



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR
Complainant,

v.

VESTAL STEAKHOUSE & SEAFOOD GRILL
Respondent.

OSHR DOCKET
NO. 93-1357

**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 April 19, 1995. The decision of the Judge will become a final order of the Commission on May 19, 1995 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 May 9, 1995 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:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: April 19, 1995

DOCKET NO. 93-1357

NOTICE IS GIVEN TO THE FOLLOWING:

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Guido Iacovelli, Owner
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Barbara Hassenfeld-Rutberg
Administrative Law Judge
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SECRETARY OF LABOR,

Complainant

OSHRC
 DOCKET NO. 93-1357

v.

VSH RESTAURANT CORP. d/b/a
 VESTAL STEAKHOUSE & SEAFOOD GRILL,

Respondent.

Appearances:

Luis Micheli, Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

Guido Iacovelli, Owner
 Thomas Panzella, Director
 Vestal Steakhouse & Seafood Grill
 Vestal, NY
 For Respondent

Before: Administrative Law Judge Barbara L. Hassenfeld-Rutberg

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.*, ("the Act"), to review citations issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to § 10(c) of the Act.

On April 2, 1993, VSH Restaurant Corporation, d/b/a, Vestal Steakhouse & Seafood Grill ("Vestal") was issued a serious citation alleging ten violations of various electrical standards, as well as three hazardous communication violations.¹ The citation stems from an Occupational Safety and Health Administration ("OSHA") inspection of Vestal's restaurant located in Vestal, New York (Tr.

¹ In the absence of a formal motion from the Secretary, the name of the respondent has been amended to correspond with the name indicated in Vestal's pretrial exchange (Tr. 168-69, 270-71). Also, the first item of the citation has been withdrawn by the Secretary (Tr. 36-37).

18; Exhibit R-10). According to Michael Casler, the OSHA compliance officer assigned to inspect the facility, the inspection was conducted on February 9, 1993, in response to a referral that OSHA received at the end of January from William VanGorder, a fire code inspector for the Town of Vestal ("the Town") (Tr. 17-19, 29, 97; Exhibit R-10).² The record indicates that VanGorder and the Town's building inspector, James Majka, had inspected the restaurant on December 29, 1992, and identified numerous violations of the New York State Uniform Fire Prevention and Building Code, including several electrical infractions (Tr. 170-71, 272, 274, 278; Exhibit C-15).

The attachment to VanGorder's December 29, 1992 letter to Thomas Panzella, Vestal's Director of Operations and the restaurant's supervisor, informing him of the Town's inspection results, indicates that due to the large number of electrical violations discovered, the New York Board of Fire Underwriters ("the Board") was required to conduct an electrical survey of Vestal's facility (Tr. 169, 278; Exhibit C-15). The survey was performed on January 26, 1993, and a report detailing the Board's findings was sent to Vestal on February 1, 1993 (Tr. 186-87, 189, 192; Exhibit R-12). Vestal received the Board's report on February 4, 1993 listing thirty-five items, and immediately began working to abate the violative conditions listed (Tr. 170-71, 191-93, 238-39, 271; Exhibits C-14 & R-12). By February 9, 1993, the date of the OSHA inspection, the Respondent had already corrected about twenty-seven of those listed violations. Prior to the OSHA inspection, Panzella had also received a letter dated February 4, 1993 from Daniel L. Gorman, the Town Attorney informing him that Vestal had ten days from the date of that letter to substantially correct the identified code violations or else the Town would close the restaurant until abatement was complete (Tr. 172-74, 271-72; Exhibits C-14 & R-11).

Because the OSHA inspection was conducted only five days after the date of the Town Attorney's letter, Panzella, who has represented Vestal throughout these proceedings, contends that the entire citation should be "dropped" (Vestal's Post-Hearing Brief at 1; Vestal's Answer at 1-3). He maintains that it was unfair for OSHA to inspect Vestal's facility equipped with a list supplied by VanGorder, of the electrical violations that both the Town and the Board had already discovered, then to cite Vestal for those yet unabated conditions for which Town Attorney had set a deadline for

² It was noted at the hearing that the inspection date indicated on the citation should be corrected to reflect that the OSHA inspection took place February 9, 1993, not 1992 (Tr. 17-18).

all abatements to take place by February 14, 1993, which is five days after the date on which the OSHA inspection occurred. Indeed, when Casler inspected the site, the Respondent had abated most of the violations cited by the Town and was working well within the time frame set out by Gorman (Tr. 19, 170, 192-93, 203-04, 207, 223; Exhibit R-10). The electrical conditions cited by OSHA under items two through ten of the citation were all included in the Board's report to Vestal and were conditions already known to Panzella and were the subject of items in the process of being abated by Respondent (Tr. 164,182, 201-02, 208, 223, 229-31, 233; Exhibits C-14, R-10, & R-12). Furthermore, despite being aware that Vestal had already been notified of these conditions and was working to abate them, Panzella points out that OSHA failed to give Vestal credit for good faith when calculating the penalties proposed for the cited electrical items (Tr. 35-36, 45, 51, 57, 64-65, 69, 77, 82, 171; Exhibits C-14 & R-10).³ Taken as a whole, these objections constitute a challenge to the reasonableness and validity of OSHA's inspection.⁴

It is well established that OSHA has the discretion, pursuant to its authority under § 8(a) of the Act, to schedule an inspection of a facility upon referral from a local agency or board. *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1010, 1993 CCH OSHD ¶ 29,986 (No. 89-1366, 1993); *Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1077-79, 1986-87 CCH OSHD ¶ 27,815 (No. 77-3804, 1987). However, I question whether it is reasonable to do so at a time when the employer has already been notified of the hazards identified in the referral and is making a good faith effort to correct the conditions before a specific date set by local authorities. Indeed, it was perfectly legitimate for Vestal to rely upon the time frame for abatement of February 14, 1993 as indicated by the Town Attorney in his letter to the Respondent dated February 4, 1993. Respondent had reasonably relied on a legal statement from Gorman on behalf of the Town; thus, Vestal targeted its abatement effort accordingly.

³ The compliance officer indicated that no reduction in penalty was given for good faith because of the number of violations cited and "...the fact that there were missing safety and health programs" (Tr. 36). Although Vestal did have a general safety manual and a folder of material safety data sheets available at the restaurant, the compliance officer testified that these documents were incomplete and did not adequately address hazard communication (Tr. 155-58, 164, 262-63, 265-66, 269; Exhibits R-8 & C-14).

⁴ That Vestal, as a pro se employer, did not formally identify this argument as such does not preclude its consideration here as an affirmative defense, particularly where these issues have been consistently raised by Panzella throughout the case.

Section 8(a)(2) of the Act specifically requires that an inspection be *reasonable*, not only in time and limit, but in *manner*. Given the manner in which OSHA proceeded with its investigation of Vestal - deliberately seeking out those conditions already cited by local authorities, yet observing that Vestal was engaged in a continuing effort to abate them within a time frame set out by Gorman - I find that the inspection failed to comply with this requirement of the Act. See *Hamilton Fixture*, 16 BNA OSHC 1073, 1079, 1993 CCH OSHD ¶ 30,034 (No. 88-1720, 1993) (“To establish the affirmative defense that an inspection is unreasonable under section 8(a) of the Act, the employer must introduce into the record sufficient evidence of unreasonable conduct.”), *aff’d*, 28 F.3d 1213 (6th Cir. 1994). Had OSHA’s inspection been conducted *after* the ten-day period (i.e. after February 14, 1993), the time limit allowed by the Town Attorney, I would have been more than willing to accept this citation as the product of a valid inspection. Likewise, had OSHA been contacted by the Town earlier in the Town’s inspection process and conducted its inspection prior to Gorman’s February 4, 1993 letter being issued, which rightfully was relied upon by the Respondent as setting the time frame for abatement, I would have been more inclined to consider the merits of this citation.⁵ However, by responding to the referral when it did, OSHA needlessly injected itself into a local enforcement effort which, at least at that point, was effectively accomplishing its goal. It seems inherently unfair and unreasonable for OSHA to act under these conditions, and I find that Vestal has met its burden of proving that the manner and circumstances under which the OSHA inspection was conducted was not reasonable within the meaning of the Act.

Where the Secretary has failed to comply with § 8(a) of the Act, the proper remedy, not unlike an illegal search and seizure in the criminal law setting, is to suppress the evidence obtained from the inspection. *Hamilton Fixture, supra*, 16 BNA at 1077, n.6, quoting *Envir. Util. Corp.*, 5 BNA OSHC 1195, 1196-97, 1977-78 CCH OSHD ¶ 21,709 (No. 5324, 1977). See also 2 Rudstein et al., *Criminal Constitutional Law* § 11.02[1][c] at 11-61 to 11-62 (1990). I find that all the evidence obtained from the OSHA inspection was tainted; thus, even evidence connected with items

⁵ It is not clear from the record why VanGorder chose to notify OSHA of the conditions at the restaurant before Vestal was given the opportunity to correct the items identified in the Board’s report by the deadline set by Gorman of February 14, 1993. The judge refused to allow VanGorder to testify at the hearing as the Secretary did not include him on the pre-hearing exchange list, thus violating the judge’s order governing testimony of witnesses. (Tr. 7-13).

that were not on the list provided to the OSHA inspector by the Town, will be suppressed. With no evidence to support the violations alleged, the citation must be *vacated* in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear herein. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed findings of fact or conclusions of law inconsistent with this decision are denied.

ORDER

Serious citation 1, item 1, alleging a violation of 29 C.F.R. § 1910.157(g)(1) was WITHDRAWN by the Complainant.

Serious citation 1, item 2, alleging a violation of 29 C.F.R. § 1910.303(b)(2) is VACATED together with any penalty proposed.

Serious citation 1, item 3, alleging a violation of 29 C.F.R. § 1910.303(f) is VACATED together with any penalty proposed.

Serious citation 1, item 4, alleging a violation of 29 C.F.R. § 1910.303(g)(2)(i) is VACATED together with any penalty proposed.

Serious citation 1, item 5, alleging a violation of 29 C.F.R. § 1910.303(f)(4) is VACATED together with any penalty proposed.

Serious citation 1, item 6, alleging a violation of 29 C.F.R. § 1910.305(a)(1)(i) is VACATED together with any penalty proposed.

Serious citation 1, item 7, alleging a violation of 29 C.F.R. § 1910.305(a)(2)(i) is VACATED together with any penalty proposed.

Serious citation 1, item 8, alleging a violation of 29 C.F.R. § 1910.305(a)(2)(iii)(f) is VACATED together with any penalty proposed.

Serious citation 1, item 9, alleging a violation of 29 C.F.R. § 1910.305(a)(2)(iii)(g) is VACATED together with any penalty proposed.

Serious citation 1, item 10, alleging a violation of 29 C.F.R. § 1910.305(b)(1) is VACATED together with any penalty proposed.

Serious citation 1, item 11, alleging a violation of 29 C.F.R. § 1910.1200(e)(1) is VACATED together with any penalty proposed.

Serious citation 1, item 12, alleging a violation of 29 C.F.R. § 1910.1200(g)(1) is VACATED together with any penalty proposed.

Serious citation 1, item 13, alleging a violation of 29 C.F.R. § 1910.1200(h) is VACATED together with any penalty proposed.


BARBARA L. HASSENFELD-RUTBERG
Judge, OSHRC

Date: April 14, 1995
Boston, Massachusetts