judgment). We therefore reject the judge's conclusion that the Secretary waived the deliberative process privilege as to the Draft OSHA 1Bs.

For these reasons, we vacate the judge's discovery orders pertaining to the Draft OSHA 1Bs and remand this matter to the judge. On remand, if the judge decides that the Secretary has properly asserted the deliberative process privilege,[2] we instruct him to perform an *in camera*

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[2] On April 13, 2012, the Secretary filed with the Commission an affidavit from Assistant Secretary of Labor David Michaels for the purpose of asserting certain privileges, including the deliberative process privilege. *See Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (listing requirements for asserting deliberative process privilege in proceeding before administrative law judge); *see also* Commission Rule 52(d)(1), 29 C.F.R. § 2200.52(d)(1) (procedure for asserting claims of privilege). On April 25, the respondents filed a motion to strike the affidavit.

We need not address the Secretary's filing or the respondents' motion because the affidavit does not concern matters that are necessary to our disposition of the PIR. If the Secretary wants the affidavit to be considered on remand, she must file it with the judge. We order the judge to allow the Secretary ten business days from the date she receives this order to file the affidavit

review of the Draft OSHA 1Bs and assess, in light of our foregoing analysis, whether these documents in their entirety, or any portion of them, fall within the privilege and are protected from disclosure. If the judge finds that any portion of the Draft OSHA 1Bs fall outside of the deliberative process privilege, the Secretary "may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission." Commission Rule 52(d)(2), 29 C.F.R. § 2200.52(d)(2). In addition, before disclosing any portion of the Draft OSHA 1Bs to the respondents, the judge must provide the Secretary an opportunity to "review [any] redactions and respond accordingly" and seek interlocutory review of his order. *Cranesville Aggregate Cos.*, 23 BNA OSHC 1570, 1573, 2011 CCH OSHD ¶ 33,142, p. 55,260 (No. 09-2011, 2011) (consolidated). If the judge finds that any portion of the Draft OSHA 1Bs fall within the privilege, he should provide the respondents an opportunity to overcome the privilege by making "a sufficient showing of need." *In re Sealed Case*, 121 F.3d at 737-38.

Show Cause Order

Under Commission Rule 52(f), when a party fails to comply with a judge's order compelling discovery, the judge may enter an order "with regard to the failure as [is] just."[3] 29 C.F.R. § 2200.52(f). Such an order "may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party." *Id.* The order "may include any sanction stated in Federal Rule of Civil Procedure 37, including . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by

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with him because, as the following circumstances show, he failed to provide her with this opportunity when the matter first arose. After the respondents moved to compel disclosure of the Draft OSHA 1Bs during the conference call on Friday, March 2, 2012, the judge gave the Secretary only until the close of business that day to file a response, via email, rather than the ten days required under Commission Rule 40(c), 29 C.F.R. § 2200.40(c). And Commission Rule 52(d)(1) expressly states that in response to a motion to compel, a party claiming a privilege may file an affidavit to support its claim. The judge nonetheless issued his order rejecting the Secretary's privilege claim on Sunday, March 4, effectively denying the Secretary the time specified by Rule 40(c) to file the affidavit.

[3] The judge relied on Commission Rule 101(a), 29 C.F.R. § 2200.101(a), as the basis for his show cause order. But paragraph (c) of Rule 101 states that "[t]his section does not apply to sanctions for failure to comply with orders compelling discovery, which are governed by § 2200.52(f)."

default against the disobedient party." *Id.* Ordinarily, "dismissal is too harsh a sanction for failure to comply with certain pre-hearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings." *See Amsco, Inc.*, 19 BNA OSHC 2189, 2191 (No. 02-0220, 2003).

Here, the judge concluded in his March 7, 2012 show cause order that the Secretary had engaged in contumacious conduct. The conduct described in the judge's show cause order and his other order from March 7 pertains exclusively to the Secretary's refusal to comply with the judge's discovery orders compelling disclosure of the Draft OSHA 1Bs. Although the judge recognized that the Secretary had filed a motion for reconsideration of his March 5 order and requested "a six-day stay if the Court overruled her [motion]," he criticized her procedural approach and explained that a motion for reconsideration does not automatically stay a case. According to the judge, the Secretary "should have followed one, or more, of the established judicial procedures to address [her] disagreement with the [March 5] Order" including a request for an immediate stay. The judge stated that he "assumes [the Secretary] knows the law and the procedures to utilize to address disagreements with a court order" and, therefore, "can only conclude that [her] decision to ignore the [March 5] Order was done intentionally, flagrantly and with disrespect for the . . . judicial process established by the Commission." In his subsequent March 9 order, the judge rejected the Secretary's explanation that it was her intent to request an immediate stay in her motion for reconsideration, characterizing her statement as "a self-serving, weak attempt . . . to justify her intentional disregard of the [March 5] Order."

The Commission has held that "failure to comply with [a discovery] order is not, by itself, an indication of bad faith or contumacious conduct when the party's reason for refusing to comply has a substantial legal basis and its conduct did not indicate disrespect towards the Commission or the issuing judge." *Donald Braasch Construction Inc.*, 17 BNA OSHC 2082, 2086, 1995-97 CCH OSHD ¶ 31,259, p. 43,868 (No. 94-2615, 1997); *see Roy's Constr., Inc.*, 21 BNA OSHC at 1558-59, 1558 n.2, 2004-09 CCH OSHD at pp. 52,716-17, 52,717 n.2 (citing cases that comport with Commission's decision in *Braasch* and limiting its reach to discovery orders). Under this precedent and given the circumstances present here, the judge's contumacy determination is unfounded. As reflected in our discussion above of the deliberative process privilege, the Secretary's claim has a "substantial legal basis," even if it is ultimately rejected. *Braasch*, 17 BNA OSHC at 2086, 1995-97 CCH OSHD at p. 43,868. And contrary to the

judge's characterization of the Secretary's procedural approach, her formal request for reconsideration of the judge's disclosure ruling shows respect for the adjudicatory process. Moreover, we find that her decision to seek a conditional stay instead of an immediate one does not demonstrate bad faith or contumacy.[4]

We conclude, therefore, that the judge erred by finding that the Secretary's refusal to comply with his discovery orders was contumacious. Accordingly, we vacate the judge's show cause order.[5]

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[4] We note that the Secretary's actions here followed rulings in which the judge improperly shortened the time periods set by the Commission's rules for the Secretary to respond to the various procedural developments regarding her privilege claim. As noted, the judge gave the Secretary only a matter of hours to respond to the respondents' motion to compel, rather than the ten days required under Commission Rule 40(c), 29 C.F.R. § 2200.40(c). And in his March 4 and 5 orders, the judge instructed the Secretary to disclose the Draft OSHA 1Bs by the close of business on March 6, even though Commission Rule 73(b), 29 C.F.R. § 2200.73(b), permits five days following receipt of the judge's ruling for a party to file a petition seeking interlocutory review. Indeed, the judge waited only until March 7, two business days after filing his first discovery order, to conclude that the Secretary's refusal to comply with his orders was contumacious.

We recognize that the respondents intended to use the Draft OSHA 1Bs during depositions scheduled on March 7, 2012. But they were aware of the Secretary's privilege claim by December 2010, and waited over a year to ask the judge to compel discovery. Under these circumstances, even if the judge had taken the proper steps to waive the requirements of our procedural rules, departures from the required response times would not have been justified. *See* Commission Rule 107, 29 C.F.R. § 2200.107 ("In special circumstances . . . and for good cause shown, the Commission or Judge may, . . . after 3 working days notice . . . , waive any rule or make such orders as justice or the administration of the Act requires.").

[5] The respondents' March 12, 2012 motion for sanctions, which raises some issues beyond the scope of our decision, is still pending before the judge.

ORDER

We vacate all of the discovery and show cause orders issued by the judge in these consolidated cases between March 5 and 9, 2012, and on March 21, 2012. In addition, we lift the stay of these cases and direct the judge on remand to proceed in accordance with this decision.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: May 23, 2012

MINUTE ORDER

In Re: Secretary of Labor v. Stone & Webster Construction (OSHRC 11-0130)
Secretary of Labor v. Bartlett Nuclear, Inc. (OSHRC 11-0169)
Secretary of Labor v. South Texas Project Nuclear Operating Company (OSHRC10-0164 (Third Party Intervenor)

This Minute Order is issued to provide expedited notice of the court's decision on the issue raised. A formal Order will be issued, and when issued, will supersede this Minute Order.

This matter comes before the Court on a conference held with the parties on March 2, 2012 at the request of the parties. Elizabeth Kruse, Esq. represented the Complainant. Kenneth D. Kleinman, Esq. represented Bartlett Nuclear, Inc. ("Bartlett") and McCord Wilson, Esq. represented Stone and Webster Construction ("Stone"). Nina Stillman, Esq. represented the Third Party Intervenor, South Texas Project Nuclear Operating Company.

Ms. Stillman requested the Court's approval to withdraw the status of South Texas Project Nuclear Operating Company as a Third Party Intervenor noting that her client has settled its case with the Occupational Safety Health Administration ("OSHA") and the Settlement Agreement has been approved. The request of South Texas Project Nuclear Operating Company to withdraw as a Third Party Intervenor, being unopposed, is GRANTED. Ms. Stillman then disconnected from the conference.

Mr. Kleinman and Mr. Wilson presented an oral motion to the Court under Commission Rule 40. The Court heard the arguments of Ms. Kruse, Mr. Kleinman and Mr. Wilson. The Court then provided the parties the opportunity to submit additional argument and case law to the court via email by March 2, 2012, 5 PM MST, due to the time sensitive nature of this matter. The Court received email communications from all parties which contained additional argument and directed the Court to additional case law to support their positions. Specifically, the case law provided covered: (i) the recognition of the deliberative process privilege ("Privilege"); (ii) the requirements for the invocation of the Privilege; and (iii) when the Privilege can be waived. The Court will deem these email submissions, which will be made part of the record, as meeting the requirements of Commission Rule 40a.

Complainant requested parties to file pleadings so each party's position is of record under Commission Rule 38. Commission Rule 38 is not applicable. Therefore, the Complainant's request for relief under Commission Rule 38 is DENIED.

The parties advised the Court that an expeditious decision was needed since scheduled depositions were to take place on March 7, 2012 at which documents subject to this dispute would need to be available if the Court granted the relief requested.

A. Findings of Fact.

OSHA conducted an inspection of the worksite referenced in the Complaint issued *against* Respondents Bartlett and Stone. After the inspection, but prior to the issuance of the citations in

this matter, the Compliance Officer ("CO") who was involved in the inspection, discussed separately with Bartlett and Stone representatives the proposed issuance of ten citations. It was at these conferences the Respondents learned what hazards were allegedly found and the factual basis for the issuance of the proposed citations Stone has provided information to the Court documenting that it was informed nine citations were proposed to be issued as "serious" and one citation would be issued as an "other than serious". Specifically, the CO informed Stone the nine citations that would be issued as "serious" citations would be cited under the following regulations: 29 C.F.R. 1910.23(A)(8); 29 C.F.R. 1910.27(D)(3); 29 C.F.R. 1910.36(D)(1); 29 C.F.R. 1910.36(D)(2); 29 C.F.R. 1910.36(E)(2); 29 C.F.R. 1910.36(F)(1); 29 C.F.R. 1910.36(G)(1); 29 C.F.R. 37(B)(1); and 29 C.F.R. 1910.37(B)(6). The other than serious violation was proposed to be issued under 29 C.F.R. 145(C) (2) (i). The CO informed Stone that the proposed citations would be postmarked the following week and mailed to them. Bartlett representatives allege that they had similar conversations with the CO as set forth above.

From deposition testimony, it is now established that before the Area Director ("AD") would issue the proposed citations, he and/or the CO had communications with the Nuclear Regulatory Commission ("NRC") about the proposed citations. These communications took place due to the concern of the AD that, as a nuclear power facility, OSHA's jurisdiction could be preempted. At least two discussions took place between OSHA and NRC representatives. After the first conversation, the NRC evidentially informed OSHA that it had no objections to the issuance of the ten citations. Then after further information was discussed/exchanged between OSHA and NRC, the NRC took the position that six of the ten citations could not be issued on the basis that NRC preempted OSHA regulation in the proposed areas. The conversations with NRC by OSHA are not disputed. What are in dispute are the nature/details of OSHAs disclosure and any documents provided to the NRC.

B. Dispute.

Respondents have requested production of the OSHA 1Bs and draft citations (collectively, "OSHA 1Bs") and other documents disclosed to the NRC for the six citations OSHA did not issue. Respondents contend the OSHA 1Bs set forth the factual basis of the issuance of the proposed citations that were not issued. Complainant has not provided the OSHA 1Bs due to her invocation of the Privilege. In addition, the Complainant contends the OSHA 1Bs is not relevant. Respondents contend that the discussions OSHA had with their representatives and NRC constitute a waiver of the Privilege. Respondents also argue that the OSHA 1Bs are relevant in that NRC preemption of OSHA enforcement at the worksite is an affirmative defense raised by the Respondents in their Answers.

C. Controlling Case Law.

The Privilege is encompassed under Exemption 5 of the Freedom of Information Act. Stated simply, "[a]gency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules are protected from discovery and ... are protected from disclosure under Exemption 5." *EPA v. Mink,* 410 U.S. 73, 86 (1973). *See also Grand Central Partnership v. Cuomo,* 166 F.3d 473 (2nd Cir. 1999). To qualify for the Privilege, a document must be both "predecisional" and "deliberative". *See Renegotiation Bd. v.*

Grumman Aircraft Eng'g Corp., 421 U.S. 168 (1975) and *National Wildlife Federation v. United States Forest Service,* 861 F.2d 1114 (9th Cir. 1988). The Privilege does not, however, as a general matter, cover purely factual material. *Hopkins v. United States Dep't of Housing & Urban Dev.*, 929 F.2d 81 (2nd Cir. 1991) and *EPA v. Mink,* 410 U.S. at 87-88. The Privilege should be interpreted narrowly. *Grand Central Partnership, Inc.*, 166 F.3d at 488.

The Privilege is not absolute as the Privilege can be waived. *Shell Oil Co. v. Internal Revenue Service,* 777 F.Supp. 202 (Del. 1991) set forth the following rule when a waiver has been deemed to have occurred: "When an authorized disclosure is voluntarily made to a non-federal party, whether or not that disclosure is denominated 'confidential,' the government waives any claim that the information is exempt from disclosure under the deliberative process privilege." *Id.*

1. Are the OSHA 1Bs both predecisional and deliberative?

OSHA 1Bs are normally part of an investigatory file prepared by the CO which support the recommendations of the CO as to potential violations to be cited, the classification of the violations and proposed penalties. It is part of the file provided to the AD to consider in approving the issuance of citations. Thus, it can be said that the OSHA 1Bs are predecisional.

The Court is not convinced the OSHA 1Bs are deliberative in the content required under case law. A document is "deliberative" when it is actually related to the process by which **policies** are formulated." *Hopkins v. United States Dep't of Housing and Urban Dev.*, 929 F.2d at 84; *Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 482.* The privileged document must "actually be related to the process of by which policies are formulated." *Jordan v. United States Department of Justice,* 591 F.2d 753, 774 (D.C. Cir. 1978). In this case no new policy is being formulated by OSHA. What is before the court is OSHA attempting to enforce an existing regulation against Respondents.

The Court is persuaded by the *Jordan* which concludes that recommendations and deliberations which comprise part of a process by which government policies are formulated are protected from disclosure. *Jordan,* 591 F.2d at 774. The court concludes that the Complainant has failed to carry her burden that the Privilege applies since OSHA is not formulating a policy in this case, she is merely enforcing regulations through civil litigation. This litigation has no direct bearing on the actual exercise of a policy judgment.

2. Are OSHA 1Bs merely factual material?

If the OSHA 1Bs set forth only factual material the Privilege does not apply. *Hopkins,* 929 F.2d at 85. In *Mink,* the Supreme Court held that memoranda consisting only of compiled factual material is available for discovery. *Mink*, 410 U.S. at 87-88. An OSHA 1B sets forth the results of the inspection, identifies the hazards identified, addresses exposure, classification and imposition of monetary penalties. The OSHA 1B does not reveal any agency deliberative process in the formulation of policy. To advance now that the OSHA 1Bs are protected in that they contain deliberative processes is undercut by longstanding OSHA policy to produce them in litigation. The OSHA 1B is designed for the CO to produce to writing facts generated from the

investigation. Its purpose is not designed to protect the deliberative *process* of OSHA in formulating of policy as there is no agency process information contained therein and no new policy being made. Complainant's argument the OSHA 1B contains the steps of OSHA's deliberative process in the issuance of citations would fail since that process has already been disclosed and is available in public domain via OSHA's own website. OSHA Field Inspection Reference Manual CPL 2.103, Section 7 - Chapter III entitled Inspection Documentation" ("FIM") sets forth the contents in a normal OSHA 1B.

Complainant has failed to demonstrate the OSHA 1Bs in this case deviate from the normal standard practice set forth in the FIM in setting forth the facts of an investigation. She has failed to demonstrate that the OSHA 1Bs in this case contains information of OSHA's deliberative process regarding formulation of policy. The court concludes the Privilege has not been properly invoked. Therefore, based upon the above, the Court finds that the underlying facts do not support the invocation of the Privilege.

3. Assuming the Privilege has been properly established and supported, has the Complainant waived the Privilege by her disclosure of the contents of the investigation memorialized in the OSHA 1B to the NRC and to Respondents representatives?

It is undisputed that OSHA had two contacts with the NRC to discuss the underlying facts of the inspection, the hazards identified and the intent of OSHA to charge the Respondent's with violations of OSHA regulations. The Complainant first argues that OSHA did not use the OSHA 1Bs in discussions with the NRC; thus, demonstrating that the OSHA 1Bs were not provided to any non-OSHA personnel. Therefore, she argues that on this basis, the Privilege has not been waived. In *Shell,* the court stated "[T]he bald argument that no waiver should be found unless a physical copy of disclosed information has been released is a weak one." *Shell,* 722 F.Supp. at 210. The court stated that once the information contained in the memorandum is disclosed, it loses its confidential status. *Id.* The substantive analysis, assuming that the NRC did not view, see or was provided a copy of the OSHA 1Bs, was the disclosure of information in the OSHA 1B to the NRC. NRC would have needed the type of information contained in the OSHA 1B for it to have determined whether or not a citation could be issued.

Complainant further argues that Respondents have proffered no evidence that shows OSHA revealed other information in the OSHA 1B to them. The Court disagrees. Stone has introduced evidence which discloses the type of violation, the classification, the proposed regulation, measurements, exposure and number of people exposed. *See* typewritten notes dated December 11, 2011.

Complainant further argues that the OSHA 1B was not in existence when the CO had his discussions with the Respondents representatives. The Court does not accept this argument. The OSHA 1B was written at some point. It contains substantial information that was discussed and disclosed to Respondent's representatives. To permit the Complainant to coyly get around a waiver of the Privilege by not memorializing such discussions in the OSHA 1B until after such discussions would contradict Congress' desire to have grant broad access to government documents not protected by a privilege. Such recognition would also contravene that any

privilege must be narrowly construed. *Shell Oil Co. v. Internal Revenue Service,* 777 F.Supp. 202 (Del. 1991). It would also constitute a subterfuge.

The above argument also fails when it comes to disclosures with the NRC. While the CO testified in a deposition that he did not use the draft OSHA 1B or draft citations in his discussions with the NRC, he indirectly acknowledges at the time of the disclosure to NRC those documents would have existed. This conclusion is supported by OSHA's internal procedures that require before a file goes to the AD for his review and approval of the issuance of citations, the AD is to have a complete investigatory file in front of him - which would include the OSHA 1Bs. The action of the AD in this case would indicate he had the Investigatory file containing the OSHA 1Bs since before he approved the issuance of the citations he communicated with the NRC on the issuance of the citations in light of NRC regulatory oversight of some nuclear facility functions. Thus, the court concludes the OSHA 1Bs existed at the time disclosure was made to the NRC.

Assuming the Privilege was properly invoked, the Court finds the Complainant has waived the Privilege. First, the disclosure to NRC was authorized by the AD and undertaken by the AD and CO. Second, the disclosure to the Respondents was also authorized as part of agency operations in conducting a closing conference. Third, disclosures were made to entities outside of OSHA. Fourth, significant facts in the OSHA 1B were disclosed to NRC and to the Respondents. The OSHA 1Bs for the six citations that were not issued must be released.

D. Relevancy.

Complainant argues that even ignoring the Privilege arguments, the requested OSHA 1Bs are not relevant to the four remaining citations in this case. Therefore, she argues that the production of the OSHA 1Bs should not be ordered produced. Respondents argue that the OSHA 1Bs are relevant to the issue of preemption which they have raised as an affirmative defense. Respondents argue that they need the OSHA 1Bs on the citations that OSHA did not issue in order to ask questions of NRCs representative on what basis six proposed violation could not be issued and on what basis the four citations could be issued. Respondent argues if the four remaining citations bear resemblance to any or all of the six citations NRC would not permit then they could have evidence to advance their preemption argument. Respondents further argue that no production of the OSHA 1Bs will hinder their ability to inquire of the NRC representative since they may assist in the refreshing of the memory of the NRC representative due to the time that has lapsed until this point in the litigation.

The issue is whether the production of the OSHA 1Bs would possibly lead to documents or testimony that has the tendency to make a fact more or less probable than it would be without the evidence. Fed.R.Evid. 401. The issue is not whether any evidence is admissible at trial at this stage in the proceedings. Fed.R.Civ.P. 26(b)(1) permits discovery of relevant information if it may lead to discovery of admissible evidence.

The Respondents have established the relevancy of the OSHA 1Bs to their affirmative defense of preemption. The Complainant's argument that the OSHA 1Bs are not relevant is OVERRULED.

Therefore, the Court Finds and Orders:

1. Complainant has not met her burden to demonstrate that the Privilege is applicable in this instance nor that it has been properly invoked.
2. Even if the Privilege is properly invoked, the Complainant has waived the Privilege.
3. Complainant shall produce the OSHA 1Bs and any other document tendered to the NRC that relate to the six citations not issued by the COB, March 6, 2012 by FAX or electronic medium.
4. Complainant is permitted to redact information from the OSHA 1Bs and other documents as it relates to the government informant privilege.
5. No ruling or finding of fact in this Order constitutes the Courts ruling or finding on the final admissibility of evidence at trial or on the issue of preemption.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge – OSHRC

Issued in Denver, CO this 4th day of March, 2012.

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
United States Customs House
721 19th Street, Room 407
Denver, Colorado 80202-2517

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. STONE & WEBSTER CONSTRUCTION, and its successors, Respondent.	OSHRC DOCKET NO.: 10-0130 (CONSOLIDATED)
SECRETARY OF LABOR, Complainant, v. BARTLETT NUCLEAR, INC., and its successors, Respondent.	OSHRC DOCKET NO.: 10-0169 (CONSOLIDATED)
SECRETARY OF LABOR, Complainant, v. SOUTH TEXAS PROJECT NUCLEAR OPERATING COMPANY, and its successors, Third Party Intervenor.	OSHRC DOCKET NO.: 10-0164 (CONSOLIDATED)

ORDER

This Order supersedes the Minute Order dated March 4, 2012.

This matter comes before the Court on a conference held with the parties on March 2, 2012 at the request of the parties. Elizabeth Kruse, Esq. represented the Complainant. Kenneth D. Kleinman, Esq. represented Bartlett Nuclear, Inc. ("Bartlett") and McCord Wilson, Esq. represented Stone and Webster Construction ("Stone"). Nina Stillman, Esq. represented

the Third Party Intervenor, South Texas Project Nuclear Operating Company.

Ms. Stillman moved to withdraw the status of South Texas Project Nuclear Operating Company as a Third Party Intervenor noting that her client has settled its case with the Occupational Safety Health Administration ("OSHA") and the Settlement Agreement has been approved. The motion of South Texas Project Nuclear Operating Company to withdraw as a Third Party Intervenor, being unopposed, is GRANTED. Ms. Stillman then disconnected from the conference.

Mr. Kleinman and Mr. Wilson presented an oral motion to the Court under Commission Rule 40. The Court heard the arguments of Ms. Kruse, Mr. Kleinman and Mr. Wilson. The Court then provided the parties the opportunity to submit additional argument and case law to the court via email by March 2, 2012, 5 p.m. Mountain Standard Time, due to the time sensitive nature of this matter. The Court received email communications from all parties which contained additional argument and directed the Court to additional case law to support their positions. Specifically, the case law provided covered: (i) the recognition of the deliberative process privilege ("Privilege"); (ii) the requirements for the invocation of the Privilege; and (iii) when the Privilege can be waived. The Court will deem these email submissions, which will be made part of the record, as meeting the requirements of Commission Rule 40a.

Complainant requested parties to file pleadings so each party's position is of record under Commission Rule 38. Commission Rule 38 is not applicable. Therefore, the Complainant's request for relief under Commission Rule 38 is DENIED.

The parties advised the Court that an expeditious decision was needed since scheduled depositions were to take place on March 7, 2012 at which documents subject to this dispute would need to be available if the Court granted the relief requested.

A. Findings of Fact.

OSHA conducted an inspection of the worksite referenced in the Complaint issued against Respondents Bartlett and Stone. After the inspection, but prior to the issuance of the citations, the Compliance Officer ("CO") who was involved in the inspection, discussed separately with Bartlett and Stone representatives the proposed issuance of ten citations. It was at these closing conferences the Respondents learned what hazards were allegedly found and the factual basis for the issuance of ten proposed citations Stone has provided to the Court documentation that it was informed nine citations were proposed to be issued as "serious" and one citation would be issued as an "other than serious". Specifically, the CO informed Stone the nine citations that would be issued as "serious"

citations would be cited under the following regulations: 29 C.F.R.1910.23(A)(8); 29 C.F.R.1910.27(D)(3); 29 C.F.R.1910.36(D)(1); 29 C.F.R.1910.36(D)(2); 29 C.F.R. 1910.36(E)(2); 29 C.F.R.1910.36(F)(1); 29 C.F.R.1910.36(G)(1); 29 C.F.R.37(B)(1); and 29 C.F.R.1910.37(B)(6). The “other than serious” violation was proposed to be issued under 29 C.F.R.145(C)(2)(i). The CO informed Stone that the proposed citations would be postmarked the following week and mailed to them. Bartlett representatives allege that they had similar conversations with the CO as set forth above.

From deposition testimony, it is now established that before the Area Director ("AD") would issue the proposed citations, he and/or the CO had communications with the Nuclear Regulatory Commission ("NRC") about the proposed citations. These communications took place due to the concern of the AD that, as a nuclear power facility, OSHA's jurisdiction could be preempted. At least two discussions took place between OSHA and NRC representatives. After the first conversation, the NRC evidentially informed OSHA that it had no objections to the issuance of the ten citations. Then after further information was discussed/exchanged between OSHA and NRC, the NRC took the position that six of the ten citations could not be issued on the basis that NRC preempted OSHA regulation in the proposed areas. The conversations with NRC by OSHA are not disputed. What are in dispute are the nature/details of OSHAs disclosure and any documents provided to the NRC.

B. Dispute.

Respondents have requested production of the OSHA 1Bs and draft citations (collectively, “OSHA 1Bs”) and other documents disclosed to the NRC for the six citations OSHA did not issue. Respondents contend the OSHA 1Bs set forth the factual basis of the issuance of the proposed citations that were not issued. Complainant has not provided the OSHA 1Bs due to her invocation of the Privilege. In addition, the Complainant contends the OSHA 1Bs are not relevant. Respondents contend that the discussions OSHA had with their representatives and NRC constitute a waiver of the Privilege. Respondents also argue that the OSHA 1Bs are relevant in that NRC preemption of OSHA enforcement is an affirmative defense raised by the Respondents in their Answers.

C. Controlling Case Law.

The Privilege is encompassed under Exemption 5 of the Freedom of Information Act. Stated simply, "[a]gency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules are protected from discovery and ... are protected from disclosure under Exemption 5." *EPA v. Mink,* 410 U.S. 73, 86 (1973). *See also Grand Central Partnership v. Cuomo*, 166 F.3d 473 (2nd Cir. 1999). To qualify for the Privilege, a document must be both "pre-decisional" and "deliberative". *See Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.,* 421 U.S. 168 (1975) and *National Wildlife Federation v. United States Forest Service,* 861 F.2d 1114 (9th Cir. 1988). The Privilege does not, however, as a general matter, cover purely factual material. *Hopkins v. United States Dep't of Housing &*

Urban Dev., 929 F.2d 81 (2nd Cir. 1991) and *EPA v. Mink,* 410 U.S. at 87-88. The Privilege should be interpreted narrowly. *Grand Central Partnership, Inc.*, 166 F.3d at 488. The Privilege is not absolute as the Privilege can be waived. *Shell Oil Co. v. Internal Revenue Service,* 777 F.Supp. 202 (D.Del. 1991) set forth the following rule when a waiver has been deemed to have occurred: "When an authorized disclosure is voluntarily made to a non-federal party, whether or not that disclosure is denominated 'confidential,' the government waives any claim that the information is exempt from disclosure under the deliberative process privilege." *Id.*

1. Are the OSHA 1Bs Both Pre-decisional and Deliberative?

OSHA 1Bs are normally part of an investigatory file prepared by the CO which support the recommendations of the CO as to potential violations to be cited, the classification of the violations and proposed penalties. It is part of the file provided to the AD to consider in approving the issuance of citations. Thus, it can be said that the OSHA 1Bs are pre-decisional.

The Court is not convinced the OSHA 1Bs are deliberative in the content required under case law. A document is "deliberative" when it is actually related to the process by which **policies** are formulated." *Hopkins v. United States Dep't of Housing and Urban Dev.,* 929 F.2d at 84; *Grand Central Partnership, Inc. v. Cuomo,* 166 F.3d 482 (Emphasis added). The privileged document must "actually be related to the process of by which policies are formulated." *Jordan v. United States Department of Justice,* 591 F.2d 753, 774 (D.C. Cir. 1978). In this case no new policy is being formulated by OSHA. What is before the court is OSHA attempting to enforce an existing regulation against Respondents.

The Court is persuaded by *Jordan* which concludes that recommendations and deliberations which comprise part of a process by which government policies are formulated are protected from disclosure. *Jordan,* 591 F.2d at 774. The court concludes that the Complainant has failed to carry her burden that the Privilege applies since OSHA is not formulating a policy in this case, she is merely enforcing regulations through civil litigation and implementing a litigation strategy/decision. This litigation has no direct bearing on the actual exercise of a policy judgment.

2. Are OSHA 1Bs Merely Factual Material?

If the OSHA 1Bs set forth only factual material the Privilege does not apply. *Hopkins,* 929 F.2d at 85. In *Mink,* the Supreme Court held that memoranda consisting only of compiled factual material is available for discovery. *Mink*, 410 U.S. at 87-88. An OSHA 1B sets forth the results of the inspection, identifies the hazards identified, addresses exposure, classification and imposition of monetary penalties. The OSHA 1B does not reveal any agency deliberative process in the formulation of policy; it is factual in nature. To advance now that the OSHA 1Bs are protected in that they contain deliberative processes is undercut by longstanding OSHA policy to produce them in litigation. The OSHA 1B is designed for the CO to produce to writing facts generated from the investigation. Its purpose is not designed to

protect the deliberative *process* of OSHA in formulating of policy as there is no agency process information contained therein and no new policy being made. Complainant's argument the OSHA 1B contains the steps of OSHA's deliberative process in the issuance of citations fail since that process has already been disclosed and is available in public domain via OSHA's own website. OSHA Field Inspection Reference Manual CPL 2.103, Section 7 - Chapter III entitled Inspection Documentation" ("FIM") sets forth the contents in a normal OSHA 1B.

Complainant has failed to demonstrate the OSHA 1Bs in this case deviate from the normal standard practice of containing the facts of an investigation. She has failed to demonstrate that the OSHA 1Bs in this case contain information of OSHA's deliberative process regarding formulation of policy. The court concludes the Privilege has not been properly invoked and that the documents sought to be protected as merely factual in nature. Therefore, based upon the above, the Court finds that the underlying facts do not support the argument that the Privilege applies.

3. Assuming the Privilege Has Been Properly Established and Supported, Has the Complainant Waived the Privilege?

It is undisputed that OSHA had two contacts with the NRC to discuss the underlying facts of the inspection, the hazards identified and the intent of OSHA to charge the Respondent's with violations of OSHA regulations. The Complainant first argues that OSHA did not use the OSHA 1Bs in discussions with the NRC; thus, demonstrating that the OSHA 1Bs were not provided to any non-OSHA personnel. Therefore, she argues that on this basis, the Privilege has not been waived. In *Shell,* the court stated "[T]he bald argument that no waiver should be found unless a physical copy of disclosed information has been released is a weak one." *Shell,* 722 F.Supp. at 210. The court stated that once the information contained in the memorandum is disclosed, it loses its confidential status. *Id.* The substantive analysis, assuming that the NRC did not see or were provided copies of the OSHA 1Bs, is the disclosure of information in the OSHA 1Bs to the NRC. NRC would have needed the type of information contained in the OSHA 1Bs for it to have determined whether or not a citation could be issued.

Complainant further argues that Respondents have proffered no evidence that shows OSHA revealed other information in the OSHA 1Bs to them. The Court disagrees. Stone has introduced evidence which discloses the type of violation, the classification, the proposed regulation, measurements, exposure and number of people exposed. *See* typewritten notes dated December 11, 2011.

Complainant further argues that the OSHA 1Bs were not in existence when the CO had his discussions with the Respondents representatives and therefore the Privilege cannot be waived. The Court does not accept this argument. The OSHA 1Bs were written at some point. They contain the same substantial information that was discussed and disclosed to

Respondent's representatives. To permit the Complainant to coyly get around a waiver of the Privilege by not memorializing such discussions in the OSHA 1Bs until after such discussions would contradict Congress' desire to grant broad access to government documents not protected by a privilege. Such recognition would also contravene that any privilege must be narrowly construed. *Shell Oil Co. v. Internal Revenue Service,* 777 F.Supp. 202 (D.Del. 1991). It would also constitute a subterfuge.

The above argument also fails when it comes to disclosures with the NRC. While the CO testified in a deposition that he did not use the draft OSHA 1Bs or draft citations in his discussions with the NRC, he indirectly acknowledges at the time of the disclosure to NRC those documents would have existed. This conclusion is supported by OSHA's internal procedures that require before a file goes to the AD for his review and approval of the issuance of citations, the AD is to have a complete investigatory file in front of him - which would include the OSHA 1Bs. The action of the AD in this case would indicate he had the investigatory file containing the OSHA 1Bs since before he approved the issuance of the citations he communicated with the NRC on the issuance of the citations in light of NRC regulatory oversight of some nuclear facility functions. Thus, the court concludes the OSHA 1Bs existed at the time disclosure was made to the NRC.

Assuming the Privilege was properly invoked, the Court finds the Complainant has waived the Privilege. First, the disclosure to NRC was authorized by the AD and undertaken by the AD and CO. Second, the disclosure to the Respondents was also authorized as part of agency operations in conducting a closing conference. Third, disclosures were made to entities outside of OSHA. Fourth, significant facts in the OSHA 1Bs were disclosed to NRC and to the Respondents. The OSHA 1Bs for the six citations that were not issued must be released.

D. Relevancy.

Complainant argues that even ignoring the Privilege arguments, the requested OSHA 1Bs are not relevant to the four remaining citations in this case. Therefore, she argues that the production of the OSHA 1Bs should not be ordered produced. Respondents argue that the OSHA 1Bs are relevant to the issue of preemption which they have raised as an affirmative defense. Respondents argue that they need the OSHA 1Bs on the citations that OSHA did not issue in order to ask questions of NRCs representative on what basis six proposed violations could not be issued and on what basis the four citations could be issued. Respondent argues if the four remaining citations bear resemblance to any or all of the six citations NRC would not permit then they could have evidence to advance their preemption argument. Respondents further argue that no production of the OSHA 1Bs will hinder their ability to inquire of the NRC representative since they may assist in the refreshing of the memory of the NRC representative due to the time that has lapsed until this point in the litigation.

The issue is whether the production of the OSHA 1Bs would possibly lead to documents or testimony that has the tendency to make a fact more or less probable than it would be without the evidence. Fed.R.Evid. 401. The issue is not whether any evidence is admissible at trial at this stage in the proceedings. Fed.R.Civ.P. 26(b)(1) permits discovery of relevant information if it may lead to discovery of admissible evidence.

The Respondents have established the relevancy of the OSHA 1Bs to their affirmative defense of preemption. The Complainant's argument that the OSHA 1Bs are not relevant is OVERRULED.

Therefore, the Court Finds and Orders:

1. Complainant has not met her burden to demonstrate that the Privilege is applicable in this instance nor that it has been properly invoked.

2. Even if the Privilege is properly invoked, the Complainant has waived the Privilege.

3. Complainant shall produce to the Respondents the OSHA 1Bs and any other document tendered to the NRC that relate to the six citations not issued by the COB, March 6, 2012 by FAX or electronic medium.

4. Complainant is permitted to redact information from the OSHA 1Bs and other documents as it relates to the government informant privilege.

5. No ruling or finding of fact in this Order constitutes the Court's ruling or finding on the final admissibility of evidence at trial or on the issue of preemption.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

March 5, 2012

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
United States Customs House
721 19th Street, Room 407
Denver, Colorado 80202-2517

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. STONE & WEBSTER CONSTRUCTION, and its successors, Respondent.	OSHRC DOCKET NO.: 11-0130 (CONSOLIDATED)
SECRETARY OF LABOR, Complainant, v. BARTLETT NUCLEAR, INC., and its successors, Respondent.	OSHRC DOCKET NO.: 11-0169 (CONSOLIDATED)

ORDER

This matter comes before the Court on a conference requested by Respondent Bartlett Nuclear, Inc. ("Bartlett") regarding the Court's Order dated March 4, 2012 ("Order"). The Complainant was represented by Elizabeth Kruse, Esq. and Michael Schoen, Esq. Respondent, Stone & Webster Construction, was not represented since McCord Wilson, Esq. was in travel status to Washington.

In its Order, the Court directed Complainant to produce certain documents to the Respondent by the close of business, March 6, 2012. Bartlett has advised the Court that after numerous attempts to communicate with Complainant on the logistics and timing of the production, it was informed Complainant was not going to comply with the Order.

Mr. Schoen and Ms. Kruse confirmed Complainant would not comply with the Order because the documents involve the invocation of a privilege, and once privileged documents are disclosed, it was the position of the Complainant the harm would be done. Mr. Schoen cited no case law to support his position for Complainant's unilateral decision to not comply with the Order.

Mr. Schoen informed the Court that Complainant would be filing a Motion for Reconsideration by the COB, March 6, 2012. The Court received the Motion for Reconsideration within the timeframe established by the Court.1 The Motion for Reconsideration also contained no case law for the position taken by Complainant that she had the right to unilaterally disregard the Order.

The Occupational Safety and Health Review Commission ("OSHRC"), created by the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("Act"), is an independent and autonomous federal administrative court charged with deciding enforcement actions (i.e. contests of citations and/or penalties) commenced by the United States Department of Labor resulting from inspections of American workplaces. OSHRC is judicial in nature; therefore, it has no regulatory functions.

OSHRC has been likened to a federal district court. See *A. Amorello & Sons,* 761 F.2d 61 (lst Cir. 1985); *Marshall v. OSHRC*, 635 F.2d 544 (6th Cir. 1980); *Marshall v. Sun Petroleum Products*, 622 F.2d 1176 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1061, 101 S.Ct.784, 66 L.Ed.2d 604 (1980); *Brennan v. OSHRC*, 505 F.2d 869 (10th Cir. 1974); *Dale M. Madden Constr., Inc. v. Hodgson*, 502 F.2d 278 (9th Cir. 1974). *See also* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act* 466 (Comm. Print 1971)(remarks of Sen. Javits)(OSHRC "should be [afforded] the same authority as ... a judge"); *id.* at 475 (remarks of Senator Holland)(similar).

Thus, the Commission is a court system rather than a simple tribunal. Within the Commission there are two levels of adjudication and thus two established sets of procedure to follow when a party disagrees with an order, ruling or decision. First, OSHRC has adopted its own rules of procedure, pursuant to section 12(g) of the Act. These rules are codified at 29 C.F.R. Part 2200. Second, section 12(g) of the Act provides that unless a specific Commission rule applies, "the proceedings [are] in accordance with the Federal Rules of Civil Procedure".

A party shows deference and respect to the established judicial process by adhering to these rules; however, by making the unilateral decision to ignore a court order simply because a party disagrees with it, the party shows a noted lack of deference and respect for the judicial process.

The Court is concerned about Complainant's decision to ignore the Order. While Complainant did file a Motion for Reconsideration, that motion in itself does not stay Complainant's compliance with the Order. For that reason, the Order is still in effect. Complainant should have followed one, or more, of the established judicial procedures to address its disagreement with the Order. Those procedures are filing: (i) a Motion for Reconsideration with a request for immediate stay; (ii) a Motion to Stay; (iii) a request for *in camera* review of the documents by the Court2; (iv) a request for a Protective Order for the documents produced which would govern the distribution and use of the documents at discovery or trial3; or (v) a petition for interlocutory review.4 The Court assumes the Complainant knows the law and the procedures to

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1 The Complainant filed a Motion for Reconsideration but did not ask for a Stay of the Order. Complainant only asked for a six-day stay if the Court overruled her Motion for Reconsideration. The filing of a Motion for reconsideration does not stay the Order. *Wes Jones & Sons, Inc.*, 13 BNA OSHC 1277 (No. 86-1095, 1987). See Fed.R.Civ.P. 62.

2 Commission Rule 52(d)(1).

3 Commission Rule 52(d)(2) and Fed.RCiv.P. 26 (c).

4 Commission Rule 73. The court advised the Complainant that filing for interlocutory review does not stay the Order pursuant to Commission Rule 73(d)(2).

utilize to address disagreements with a court order. Therefore, this Court can only conclude that its decision to ignore the Order was done intentionally, flagrantly and with disrespect for the established judicial process established by the Commission.

The Court has informed the parties that the Order remains in effect. The Court expects the Parties to comply with its provisions. Since Complainant did not ask for an immediate stay in her Motion for Reconsideration and the Court has not granted a stay of its Order, Complainant is and remains in default.

The Motion for Reconsideration has been received by the Court. Respondents have seven business days to respond to the Motion for Reconsideration. Motions and Responses shall comply with Commission Rules 30(f) and 40(a); Fed.R.Civ.P. 7(b). The Court will decide whether oral argument is appropriate and issue its Order.

Respondents allege the Complainant has engaged in disruptive behavior, dilatory tactics or has acted in bad faith. Respondents may address specific instances of these allegations to the Court by filing for relief under Commission Rules 52(f) and 101 within seven calendar days of this Order. Complainant shall file a response by March 24, 2012. The Court will rule on these allegations upon the proper filing of a motion with supporting factual basis and case law.

The Court will determine, at a Show Cause hearing to be noticed, if the intentional disregard of the Complainant is the type of conduct that rises to the level of contumacious conduct which could result in the exclusion of evidence or dismissal of the citations for flagrantly disregarding a Commission order. *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1166, 1993-95 CCH OSHD ¶ 30,041, p. 41,218 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994).

SO ORDERED.

/s/

Patrick B. Augustine
Judge, OSHRC

Dated: March 7, 2012

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
United States Customs House
721 19th Street, Room 407
Denver, Colorado 80202-2517

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. STONE & WEBSTER CONSTRUCTION, and its successors, Respondent.	OSHRC DOCKET NO.: 11-0130 (CONSOLIDATED)
SECRETARY OF LABOR, Complainant, v. BARTLETT NUCLEAR, INC., and its successors, Respondent.	OSHRC DOCKET NO.: 11-0169 (CONSOLIDATED)

ORDER TO COMPLAINANT TO SHOW CAUSE

Commission Rule 101(a) sets forth the obligation of the parties to obey orders issued by the court and the ramifications for failure to do so. By Order dated March 4, 2012 and March 5, 2012. Complainant, through counsel, was ordered to produce certain documents to Respondent by March 6, 2012. Complainant has elected not to comply with the Order. The Order was served via email and through electronic filing process on March 4, 2012 and March 5, 2012. The Order was not returned as undeliverable by the electronic filing medium. Complainant and Respondent Bartlett Nuclear acknowledged receipt of the Order as the Complainant's noncompliance with the Order

was the subject of a call on the afternoon of March 6, 2012. The Court has issued another Order dated March 7, 2012 notifying the Complainant that the Court finds her in default of the Order. The actions of Complainant demonstrates intentional and flagrant disrespect to the undersigned and the Commission, disregard for the Commission's rules and procedures, and contumacious conduct in electing not to comply with the Court's Order. *Architectural Glass & Metal Company,* 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001); *Jersey Steel Erectors,* 16 BNA OSHC 1162, 1166 (No. 90-1307, 1993).

Accordingly, Complainant, by and through (1) Elizabeth Kruse, Esq. and Michael Schoen, Esq. **and** (2) an OSHA representative employed by OSHA, are hereby ORDERED to appear for an in person show cause hearing which will be held on March 28, 2012 at 9:30 a.m. Central Standard Time. **The Hearing will be held at the Federal Building, 207 South Houston Street, Room 591, Dallas, Texas 75202** to SHOW CAUSE as to why the Court should not dismiss the Citation and Notification of Penalty in this matter as a sanction for Complainant's failure to comply with the Order.

Respondents counsel are also ordered to appear to articulate any communications and attempts to confer with Complainant's counsel and to address any Motion for Sanctions which have been filed in this matter. A court reporter will be present to transcribe the hearing.

Failure to appear for the scheduled hearing, and/or failure to establish good cause, if any, will result in sanctions pursuant to Commission Rule 101, vacating the Citation and Notification of Penalty proposed in this case.

SO ORDERED.

/s/

Dated: March 7, 2012

PATRICK B. AUGUSTINE
Judge, OSHRC

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
United States Customs House
721 19th Street, Room 407
Denver, Colorado 80202-2517

Phone: (303) 844-3409 Fax: (303) 844-3759

SECRETARY OF LABOR, Complainant, v. STONE & WEBSTER CONSTRUCTION, and its successors, Respondent.	OSHRC DOCKET NO.: 10-0130 (CONSOLIDATED)
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ORDER

This matter comes before the Court on the *Secretary's Notice of Withdrawal of Motion to Reconsider* ("Motion to Reconsider") *and Motion for Immediate Stay Pending Interlocutory Appeal* ("Motion for Stay"). In her *Motion for Stay*, Complainant requests an immediate stay of the Order dated March 5, 2012 ("Order").

The Secretary's withdrawal of her Motion to Reconsider is GRANTED. Accordingly, the Respondent's deadline to respond to the Motion to Reconsider established in an Order dated March 7, 2012 is VACATED.

As it relates to the Motion to Stay, the Court notes the last paragraph of the motion whereas the Secretary states: "To the extent that the Secretary's request for stay could be read as contingent upon denial of the motion to reconsider, the Secretary wishes to clarify the record that it was the Secretary's intent at that time to have an immediate stay. Therefore, the Secretary is renewing and clarifying her motion for an immediate stay of the Court's March 5, 2012 order."

This statement is a self-serving, weak attempt by the Secretary to justify her intentional disregard of the Order.

The above argument to justify the continued default of the Secretary under the Order is not supportable by the facts. First, the Secretary only uses the word "stay" twice in the narrative of her Motion to Reconsider[1]. Both times it is used in the context of requesting a stay only if the Court denied her Motion for Reconsideration. In addition, the Secretary cited no justified grounds or legal support for the stay in her Motion to Reconsider as required by Commission Rules 30(f) and 40(a).[2]

Irrespective of what the intent of the Secretary was, the relief requested in the Motion for Reconsideration was clear and unambiguous. Starting at page 7 of the Motion for Reconsideration under the heading "Conclusion", the Secretary made the following request: "[F]or the above reasons, the Secretary respectfully requests the court reconsider its ruling regarding the draft 1Bs. **Should the court deny this motion, the Secretary respectfully requests that the court stay its order for six (6) days** so that the Secretary may determine whether this important issue of privilege is appropriate for a petition for discretionary review.[3]" (Emphasis added). Accordingly, the Secretary did not request an immediate stay. It was contingent upon a ruling on the Motion to Reconsider. Therefore, irrespective of what the Secretary meant to request; she simply did not request what she intended. The Secretary's representatives are seasoned and experienced attorneys who authored the language advanced. Failure to accurately convey the Secretary's "intent" is no one's fault but her representatives.

The Court now addresses the request of the Secretary for an immediate stay of its Order. While the Secretary did not request this immediate stay by citing to particular authority to support the Motion for Stay, or provide any compelling reasons as required by Commission Rule 30(f) and 40(a)[4], the Court will act under Commission Rule 52(d), which supports the granting the Motion to Stay. Accordingly, the Court will GRANT the Stay of its Order ("Stay"). However, if the Secretary does not file her Petition for Interlocutory Review ("Petition") within the timeframes set forth in Commission Rule 73(b), the Stay will be vacated.

In that the Commission, under Commission Rule 52(d)(2), shall give the Petition priority consideration, the Court will NOT VACATE the trial date in this case, which is currently

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[1] The mere filing of that motion did not automatically stay the Order. *See, e.g.,* 29 C.F.R. § 2200.73(d)(2) ("[T]he filing or granting of a petition for interlocutory review shall not stay a proceeding or the effect of a ruling unless otherwise ordered."). At the time the Motion to Reconsider was filed, the Secretary was already in default of the Order.

[2] In an Order dated March 7, 2012, the Court set forth the rules and procedures established by the Commission as a federal administrative court. When a party requests relief from the Court, it is expected that party will set forth the grounds for the requested relief with citation to authority. The Secretary failed to do so.

[3] The Secretary uses this exact same language on p. 2 of her Motion to Reconsider.

[4] *Id.*

scheduled for June 4-7, 2012, because the Commission may rule in time such that the trial date is not affected.

The Court's Order to Show Cause issued to the Secretary dated March 7, 2012 ("Show Cause Order") is **not** modified, vacated or changed by the Stay granted herein because any Commission ruling on the issue of privilege does not impact the issues to be addressed at the Show Cause Hearing. Parties are required to comply with the directives in the Show Cause Order.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Dated: March 9, 2012