



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.

THE METROPOLITAN MUSEUM OF ART,

Respondent.

OSHRC Docket No. 08-0170

APPEARANCES:

Diane C. Sherman, OSHA Counsel; Patricia M. Rodenhauen, Regional Solicitor; Gregory F. Jacob, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Dennis J. Morikawa, Esq.; Morgan Lewis & Bockius, LLP, Philadelphia, PA
For the Respondent

REMAND ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

Before the Commission is an order by Chief Administrative Law Judge Irving Sommer approving a “Stipulated Settlement” between the Secretary and the Metropolitan Museum of Art (“MMA”). Jon Peterson, an affected employee of the MMA, petitioned the Commission for review of the judge’s order, disputing several of the stipulations made by MMA in the settlement agreement. For the following reasons, we remand this case to the Chief Judge for further proceedings consistent with this opinion.

Background

This case arises from a November 8, 2007 inspection conducted by the Occupational Safety and Health Administration (“OSHA”) at the MMA located at 1000 Fifth Avenue, New York, New York. As a result of the inspection, OSHA issued MMA two citations—one serious and one

“other”—on December 20, 2007, alleging a total of six violations with a total proposed penalty of \$7,500. MMA filed a timely notice of contest on January 14, 2008. About a month later, on February 18, 2008, Peterson sent a fax to the Commission’s Executive Secretary consisting of a cover sheet and copies of seven letters between Peterson and several private, federal, and state entities. One of these letters, dated the same day as his fax, was sent by Peterson to OSHA’s New York Office with a copy to the Executive Secretary.

On August 26, 2008, the Chief Judge received a “Stipulated Settlement” from the parties. In the settlement agreement, the Secretary withdrew two of the citation items, reclassified one of the serious citation items to “other than serious,” and amended the total penalty amount to \$3,700. In addition, MMA certified that all violations alleged in the citation had been abated, and a copy of the agreement had been posted and served on John Mayers, the authorized employee representative, on August 14, 2008. *See* Commission Rule of Procedure 100(c), 29 C.F.R. § 2200.100(c) (setting forth filing requirements for settlement agreements including proof of service on all parties including authorized employee representatives and the posting of notice to non-party affected employees). On September 10, 2008, the Chief Judge issued an order approving the settlement agreement. *Id.* (requiring that order terminating litigation before Commission not be issued until 10 days after agreement’s service or posting to allow for consideration of any affected employee or authorized employee representative’s objection to the reasonableness of any abatement time).

Discussion

Based on our review of this matter, we find that the record raises questions about Peterson’s status in the case at the time he sent his February 18, 2008 fax to the Commission. Under Commission Rule of Procedure 20(a), 29 C.F.R. § 2200.20(a), “[a]ffected employees and authorized employee representatives may elect party status concerning any matter in which the Act confers a right to participate. The election shall be accomplished by filing a written notice of election at least 10 days before the hearing.” The Commission has held that “[a]ffected employees need not expressly state that they wish to elect party status before it is conferred. Party status is conferred upon affected employees if they manifest an intent to be heard during Commission proceedings.” *General Electric Co.*, 7 BNA OSHC 1277, 1277 & n.1, 1979 CCH OSHD ¶ 23,497, p. 28, 466 & n.1 (No. 77-3915, 1979). In *General Electric*, the Commission concluded that an authorized employee representative’s letter to the Commission expressing an interest in the case and requesting

permission to attend the hearing, manifested “an intent to be heard” and therefore, was considered an election of party status. *Id.*

Here, Peterson wrote in his February 18, 2008 letter to OSHA:

I request that these [enclosed] letters are part of the deliberations concerning my OSHA complaint against the museum . . . I have been given conflicting information as to my rights to attend th[e] meeting [between OSHA and the union to discuss the complaint], my eligibility to elect party status for this case, and the proper procedures to file an OSHA complaint as a Union employee through District Council 37.

In view of this language, we find it appropriate to remand this case to the Chief Judge for him to consider whether, under *General Electric*, Peterson’s February 18, 2008 letter “manifest[s] an intent to be heard” such that the letter should be considered an election of party status.¹ If the Chief Judge finds that Peterson has party status in this case, he shall also consider whether the requirements of Rule 100(c) have been met and whether Peterson had the type of opportunity for input concerning the settlement as described in *Boise Cascade Corp.*, 14 BNA OSHC 1993, 1991-93 CCH OSHD ¶ 29,222 (No. 89-3087, 1991).

Accordingly, we set aside the judge’s order approving the settlement agreement and remand for further proceedings consistent with this opinion.

SO ORDERED.

/s/
Horace A. Thompson III
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: October 20, 2008

¹ We note that there is nothing in the record indicating the authorized employee representative elected party status. Accordingly, under Commission Rule of Procedure 22(b), Peterson would not have been barred from electing party status as an affected employee. *See* 29 C.F.R. § 2200.22(b) (stating, in relevant part, that if “an authorized employee representative . . . elects to participate as a party, affected employees who are members of the collective bargaining unit may not separately elect party status.”)