



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. CUSTOM HOUSE
721 19TH STREET, ROOM 407
DENVER, COLORADO 80202-2517

Phone: (303) 844-0418

Fax: (303) 844-3759

SECRETARY OF LABOR,
Complainant,

v.

TRUSTON TECHNOLOGIES, INC., and its
successors,
And
HEALY TIBBITTS BUILDERS,
Respondents

And

UNITED STATES DEPARTMENT OF THE
NAVY
Court Ordered Third Party Joinder

OSHRC Docket Nos.: 15-1023

15-1069

**ORDER GRANTING RESPONDENTS UNOPPOSED JOINT MOTION
TO COMPEL TESTIMONY**

And

**ORDER JOINING THE UNITED STATES DEPARTMENT OF THE NAVY TO THESE
PROCEEDINGS**

The Court held a conference with the following parties upon receipt of *Respondent's Joint Motion to Compel Testimony* ("Motion") under F.R.C.P. Rule 30(a)(2). The Secretary of Labor ("Secretary") does not oppose the Motion. Patricia Drummond, Esq., OSHA Counsel, Elizabeth Finnenman, Esq. and Cheryl Adams, Esq. represented the Secretary. Elena A. Pecoraro, Esq. represented Respondent, Truston Technologies, Inc. and Thomas Benjamin Huggett, Esq. represented Respondent, Healey-Tibbitts Builders, Inc. The United States Department of the Navy was not present.

COURT AUTHORITY

This Court is a federal administrative court created by 29 U.S.C. §§ 651-678. The proceedings of this Court, and therefore the authority under which it acted in issuing the Subpoena at issue, are governed by the Federal Rules of Civil Procedure (29 U.S.C. § 651(g) and 29 C.F.R. § 2200.2(b)). Section 651(g) of the Occupational Safety and Health Act states "Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." 29 U.S.C. § 651(g). United States Administrative Law Judges (ALJ), responsible for conducting pre-trial proceedings, trials and issuance of a decision after a *de novo* proceeding in conformity with 5 U.S.C. § 554 (section 10(c) of the Act, 29 U.S.C. § 659), have life tenure. 29 U.S.C. § 12(k). The United States Supreme Court has stated that the role of an ALJ is "functionally comparable" to a trial judge. *Butz v. Economou et al.*, 438 U.S. 478, 513-14 (1978).

This Court differs from the conventional federal agency model in that it is purely an adjudicator; there is no intermixing of regulatory, prosecutorial and adjudicative functions. For this reason the proceedings of this Court have been likened to a federal district court. *See A. Amorello & Sons*, 761 F.2d 61 (1st Cir. 1985); *Marshall v. OSHRC*, 635 F.2d 544 (6th Cir. 1980); *Marshall v. Sun Petroleum Products*, 622 F.2d 1176 (3rd Cir.), *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); 116 Cong.Rec. 38708 (Nov. 24, 1970)(Statement of Rep. Steiger)(characterizing OSHRC as "an independent court").

PROCEDURAL HISTORY, ARGUMENT AND FINDINGS OF FACT

The Court issued a Subpoena under F.R.C.P. Rule 45 and 29 C.F.R. §2200.56 for John Robert Pittman to give oral deposition testimony in the above actions commenced by the Secretary under the Act. The Subpoena was properly served. F.R.C.P. Rule 45 and 29 C.F.R. § 2200.56. Mr. Pittman is a former civilian employee of the United States Navy and was the Contracting Officer's Representative on the worksite on the date of the accident giving rise to this litigation. Following the issuance of the Subpoena, Respondent Truston sent correspondence on May 2, 2016 to the Navy Judge Advocates General Office ("JAG") in an attempt to comply with the Department of Defense ("DOD") interpretation of the requirements of *Touhy v. Ragen*, 340 U.S. 462 (1951). The Navy's JAG office has denied this request often changing the reasons for its refusal to comply with the Court's Subpoena. The actions of JAG changing the goal posts as the parties in these proceedings have been close to rushing into the in-zone brings into question the good faith of JAG. As agents of the federal government, JAG is charged with discharging the public trust granted to it in an impartial and fair manner which promotes public confidence in its actions. The JAGs actions, so far in this case, fall short of meeting these expectations.

DODs and JAGs initial response to the *Touhy* request was that Mr. Pittman had no official information that was classified or that could be compromised in the deposition as it relates to the matters at issue in this case. They later changed their position. Under Section 4 of the DOD Directive No. 5405.2 dated July 23, 1985 ("Directive") "it is the policy that official information should generally be made reasonably available for use in Federal and State courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure." If Mr. Pittman has no official classified information that can be compromised, under the Directive he is to be made available.

Second, in responding to the Truston May 2, 2016 *Touhy* request, JAG summarily concluded that “...have[ing] considered all relevant information, including your May 2, 2016 letter, and have concluded that it would be inappropriate to approve your request.” Letter dated May 17, 2016 to Elena A. Pecoraro, Esq. by J. B. Blazek, Lieutenant Commander, JAGC, USN. This communication fails to adequately explain the consideration factors set forth in Section 6.2 of the Directive. Summary disposition undermines the integrity of the process and calls into question the thoroughness of any evaluation.

Third, in Lieutenant Commander Blazek’s letter he recognized that the deposition of Mr. Pittman was proper by stating “The incident under review in the OSHA hearing is the subject of existing litigation to which you and the United States are parties. The deposition of Mr. Pittman would be more appropriate in the course of discovery in that litigation under the Federal Rules of Civil Procedure.¹” Blazek letter dated May 17, 2016. The Subpoena issued by the Court is due to the OSHA litigation referenced by Lieutenant Commander Blazek and is issued under the Federal Rules of Civil Procedure. *See above* authorities under which this Court exercises its powers. Yet, despite this acknowledgement, JAG refuses to make Mr. Pittman available.

Fourth, following the above attempts by the parties to this litigation to convince JAG to make Mr. Pittman available, the Office of the Solicitor, who represents the Secretary, worked with the U. S. Department of Justice (“DOJ”), who represents the United States in separate civil litigation, to make Mr. Pittman available. DOJ and the Solicitor on behalf of all the parties to this litigation agreed to schedule the deposition of Mr. Pittman for September 8, 2016. Then on August 19, 2016 in an email from Vickey Quinn, DOJ Counsel, DOJ/JAG changed their mind again. The explanation provided, as explained to this Court, was that the interests of the Navy could not be protected because they could not be at the deposition because they were not a party. Nothing under the

¹ From the references noted above, this Court is subject to the Federal Rules of Civil Procedure.

Directive requires the attendance of JAG at the deposition to protect the interest of the Navy. Again, this action appears to contravene Section 2.2. of the Directive which states that the Directive does not apply to the release of official information or testimony by DOD personnel in the following situations:

2.2.3 In response to requests by Federal Government counsel in litigation conducted on behalf of the United States.

This litigation was commenced by the Secretary of Labor on behalf of the United States. The Solicitor represents the Secretary. The Court concludes that when the Solicitor requested the deposition of Mr. Pittman in accordance with the Federal Rules of Civil Procedure the Directive commands that DOD/JAG comply with such request made by the Solicitor.

Most courts have concluded that *Touhy* requests are governed by the Federal Rules of Civil Procedure which tend to favor the allowance of such testimony:

Section 301 does not create an independent privilege to withhold government information or shield federal employees from valid subpoenas. Rather, the district courts should apply the federal rules of discovery when deciding on a discovery request made against government agencies, whether or not the United States is a party to the underlying action. Under the balancing test authorized by the rules, courts can ensure that the unique interests of the government are adequately considered.

Exxon Shipping Co., v. U.S. Department of Interior, 34 F.3d 774, 780 (9th Cir. 1994). The D.C. Court of Appeals, which has jurisdiction over the Navy JAG office, has adopted this approach. *See Watts v. S.E.C.*, 482 F.3d 501 (D.C. Cir. 2007). *See also Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001); *In re Micron Technology, Inc.*, Securities Litigation, 264 F.R.D. 7 (D.C.C. 2010).

Finally, the issues in this litigation require different discoverable information from the litigation pending in the United States District Court of Hawaii and the Hawaii State Court. The position that the deposition of Mr. Pittman should be delayed until his deposition can be taken in

conjunction with the subsequent Hawaii cases is adept. There is no duplication or overlap whatsoever between the three cases. That position delays the proceedings in these cases and could result in the loss of evidence or availability of evidence for the trial in these matters scheduled for October, 2016 as it appears the discovery track of the Hawaii cases takes discovery well into 2017-2018.

The Court is also perplexed in the position of JAG/DOJ. It appears from the email of Vickey L. Quinn, DOJ Attorney dated August 19, 2016, that there is no objection that the deposition of Mr. Pittman can be taken. It appears the only dispute is WHEN the deposition of Mr. Pittman can be taken. For the reasons stated above, the Court is not permitting this scheduling dispute to prejudice these proceedings instituted by the United States Government. The Court will not permit one part of the United States Government to prejudice another part of the United States Government when the two proceedings in which the U.S. Government is a party have no overlapping issues and evidentiary proof. That is why Direction Section 2.2.3 was incorporated to prevent this absurd result. The Court concludes that DOJ/JAG cannot invoke the Directive and keep changing their position to the prejudice of these proceedings and to another part of the United States Government. For the above reasons, the Court enters the following Orders:

ORDER TO GIVE DEPOSITION

IT IS ORDERED that the Department of Navy make John Robert Pittman available for oral deposition and John Robert Pittman be compelled and required to appear for an oral deposition, previously agreed to by DOJ, to be conducted by the Secretary and in which the Respondents shall also have the right to appear and question John Robert Pittman in accordance with the Federal Rules of Civil Procedure on either September 8 or 9, 2016 at a place and time to be worked out between the parties and the DOJ/JAG. Authority: F.R.C.P. Rule 30(a)(2).

JOINDER OF DEPARTMENT OF NAVY PURSUANT TO F.R.C.P. RULE 19(a)(2)

The Court on its own Motion, pursuant to F.R.C.P. Rule 19(a)(2), joins the U. S. Department of Navy as a party to this action for the limited purposes of: (1) being subject to this Order in making John Robert Pittman available for the oral deposition; and (2) enabling the Department of Navy to attend the deposition of Mr. Pittman and the trial proceedings to insure that its interests in the nondisclosure of official confidential information is not compromised. The Court will be available to rule on any objections imposed by the Department of Navy during Mr. Pittman's deposition. In so ruling, the burden is on the Department of Navy to establish the confidentiality of the information through established government protocols.

**ORDER TO THE SOLICITOR TO SERVE THE DEPARTMENT OF NAVY
AND THE DEPARTMENT OF JUSTICE**

Patricia Drummond, as OSHA Counsel and the highest ranking Solicitor in these proceedings and who serves as a duly appointed Attorney representing the U. S. Secretary of Labor as an official of the United States Government, is ORDERED under F.R.C.P. Rule 4 and 29 C.F.R. § 2200.7 to serve upon the Department of Navy through JAG and the U. S. Department of Justice a copy of this Order. OSHA Counsel shall provide certification to the Court of the service, including the date, method and individual served.

ORDER FOR ENFORCEMENT

If the deponent, John Robert Pittman fails to attend the deposition, or should DOJ/JAG persist in its denial to make him available, parties are directed to file with this Court a Motion to

Seek the Enforcement of this Order and Subpoena in accordance with 29 C.F.R. § 2200.57(e).

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
U. S. Administrative Law Judge
Judge, OSHRC

Dated: August 25, 2016