



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.

UHS OF FULLER, INC., and UHS OF  
DELAWARE, INC.,

Respondents.

OSHRC Docket No. 20-0032

**BRIEFING NOTICE**

The parties are requested to brief the following issues:

- (1) Whether the judge erred in imposing curative measures and sanctions against Respondents under Federal Rule of Civil Procedure 37(e) (Failure to Preserve Electronically Stored Information). In addressing this issue, the parties should discuss:
  - a. Whether the judge abused her discretion under Federal Rule of Civil Procedure 37(e)(1) by imposing the curative measures specifically identified in her decision.
  - b. Whether the judge erred by concluding under Federal Rule of Civil Procedure 37(e)(2) that Respondents “acted with the intent to deprive” the Secretary of the electronically stored information’s use in the proceeding and, if the judge did not err, whether she abused her discretion by imposing the sanctions specifically identified in her decision.
  - c. Whether and to what extent the curative measures and sanctions imposed by the judge, if found to be appropriate, affect the abatement issue.
- (2) Whether the judge erred in rejecting Respondents’ argument that the general duty clause, as applied here, is unconstitutionally vague because Respondents lacked fair notice of the proposed abatement measures.
- (3) Whether the judge erred in concluding that the Secretary established that the proposed abatement measures were effective and feasible. In addition to any arguments raised

by the parties on efficacy or feasibility, their discussion should specifically include:

- a. Whether the judge properly excluded or relied upon, and properly weighed, the testimony of the parties' expert witnesses. *See S. Pan Servs. Co.*, 21 BNA OSHC 1274, 1276-77 (No. 99-0933, 2005) (discussing admissibility of expert witness testimony under Federal Rule of Evidence 702).
- b. Whether the judge erred in finding that the Secretary established that the proposed abatement measures are economically feasible. *See United States Postal Service*, No. 16-1713, 2023 WL 2663313, at \*\*11-15 (OSHRC Feb. 17, 2023) (consolidated) (discussing economic feasibility).

The parties are advised that when a case is directed for review to consider either the merits or characterization of an item, the appropriateness of the penalty is also subject to review. Accordingly, the parties may address the amount of the penalty if they so choose.

All briefs are to be filed in accordance with Commission Rule 93.<sup>1</sup> The first brief is to be filed within 40 days of this notice. A party not intending to file a brief shall notify the Commission in accordance with Commission Rule 93. The time for filing any responsive briefs (or letters filed in lieu of briefs) shall commence on the date of service.

BY DIRECTION OF THE COMMISSION

Dated: March 20, 2023

/s/  
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John X. Cerveny  
Executive Secretary

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<sup>1</sup> The Commission requests that all briefs include an alphabetical table of authorities with references to the pages on which they are cited, and that an asterisk be placed in the left-hand margin of the table to indicate those authorities on which the brief principally relies. The Commission also requests that copies of cited authority, other than statutes, regulations, case law, law journal articles, and legal treatises, be provided to the Commission and to the opposing party. Parties should be cautioned that these materials will be considered only if appropriate.