

**BEFORE THE BOARD OF DIRECTORS
OF THE OFFICE OF COMPLIANCE**

_____)
In the Matter of)
Case No. OSH-1017)
)
)
_____)

DECISION AND ORDER

Preliminary Statement

This matter comes before the Board pursuant to section 215(c)(4) of the Congressional Accountability Act (2 U.S.C. 1341(c)(4),) which states, *inter alia*, that with regard to applicable OSHA standards, “[a]n employing office may request from the Board an order granting a variance from a standard made applicable by this section. For the purposes of this section, the Board shall exercise the authorities granted to the Secretary of Labor in sections 6(b)(6) and 6(d) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)(6) and 655(d)) to act on any employing office’s request for a variance.”

A “Motion for Variance from any Disclosure and Posting Requirements” was filed by the Capitol Police Board on April 12, 2002 (all subsequent dates are 2002, unless otherwise stated). On April 16, the Executive Director issued a scheduling order. He also provided a copy of the motion to counsel to the Fraternal Order of Police, U.S. Capitol Police Labor Committee (hereinafter referred to as the FOP Labor Committee), in order to ensure that the employee notice requirements of 29 U.S.C. 655(b)(6)(B)(v) regarding requests for a variance were met in this matter. Thereafter, on April 17, a “Partial Opposition to U.S. Capitol Police Motion . . .” was filed by the FOP Labor Committee, and “General Counsel’s Response to Motion for Variance . . .” was filed by the Office of the General Counsel of the Office of Compliance. On April 19, a “Capitol Police Board Reply to General Counsel’s Response . . .” was filed by the Capitol Police Board.

On April 23, a pleading not contemplated by the Executive Director’s scheduling order was filed by the Office of the General Counsel entitled “Motion for Leave to File Rebuttal

Memorandum,” with an attached rebuttal. On that same day, an “Opposition to Motion for Leave to File . . .” was filed by the Capitol Police Board. The Board strongly discourages “last minute” and “supplemental” filings not contemplated in a scheduling order unless a particularly compelling cause for it is demonstrated. Such a compelling cause has not been established in this matter. The Office of the General Counsel’s Motion for Leave to File is **DENIED**, and the Board does not consider any arguments or submissions therein.

Having reviewed the record before us, and the applicable provisions of Title 29 of the U.S. Code, the Board concludes that the instant motion is not properly styled as a “Motion for Variance.” 29 U.S.C. 655(b)(6) and (d) relate solely to “standards” as that term is defined in section 655: “an occupational safety or health standard” setting a particular substantive requirement covering a particular health or safety danger. See e.g., *Cleveland Elec. Illuminating Co. v Occupational Safety and Health Review Com’n.*, 910 F2d. 1333 (6th Cir. 1990). The motion in this case takes no issue with any such “standard,” but rather seeks a variance from the required procedure for posting a citation. Therefore, this motion was not properly premised on section 215(c)(4) of the CAA.

The Board determines sua sponte, however, that this matter can be entertained by the Board pursuant to section 9.06(b) of the Procedural Rules of the Office of Compliance, which states: “[t]he Board or a Hearing Officer may waive a procedural rule contained in this Part in an individual case for good cause shown if the application is not required by law.” Section 4.13 of the Procedural Rules governs the “posting of citations,” and may be waived by this Board in conformity with section 9.06(b). Therefore, because this matter is of some urgency, concerns security sensitive information, and can be addressed, the Board proceeds with its discussion of this matter pursuant to our section 9.06 authority.

Discussion

The gravamen of the Capitol Police Board’s motion is to obtain a “variance” from the requirement that certain citations (neither the text nor substance of which have been provided to this Board) of OSHA violations which were issued by the Office of the General Counsel on April 10, not be posted, and that the substance of the citations not be disclosed to anyone unless the Office of the General Counsel and the Capitol Police have adopted and implemented formal protocols to ensure that the information is not divulged to any unauthorized person or entity. The cause for the Motion is that the substance of the citations is “sensitive law enforcement and security information . . .” (Capitol Police Board Motion.) To the extent that the Motion seeks that the citations at issue not be posted, the Motion is not opposed by either the Office of the General Counsel or the FOP Labor Committee. Both of these parties agree that the citations involve security sensitive matters which should not be disclosed to the general public. Both the Office of the General Counsel and the FOP Labor Committee do oppose the request by the Police that the substance of the citations not be divulged to Capitol Police Officers.

The parties argue that making the citations available to members of the Capitol Police force either does or does not potentially compromise the asserted responsibility of the Capitol Police Board to safeguard the security of Congress and Government employees on Capitol Hill. No party referenced any existing standards or process either within the Capitol Police department or Congress and its instrumentalities for determining what is “sensitive law enforcement and security information” in the context of the Legislative Branch, but all parties agree that this information falls within such parameters to the extent that it should not be made public by posting. Therefore, the Board’s review of this matter does not reach the issue of what constitutes “sensitive law enforcement and security information.”

Neither is the record clear with reference to any actual dissemination of these citations by the Office of the General Counsel or by the Capitol Police Board to any persons or entities to date. Therefore, we make no findings or determinations in that regard. Suffice it to say that we understand that both the Office of the General Counsel and the Capitol Police Board only intend to divulge the terms or substance of these citations to persons or entities directly involved in or impacted by the Office of the General Counsel’s investigation and enforcement activities, or in the activities of the Capitol Police Board in responding to the citations and/or ameliorating the conditions set forth therein.

Section 9(b) of the OSH Act (29 U.S.C. 658(b)) is included by reference at section 215(c)(2) of the CAA. Section 9(b) requires that: “[e]ach citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.” Therefore, the method for accomplishing such “posting” shall be accomplished “as prescribed in regulations” In this matter, those regulations are located at section 4.13 of the Procedural Regulations, which may also be waived pursuant to section 9.06(b) thereof. However, because the act of “posting” that is to be accomplished is “required by law,” we cannot void the posting requirement altogether.¹

Because the parties agree that dissemination of these citations to the public represents an improvident release of “sensitive law enforcement and security information,” we have concluded, pursuant to section 9.06(b), that “good cause” has been shown for a waiver of the posting requirements as set forth in section 4.13 of the Procedural Rules of the Office of Compliance in this matter only.

¹ In this regard, we note that section 16 of the OSH Act, 29 U.S.C. 665, which is not included by reference in the CAA, authorizes the Secretary of Labor to vary statutory as well as regulatory requirements based upon the exigencies of “national defense.” As we reference *infra*, a “housekeeping” amendment to the CAA providing this Board with such authority in OSHA matters would substantially assist us in meeting the requirements of handling security sensitive information issues in the future.

However, as the Capitol Police Board agrees, there must be an “attempt to strike a balance between the statutory duties and responsibilities of the CPB and the OG-GC, which may appear to present competing interests.” (Capitol Police Reply.) We have concluded that the appropriate balance in this matter is best struck by recognizing a number of statutory mandates. First, the Capitol Police Board is generally given the grave responsibility to safeguard the Capitol Hill campus and its inhabitants from harm. See, 40 U.S.C. 212a et seq. Second, the Office of the General Counsel is given the equally grave responsibility to protect the Capitol Hill campus and its inhabitants from health and safety dangers. See, 2 U.S.C. 1301 et seq. Both of these responsibilities have been rendered more urgent by the events of the past six months. Indeed, in the ill-defined area of “environmental terrorism,” the two agencies’ duties overlap. However, these responsibilities are also characterized by well-founded countervailing policies that simultaneously urge confidentiality and broad dissemination of the same information, when such information is “law enforcement security sensitive” and related to health and safety issues.

That “balance” of competing statutes, policies, and interests is best attained in this case by the adoption of a process which ensures, to the greatest extent possible, that the substance of the citations at issue remains confidential while, at the same time, it is disseminated to responsible representatives of the Capitol Police Officers whose health and safety is allegedly at risk. Such dissemination is not only necessary for the Board’s decision not to run afoul of our statutory responsibility, but also addresses the fundamental policy of the OSH Act that employees must have notice of the citation. The keystone of this matter is to fashion such dissemination in a way which adequately addresses the recognized mandate of confidentiality.²

Some form of “posting” must occur to ensure that these citations are processed in accordance with statutory requirements. Therefore, we conclude that in this case only, such “posting” is to be accomplished as follows. On the eighth day after receipt of this Decision and Order by the Office of the General Counsel, the Office of the General Counsel is orally to inform the FOP Labor Committee counsel of record in this matter and each of the elected officers of the FOP (all to be termed hereinafter “Elected Officers”), that she/he has the right to view each and every citation at issue in this matter at the Office of the General Counsel. The Office of the General Counsel may also on and after such eight days provide the opportunity to other sworn Capitol Police Officers who have a legitimate need to be apprised of the contents of any or all of the citations at issue in this matter to view such citation(s) at the Office of the General Counsel. However, these viewing opportunities shall only be provided to those individuals who have executed a written declaration that she/he will not divulge any citation information to any person or entity. We have also concluded pursuant to our authority under section 9.06(b), that the

² In this regard, we note that the record also fails to reveal what kind or level of security sensitive law enforcement information is known by the sworn members of the Capitol Police force by reason of their training and duties. We can only make a common sense assumption that a great deal of such information is known in varying degrees by most if not all sworn officers. However, based on the state of this record, we reach no conclusions in that regard here.

procedures as set forth in section 1.07(e) of the Procedural Rules shall be utilized in the review of alleged breaches of confidentiality in this matter. Such procedure is not in derogation of any other remedy or procedure provided by equity, law or regulation regarding the unauthorized disclosure of confidential information.

The declaration to be executed by each officer authorized to view the citations at issue shall state: "I am aware that the FOP Labor Committee has informed the Board of Directors of the Office of Compliance that the substance of every citation issued on April 10, 2002 in OOC Case OSH-1017 is "law enforcement sensitive," and that no such citation may be divulged to the public. Pursuant to that representation, and pursuant to the Decision and Order of the Board of Directors which is attached to this document, and made a part hereof, I hereby declare that I will not disclose the terms or substance of any of the citations issued in OOC Case OSH-1017 to any person or entity, including but not limited to other Capitol Police Officers. I understand that this declaration is a permanent promise, and that I can only be released from it by a written authorization from the Executive Director of the Office of Compliance. I understand that the execution of this declaration is a condition for my viewing of the aforementioned citations. I understand that any allegation that I have violated this declaration will be reviewed pursuant to the procedures set forth at section 1.07(e) of the Procedural Rules of the Office of Compliance and may be subject to review in other proceedings as provided by equity, law or regulation regarding the unauthorized disclosure of confidential information." At no time will any Elected Officer or member of the FOP Labor Committee collective bargaining unit be given copies of any of the citations at issue here by the Office of the General Counsel.³

³The Board is constrained to make two observations. First, it appears probable that this is not going to be the last controversy between these parties, and perhaps between the Office of the General Counsel and other employing offices as well, regarding the vastly heightened sense of urgency about the sensitivity of health and safety related information on Capitol Hill. To the extent that parties are able to reach accommodations in regard to other controversies, perhaps referring to the procedure we have mandated here, we urge them to do so. Should such accommodations properly require that this Board "so order" an arrangement pursuant to section 9.06(b) of the Procedural Rules, the parties may seek such an order. However, we remained concerned that the present state of our procedural rules does not lend itself to these issues. In this regard, we are also aware that the Executive Director of this Office is in the process of initiating an effort pursuant to his authority under section 303 of the CAA (2 U.S.C. 1383) to present the Board with proposed procedural regulations regulating the subject of acquiring, receipt, and dissemination of security sensitive information by the Office of Compliance. The Board agrees that expeditious rule making is appropriate and necessary in this context.

The posting procedure set forth in the two paragraphs immediately above shall not be implemented until the eighth day after this Decision and Order is delivered to the offices of the General Counsel of the Capitol Police Board and the General Counsel of the Office of Compliance. Upon receipt of this Decision and Order the General Counsel of the Office of Compliance shall immediately contact the General Counsel of the Capitol Police Board. The General Counsels are directed to communicate with each other in an effort to resolve any concerns they may have regarding the above stated posting methodology and to reach a mutually agreeable alternative to such methodology which does not violate any OSH Act or CAA statutory requirements. The parties are directed to report to the Executive Director of the Office of Compliance on or before the fifth day regarding the status of that effort. Should the parties reach such an agreement during the time period allotted, a written and executed copy of said agreement shall be transmitted immediately to this Board for review and approval. Upon approval of said agreement by this Board, the posting methodology set forth in this Decision and Order shall be preempted and superseded thereby.

ORDER

Having reviewed the record and considered this matter, the Board of Directors of the Office of Compliance hereby **ORDERS**:

That the “Motion of the Office of the General Counsel for Leave to File Rebuttal Memorandum, or, In the Alternative, To Permit the U.S. Capitol Police Board to File a Surreply,” is **DENIED** in all respects.

That the Capitol Police Board’s “Motion For Variance from any Disclosure and Posting Requirements,” is **GRANTED** to the extent referenced and explained in the “Discussion” hereinabove.

That, absent an agreement approved by this Board, the Office of the General Counsel is **ORDERED** on the eighth day after receipt of this Decision and Order, to contact the Elected Officers of the Fraternal Order of Police, U.S. Capitol Police Labor Committee, and undertake the notification, preparation of the declarations, and opportunity for such elected officers and other sworn Capitol Police officers who have a legitimate need to be apprised of the contents of any or all of such citation to view the citations at issue, as is referenced and explained in the “Discussion” hereinabove.

That the General Counsel of the Office of Compliance is ordered to contact the General Counsel of the Capitol Police Board to initiate communications in an effort to resolve any concerns they may have regarding the posting methodology described in this Decision and to

reach a mutually agreeable alternative to the otherwise mandated posting requirement herein.

ENTERED THIS 29TH DAY OF APRIL, 2002;

Susan S. Robfogel, Chair

Barbara L. Camens, Member

Alan V. Friedman, Member

Roberta L. Holzwarth, Member

Barbara Childs Wallace, Member