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SECRETARY OF LABOR,

Complainant,

v.

LAFORGE & BUDD CONSTRUCTION CO., INC.,

Respondent.

OSHRC Docket No. 91-2264

ORDER

Before: WEISBERG, Chairman; FOULKE and MONTROYA, Commissioners.

BY THE COMMISSION:

After the Secretary of Labor issued a citation alleging that LaForge & Budd Construction Company, Inc., (“LaForge”) had violated various standards issued by the Occupational Safety and Health Administration (“OSHA”), LaForge moved to suppress the evidence obtained by an OSHA compliance officer during his inspection. After a hearing, Administrative Law Judge Stanley M. Schwartz granted that motion, and the Secretary sought review of the judge’s order. For the reasons below, we reverse.

FACTS

When it became necessary for the city of Shawnee, Oklahoma (“the city”) to enlarge its wastewater treatment plant, it hired a consulting engineering firm to draw the plans, to engage a contractor to do the work, and to oversee the construction. That engineering firm selected LaForge to perform the construction, and LaForge entered into a contract with the Shawnee Municipal Authority, which the city had created to operate its public utilities. Paragraph 13.2 of that contract provides:

ENGINEER and ENGINEER's representatives, other representatives of OWNER, testing agencies and governmental agencies with jurisdictional interests will have access to the Work at reasonable times for their observation, inspecting, and testing. CONTRACTOR shall provide proper and safe conditions for such access.

During the work, a trench on the site collapsed. A day or so later, a representative of the engineering firm saw LaForge employees in the trench. Because he did not believe that proper safety measures had been taken, he telephoned OSHA to report a possible violation of OSHA's trenching standards. The call was taken by a compliance officer, who informed his supervisor of the situation and was sent to inspect the worksite later that day. When the compliance officer arrived at the worksite, he introduced himself to LaForge's senior official at the site, who informed the compliance officer that he would not be admitted without a search warrant.

The compliance officer testified that he knew that OSHA guidelines required him to leave the worksite at that point and that he was prepared to do so. Before returning to his office, however, he attempted, as a courtesy, to telephone the engineer's representative who had made the complaint in order to explain why he could not conduct the inspection. During this effort, he reached the assistant city engineer, who asked the compliance officer to wait where he was. A few minutes later, the city engineer, the assistant city engineer, and the representative of the consulting engineering firm all arrived and accompanied the compliance officer to the worksite to have the inspection conducted. Again, entry was refused. LaForge's vice-president and some of his workmen obstructed the way, and the assistant city engineer felt that his group was being threatened with violence if they continued.

At that point, the compliance officer telephoned the area director, as required by OSHA's regulations and Field Operations Manual. The acting area director instructed the compliance officer not to persist with the inspection unless the city officials prevailed upon LaForge to permit the inspection. Meanwhile, the city's employees informed the city manager, who was also the manager of the Municipal Authority, of the situation. The city manager indicated a desire to have the inspection take place and telephoned the police department to request that officers be sent to the site to keep the peace during the

inspection. Two police officers arrived at the wastewater treatment plant, conferred with the city officials, and accompanied the three engineers and the compliance officer to the worksite, where they again encountered LaForge's vice president. One of the policemen stayed with the vice president at LaForge's trailer, while the other officer accompanied the compliance officer on his inspection. The parties stipulated that LaForge did not consent to the inspection.

As a result of that inspection, OSHA issued a citation alleging various violations, and LaForge contested the citation. After LaForge filed a motion to suppress the evidence gathered during that inspection, the judge held a hearing on the circumstances surrounding the inspection. The judge then issued an order granting the motion to suppress, in which he reviewed the terms of the contract between LaForge and the Municipal Authority and the practices at the worksite and concluded that LaForge had a reasonable expectation of privacy on the construction site. The judge also concluded that, under OSHA regulations governing inspections, the compliance officer should have left the site when he was refused admittance. Because the compliance officer did not leave but allowed others to obtain LaForge's acquiescence through the intervention of the police, the judge found that he could not have had a good faith belief that he was entitled to conduct the inspection.

DISCUSSION

A. Legal context

"The Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *California v. Acevedo*, 500 U.S. 565, 569 (1991). The Fourth Amendment does not proscribe all searches and seizures; it merely proscribes those which are unreasonable. *Florida v. Jimeo*, 500 U.S. 248, 250 (1991) (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)). The prohibition on unreasonable searches applies to commercial premises as well as to homes and during civil as well as criminal investigations. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978). The Supreme Court has emphasized "[o]ver and again" that searches conducted without the benefit of a warrant are unreasonable *per se* under the Fourth Amendment, subject to a few exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). One well-established exception

to the requirement for a warrant or probable cause is a search conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent sufficient to validate a warrantless search may be granted by someone other than the victim of the search. *Frazier v. Cupp*, 394 U.S. 731 (1969). Such valid third-party consent may be given by any individual who possesses common authority over, or other sufficient relationship to, the premises or effects to be inspected. *United States v. Matlock*, 415 U.S. 164, 169-71 (1974). That common authority does not derive from mere ownership of the property but rests on mutual use of the property by persons having joint access or control. *Id.* at 171 n.1.

B. Analysis

Here, we find that, before the compliance officer entered onto the worksite and performed his inspection, consent for the inspection was given by two parties having joint access to or control of the worksite: the manager of the Municipal Authority and the onsite representative of the consulting engineer. We further find that his failure to leave the area immediately upon initially being denied entry was not unreasonable conduct under the circumstances.¹

We find that consent was obtained from the city manager, who was also the manager of the Municipal Authority. The city owned the property. While bare title to the land may not have been sufficient to give the city common authority with LaForge over the premises, the Municipal Authority was the party who let the contract. The Municipal Authority had access to the site at all times and had the authority to bring individuals onto the site for purposes it deemed sufficient.² We find that this establishes that the Municipal Authority had “common authority” over the premises that were the object of the inspection. *See National Eng’g & Contrac. Co. v. OSHA*, 928 F.2d 762, 765 (6th Cir. 1991). That the manager of the Municipal Authority consented to the inspection is evidenced by his

¹See discussion at pp. 7-8, below.

²Although LaForge asserts that the compliance officer never explicitly asked the city employees for consent to inspect, one city employee testified on two occasions that the compliance officer did request the city’s consent and that he granted it.

telephone call to the police department requesting the presence of officers to maintain the peace and prevent LaForge from disrupting the inspection.

Additionally, the consulting engineering firm had an engineer on the site full time, based in a trailer office next to LaForge's trailer headquarters. That representative had access to the entire worksite in order to assure that LaForge and its subcontractors performed the work in accordance with the plans and specifications. It was that individual who called OSHA to report the possible violation. We conclude that his complete access to the worksite would also be sufficient basis for us to find that he had mutual use of the premises for the purpose of giving consent for the compliance officer to enter the worksite and inspect.

We disagree with the administrative law judge's conclusion that LaForge had a reasonable expectation of privacy at this worksite. By the terms of its contract, LaForge agreed that governmental agencies with jurisdictional interests would have access to the site. Although the site was closed to the public, that limitation appears to have been more for the safety of those excluded and to prevent interference with the work being done than because of any need or desire for privacy. LaForge argues that it had control over all entry onto the site because access was limited to reasonable times and because LaForge was required to provide safe access. LaForge does not argue, and points to no facts that would establish, that the OSHA compliance officer arrived at an unreasonable time; nor do we perceive any basis for finding that this was not a reasonable time. In fact, the record clearly establishes that access was denied only because it was company policy not to consent to any OSHA inspections.

We find that the contractual provision requiring that LaForge provide access to "governmental agencies with jurisdictional interests" imposed an obligation on LaForge to assure that the premises were in safe condition for that access and did not grant LaForge any additional control over who would be admitted to the worksite.³ We therefore conclude that the provision in the contract on which LaForge relies actually supports a finding that

³There is no suggestion that the compliance officer was turned away because it would have been unsafe for him to be on the premises.

the company had no reasonable expectation of privacy, at least from government inspectors, because it had expressly agreed that they should have safe access to the worksite. Under these circumstances, we find that the Municipal Authority could consent to an inspection of LaForge's worksite by government inspectors having jurisdictional interests, such as the safety and health of employees working there, and that, because under the contract LaForge had no right to refuse that access, LaForge had no reasonable expectation of privacy.

We also conclude that LaForge's denial of access to the compliance officer and its objections to the inspection had no legal significance. If there has been valid consent by a third party with common authority over the premises, that consent is not negated by the objections of an employer against whom evidence is found. *J.L. Foti Constr. Co. v. Donovan*, 786 F.2d 714, 716-17 (6th Cir. 1986); *Donovan v. A.A. Biero Constr. Co.*, 746 F.2d 894, 898-900 (D.C. Cir. 1984); see also *United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States v. Baldwin*, 644 F.2d 381, 383 (5th Cir. 1981); *United States v. Samlin*, 567 F.2d 684, 687 (6th Cir. 1977). Accordingly, the fact that LaForge was present and objected to the inspection, acquiescing only when confronted with police authority, cannot negate the valid consent given by the city, the Municipal Authority, and the construction manager.

LaForge asserts that it was denied procedural due process because the compliance officer violated OSHA's regulations by not vacating the premises when he was first refused entry onto the worksite. The judge gave considerable weight to the fact that the compliance officer did not leave the area when he was denied access. Because the touchstone of the Fourth Amendment is reasonableness, *Katz*, 389 U.S. at 360, we will examine the compliance officer's actions to determine whether they departed from OSHA's regulations so sharply that his conduct was unreasonable.

OSHA has regulations setting out the procedures for a compliance officer to follow

when access is refused in 29 C.F.R. § 1903.4.⁴ The record shows that, when he was first denied access to the site, the compliance officer was ready to leave but decided, as a courtesy, to telephone the person who had filed the complaint and explain why the inspection was not taking place. In this effort, he did not reach the person he was calling but rather the assistant city engineer, who prevailed upon him to remain a little longer. To this point, we see nothing about the compliance officer's conduct that was either unreasonable or in conflict with section 1903.4. When the assistant city engineer arrived, he was accompanied by both the consulting engineer who had filed the complaint and by the city engineer. Those three individuals appeared certain that the city wanted the inspection to take place and persuaded the compliance officer to accompany them back to the worksite, where LaForge prevented them from entering.⁵ At that point, the compliance officer called the (acting) area director, as required by section 1903.4. That official instructed the

⁴That regulation provides:

§ 1903.4 Objection to inspection.

(a) Upon a refusal to permit the Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator agent, or employee, in accordance with § 1903.3 or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.

⁵Contrary to LaForge's assertion, the record does not indicate that the two city employees and the consulting engineer left because they recognized LaForge's right to exclude them from the worksite. We find that the reason they left was that they feared violence from LaForge's vice president and the LaForge employees on the site.

compliance officer to leave unless the city, the owner of the property, was able to obtain access for him. We find those instructions to be reasonable and consistent with the regulation. Even if we found that the compliance officer's actions violated the Secretary's regulations, however, we would not impose the sanction imposed by the judge unless the record established that LaForge was prejudiced in its ability to present an effective defense by that failure to follow section 1903.4(a). *Accu-Namics, Inc.*, 1 BNA OSHC 1751, 1756, 1973-74 CCH OSHD ¶ 17,936, p. 22,234 (No. 477, 1974), *aff'd*, 515 F.2d 828 (5th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976).

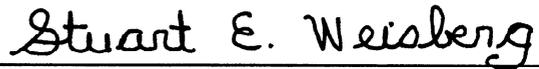
In addition, the city employees called the city manager, who was also the manager of the Municipal Authority. The city manager then called the police department to request that officers be sent to the site to maintain the peace during the inspection. Apparently, his intent was to prevent LaForge's employees from engaging in violence to prevent the inspection. We construe that action as not only consent to the inspection but an active effort to have the inspection take place. It is not clear from this just how vigorous the two city engineers and the consulting engineer were in their attempts to persuade the compliance officer to remain and perform the inspection. However, the information that the city was sending police officers to prevent LaForge from interfering with the inspection must have been sufficiently persuasive evidence to him that the owner of the property not only consented to the inspection but also endorsed it. We do not find that the compliance officer's failure to leave at that point was so unreasonable as to place him in violation of OSHA's regulations. Further, we find nothing in the record to indicate that, once the police arrived, the conduct of the ensuing inspection was unreasonable. Accordingly, we disagree with the judge's finding and reject LaForge's argument that the compliance officer's failure to follow section 1903.4 deprived it of administrative due process.⁶

⁶LaForge also cites provisions in OSHA's Field Operations Manual to support its assertion that the compliance officer acted improperly. The Commission has often held, however, that the Field Operations Manual is an internal document that sets out guidelines and accords employers no substantive rights. *E.g.*, *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2143 n.5, 1993 CCH OSHD ¶ 29,953, p. 40,972 n.5 (No. 89-2614, 1993); *H.B. Zachry Co.*, 7 BNA OSHC 2202, 2204-05, 1980 CCH OSHD ¶ 24196, p. 29,424 (No. 76-1393, 1980), *aff'd*, 638 F.2d 812 (5th Cir. 1981).

In view of the discussion above, we need not address the Secretary's argument that the open fields doctrine applies here.

CONCLUSION

For the reasons above, we reverse the administrative law judge's order granting LaForge's motion to suppress the evidence gathered during the inspection. We remand this case to the judge for further proceedings.



Stuart E. Weisberg
Chairman



Edwin G. Foulke, Jr.
Commissioner



Velma Montoya
Commissioner

Dated: September 21, 1994

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SECRETARY OF LABOR
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v.

LAFORGE & BUDD CONSTRUCTION COMPANY
Respondent.

OSHRC DOCKET
NO. 91-2264

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 8, 1993. The decision of the Judge will become a final order of the Commission on April 7, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before March 29, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Date: March 8, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-2264

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moved for a hearing to determine whether the evidence in this case should, in fact, be suppressed; pursuant to that motion, a hearing was held on August 6, 1992.

Background

The project at issue involved the construction of improvements to the Southside Wastewater Treatment Plant, which is located on property owned by the City of Shawnee ("City").² The project contract was between LaForge & Budd, the general contractor, and the Shawnee Municipal Authority ("Authority").³ C. H. Guernsey, the engineering firm that designed the project and prepared the contract, also provided engineering and construction management services, and an assistant engineer employed by the City supervised the project and acted as a liaison between the City and Guernsey. The project commenced in December 1989 and was substantially completed by December 1991. (Tr. 82-90; 93; 99; 105-08; 113; R-2).

Although the plant was in full operation twenty-four hours a day throughout the project, the Authority did not have the use of structures as they were being worked on, and, pursuant to the contract, did not use any completed structures without the approval of LaForge & Budd. LaForge & Budd hired the project subcontractors and was responsible for safety and cleaning up the site when done and turning it over to the Authority; the company also provided a trailer next to its own for Guernsey's on-site inspector, who was there throughout the project. (Tr. 87-91; 107; 111-15; 165).

LaForge & Budd had a policy which allowed only employees, delivery personnel and persons necessary for quality inspections on the project.⁴ The City assistant engineer visited the project weekly to see how it was progressing, and the City could issue work directives based on deficiencies; his visits lasted thirty to forty minutes and usually consisted of meeting

²The improvements included two new digesters, a new administrative building, and renovations to already-existing process units. (Tr. 84; 88; 91; 113; 115).

³The Authority was established to manage the utility system for the City, which paid for the project and the employees who operated the plant on City checks from Authority funds. The Authority's board was the City commission, and the City manager was also the Authority manager. (Tr. 88; 93-94; 99-100; 108-10; 130-31).

⁴The company's established policy was to require a warrant for all OSHA inspections. (Tr. 131).

with Guernsey's inspector and LaForge & Budd's job superintendent and walking through the entire plant. The State health department inspected the project monthly, and the County sanitarian made quarterly inspections of the plant's operation. LaForge & Budd was generally informed of inspections, and had not refused access to the project before the OSHA inspection; however, on one occasion it determined the health department inspection would be disruptive and discussed the matter with the Guernsey inspector, after which the inspection was postponed a few days. (Tr. 86-89; 97-98; 103-07; 119-20; 134-36; 159-60; 170-71; 186).

R-3, a portion of the official plans for the project, depicts the new digester area and the trench that was the focus of the OSHA inspection, the two jobsite trailers, which were about 50 yards from the digester area, and the route of employees who worked at the plant; plant employees went by the digester area every day but did not work there because it was not yet operating, and on one occasion when a plant worker did enter the area to see what was going on LaForge & Budd asked him to leave and he did so. The "X" on R-3 indicates where the OSHA compliance officer ("CO") initially met representatives of LaForge & Budd, and R-4 and R-5 depict what the CO could see at that encounter. The road around the digester area as shown on R-3 was not yet constructed, and LaForge & Budd had put a gate across a road to the west of the digester site to limit public access to the area. LaForge & Budd was also to put up a chain link fence on the west side of the digesters; however, it had not been erected at the time of the inspection. (Tr. 112-16; 122; 136-43; 160-65; 186).

The Inspection

On May 29, 1991, an OSHA CO based in Oklahoma City received a phone call from Guernsey's on-site inspector, who reported that an employee was working in an unsafe excavation and that he believed it should be inspected. The CO discussed the situation with his supervisor and then drove to the plant. Since no one was in the administration building when he arrived he proceeded to the construction area, where he was met by both the vice president and the project superintendent of LaForge & Budd. The CO showed his credentials and explained why he was there. The vice president replied that without a

warrant no inspection would be allowed, even after the CO told him the City had requested it and no warrant was needed. The CO returned to the administration building and called the City assistant engineer, who arrived in about twenty minutes with the City engineer and Guernsey's inspector.

The CO again proceeded to the construction area accompanied by the City and Guernsey representatives. LaForge & Budd's vice president met them outside his trailer with some of his employees and again stated that no inspection would be permitted without a warrant, after which one of the City representatives told him one was not necessary because it was City property. The CO and representatives tried to walk past the vice president; however, he prevented their doing so by stepping in front of them, and they went back to the administration building. The CO called the OSHA acting area director in Oklahoma City, who told him he could not conduct an inspection if the employer did not want it unless the City wanted him to, in which case it was up to the City to get him onto the site. A City representative testified he did not tell the CO he wanted the inspection, but that he gave his permission when asked because of the City's interest in safety. On the suggestion of the City engineer one of the representatives called the police department for an escort, after which two armed and uniformed officers arrived.

The CO proceeded to the construction area once more, this time with the representatives and the officers. The vice president testified he met the group outside his trailer, that one of the officers told him he wanted to discuss the matter privately inside, and that he complied but again objected to the inspection. The vice president further testified the officer had his hand on his revolver, which was unstrapped in its holster, that he believed he would be arrested if he resisted the inspection, and that he therefore allowed it. The CO inspected the site accompanied by the vice president, the representatives, and one of the officers. The vice president did not interfere with the inspection, but did not answer the CO's questions.

The Contentions of the Parties

The Secretary stipulates LaForge & Budd did not consent to the inspection. She contends, however, that the City's permission to inspect the site constituted valid third party

consent, and that LaForge & Budd had no reasonable expectation of privacy in its worksite in view of the contract it signed and the City's access to the project. Respondent contends there was no valid third party consent, that the City did not have access to the project without its permission, and that it did, in fact, have a reasonable expectation of privacy in its worksite. Respondent also contends its due process rights were violated because OSHA did not follow its own procedures providing for the securing of a warrant when an employer objects to an inspection.

Discussion

It is well settled that OSHA must have either a warrant or the consent of an authorized party to inspect a workplace. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). Since no warrant was obtained in this case and Respondent did not consent to the inspection, the Secretary has the burden of establishing the City's authority to consent. *Illinois v. Rodriguez*, 110 S.Ct. 2793, 2797 (1990). Valid third party consent depends on whether the "permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Common authority may not be implied solely from a third party's property ownership, but instead hinges on "mutual use of the property by persons generally having access or control for most purposes." *Id.* at 171 n.7. The touchstone of *Matlock's* analysis is that "any reasonable expectation of privacy in common areas is lost once joint occupants assume the risk that a co-occupant will allow access to the common areas." *Donovan v. A.A. Beiro Constr. Co.*, 746 F.2d 894, 899 (D.C. Cir. 1984).

Respondent contends the City had no authority to consent because its contract was with the Authority, a separate entity. This contention is rejected. The City supervised the project and owned the plant property. Moreover, both entities had the same principals, and the checks paying for the project and the plant employees, while derived from Authority funds, were written by the City. It can only be concluded the Authority was an agent of the City, whose authority to consent, based on the foregoing, depends on relevant contract provisions and the circumstances at the site.

Both parties point to section 13.2 of the project contract, appearing on page 24 of R-2, in support of their respective positions. That section provides as follows:

Access to Work: ENGINEER and ENGINEER'S representatives, other representatives of OWNER, testing agencies and governmental agencies with jurisdictional interests will have access to the Work at reasonable times for their observation, inspecting and testing. CONTRACTOR shall provide proper and safe conditions for such access.

Although the foregoing does address access, it is at best ambivalent as to the City's authority to consent and therefore not decisive. Other contract sections cited by the parties are equally inconclusive. *See, e.g.,* section 6.20, requiring contractor to comply with all applicable safety laws, and section 14.10, requiring contractor's approval before owner can use a completed portion of the project. In any case, *Beiro* held that contract provisions are not ultimately controlling in questions of third party consent. *Id.* at 900 n.6. This case must accordingly be resolved based on relevant case law and the circumstances at the site.

The Secretary relies on *Beiro* in support of her position.⁵ In that case, *Beiro* was one of several prime contractors engaged by the District of Columbia for a construction project; the project, on property owned by the District, consisted of four square blocks surrounded by a fence, and while each contractor tended to occupy a particular area there was no interior fencing and workers of the various companies worked throughout the site. When OSHA sought to inspect the site, all the contractors except *Beiro* agreed; however, the inspection took place the next day after OSHA obtained the consent of the District's project manager. In upholding the inspection, the court found *Beiro* had no reasonable expectation of privacy and that OSHA had valid third party consent because there was joint access and control of the project. *Beiro* at 898-900.

There are distinct differences between *Beiro* and this case. Respondent, the general contractor, restricted access to project areas to employees, delivery personnel and persons conducting quality inspections. It was usually given notice of inspections and could postpone those which interfered with the job; moreover, the City obtained Respondent's approval before using structures on which work was completed. In regard to the digester area itself,

⁵⁵The Secretary cites *Beiro* in her response to Respondent's motion to suppress, which is incorporated by reference in her brief.

plant employees did not work there and were not permitted in the area, and while they walked by it, their route, based on R-3, was some distance from the construction site. The road around the digesters was not yet constructed, a road to the west had a fence across it to limit access to the site, and a chain link fence was also to be erected on the west side of the digesters.

Based on the foregoing, the Secretary has not met her burden of establishing the City's authority to consent to the inspection. While the City owned the plant property, mere ownership, as noted *supra*, is insufficient to demonstrate authority to consent. Further, while it is clear the City had authority over and access to its plant in general, the record in this case, unlike *Beiro*, shows neither common authority nor joint access and control of the inspected area and in fact indicates Respondent had a reasonable expectation of privacy in its worksite. On the facts of this case, there was no valid third party consent to the inspection.⁶

Alternatively, the Secretary contends that even if there was no common authority, the City's representation it had such authority and the CO's reasonable reliance on that representation validated the search, based on *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990). In that case, the Supreme Court held searches based on third party consent to be valid as long as the official reasonably believed the third party had the authority to consent, even if it was later established the party did not. *Id.* at 2801. However, in so holding, the Court noted that:

[W]hat we hold today does not suggest that law enforcement officers may always accept a person's invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry.

Id. at 2801.

⁶The Secretary's reliance on *Frey v. Panza*, 621 F.2d 596 (3d Cir. 1980), is also misplaced. In that case, a municipal building inspector's warrantless inspection of a home under construction was held valid; however, the holding was based on the construction industry's long history of governmental supervision and oversight enforced by inspection, the contractor's awareness in advance the work was subject to inspections without notice, and the fact the inspections were limited to reasonable hours and for the purpose of enforcing compliance with the building code. *Id.* at 598.

In *U.S. v. Whitfield*, 939 F.2d 1071 (D.C. Cir. 1991), the court read *Rodriguez* as validating warrantless searches based on reasonable mistakes of fact, as distinguished from mistakes of law. *Id.* at 1073. The court then reversed the defendant's conviction, finding the agents had been faced with an ambiguous situation and proceeded without making further inquiry.⁷ *Id.* at 1075. In so doing, the court noted that "[i]f the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to 'mutual use' by the person giving consent, 'then warrantless entry is unlawful without further inquiry.'" *Id.* at 1075, quoting from *Rodriguez* at 2801. Other courts have agreed with *Whitfield*. See, e.g., *U.S. v. Salinas-Cano*, 959 F.2d 861 (10th Cir. 1992) (officer's belief girlfriend had authority to consent to search of closed suitcase defendant left in her apartment was mistake of law); *U.S. v. Brown*, 961 F.2d 1039 (2d Cir. 1992) (officer's belief landlady had authority to consent to search of leased premises was mistake of law).

The Commission has not decided whether there is a good faith exception to warrantless OSHA inspections.⁸ Based on the foregoing, the undersigned assumes the Commission would apply the exception. The cases cited above are subject to interpretation, especially when considering the question of whether a mistake of fact or law has occurred, and applying the consent standard to OSHA inspections is not easy. For the circumstances of this case, the undersigned has framed the question as follows: What are the limits, under the Act, to a CO's warrantless entry at a worksite?

The facts of this case demonstrate that well-meaning individuals escalated a confrontation about access to the worksite to the extent that a local police department was called to obtain entry. While this procedure might be appropriate in rare situations, such as life-threatening imminent dangers or where employee safety is immediately at risk, the government presented no evidence that the reasons for its actions at the worksite were based on such circumstances. LaForge & Budd refused entry in plain, convincing language,

⁷Whitfield's mother, responding to the agents' questions, said that he lived there, that the house was hers, that his room was open, and that they could search it, after which the agents searched his closet and found large numbers of bills in coat pockets.

⁸See *Sanders Lead Co.*, 15 BNA OSHC 1640, 1651, 1992 CCH OSHD ¶ 29,690, p. 40,271, n.19 (No. 87-260, 1992).

which occurs at some worksites, and the Secretary has promulgated reasonable and comprehensive regulations and procedures to address this situation. In my opinion, input from the OSHA area director to the regional solicitor would have resulted in prompt resolution of the problem; a warrant would have been obtained and served, and the inspection would have commenced or contempt procedures would have been instituted. Most importantly, the regional solicitor would have had a chance to counsel his client and make appropriate recommendations.

The issue to be determined is the appropriate resolution of this matter. Although the undersigned is always hesitant to vacate citations for reasons other than their actual merits, it seems far better, in looking at the total circumstances of this record, to vacate the two citations and use this case as a learning experience for all CO's and employers faced with similar situations in the future. This decision is not intended to encourage employers to refuse entry, and most employers, in fact, readily admit OSHA inspectors without the necessity of the Secretary seeking compulsory process. This decision is also not intended to reflect adversely on Respondent's vice president, the City officials, or the CO, who has conducted proper inspections in other cases previously decided by the undersigned. However, both OSHA and employers should interpret this decision as suggesting that cooler heads prevail at the worksite. In this case, the CO became embroiled in a situation which can only be described as ambiguous, and I conclude, as did the court in *Whitfield*, that the CO should not have proceeded without further inquiry. I also conclude, based on the evidence of record, that this case does not fit within the concept of *Illinois v. Rodriguez*. For these reasons, the subject citations are vacated.

Conclusions of Law

1. Respondent, LaForge & Budd Construction Company, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was not in violation of 29 C.F.R. §§ 1926.152(a)(1), 1926.251(a)(1), 1926.350(a)(9), 1926.652(a)(1) and 1903.2(a)(1).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation numbers 1 and 2 are VACATED in their entirety.



Stanley M. Schwartz
Administrative Law Judge

Date: **MAR 1 1993**