

**STATE OF ALASKA
DEPARTMENT OF LABOR**

**OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
P.O. BOX 21149
JUNEAU, AK 99802**

STATE OF ALASKA, DEPARTMENT)	
OF LABOR, DIVISION OF LABOR)	
STANDARDS AND SAFETY,)	
OCCUPATIONAL SAFETY AND)	
HEALTH SECTION,)	
)	
Complainant,)	Docket No. 96-2082
)	Inspection No. 124095233
v.)	
)	
CITY AND BOROUGH OF SITKA,)	
)	
Contestant.)	
_____)	

DECISION AND ORDER

INTRODUCTION

This decision addresses whether a non-party employee may object to the withdrawal of a citation by the Department of Labor (Department). This is a question of first impression in Alaska.

Following an inspection on March 15-17, 1996, the Department cited the City and Borough of Sitka (City) for a violation of the hazard communication standard in 29 CFR 1926.1101(k)(3)(ii)(B). Specifically, the Department alleged that the City failed to inform its employees of asbestos hazards associated with a flooring removal project at the Sitka Police Department.

The City contested the citation, and the matter was transmitted to the Occupational Safety and Health Review Board. The Board scheduled a hearing for March 20, 1997. Prior to the hearing, however, the Department filed a notice of dismissal of its citation dated February 20, 1997. The notice of dismissal was posted at the workplace in accordance with 8 AAC 61.185(a).

In a letter dated March 8, 1997, William Ball, an employee of the Sitka Police Department and a non-party in this proceeding, objected to dismissal of the citation and requested that the hearing process go forward. The Board permitted the Department and the City to respond to Mr. Ball's letter, which both parties did. The hearing scheduled for March 20, 1997, was removed from the Board's calendar pending resolution of the objection to dismissal of the Department's citation.

FINDINGS AND CONCLUSIONS

The Board's procedural regulations in 8 AAC 61.185 provide in pertinent part:

(a) The department will, in its discretion, withdraw a citation or proposed penalty at any stage in the proceedings in a contested case. If a citation or proposed penalty is withdrawn before the hearing in a contested case, a notice of withdrawal must be submitted in writing to the board and copies must be mailed or personally delivered to all parties of record. In addition, the employer shall mail or personally deliver a copy of the notice of withdrawal to any authorized employee representatives and shall post a copy of the notice of withdrawal, for not less than 10 days, at the place of employment where notices to employees are customarily posted. Proof of the mailing or delivery and posting at the place of employment must be made by the employer in an affidavit submitted to the board.

...

(c) Upon the filing of a notice of withdrawal of a citation, proposed penalty, or notice of contest, the board shall issue an order dismissing the case.

The foregoing language makes clear that the Department has the discretionary authority to withdraw a citation at any stage in a proceeding. Employees and authorized employee representatives are entitled

to notice and posting of the withdrawal. However, there is no statutory or regulatory language permitting employees to object to the Department's withdrawal of a citation or authorizing the Board to schedule a hearing on the objection. 8 AAC 61.185(c) specifically states that upon the filing of a notice of withdrawal of a citation, the Board "shall" issue an order dismissing the case.¹

Decisions of the federal courts and the U.S. Occupational Safety and Health Review Commission (OSHRC) have established that employees and unions, regardless whether they have elected party status, have no right to object to the withdrawal of a citation and may not "prosecute" a citation on their own. Marshall v. OSHRC (IMC Chemical Group), 635 F.2d 544 (6th Cir. 1980); American Bakeries Co., 11 OSHC 2024, 1984 OSHD ? 26,951 (1984). Moreover, the U.S. Supreme Court has held that the Secretary of Labor has unreviewable discretion to withdraw a citation and the OSHRC is without authority to overturn the Secretary's decision not to issue or to withdraw a citation. Cuyahoga Valley Railway Co. v. United Transportation Union, 474 U.S. 3 (1985), *on remand*, 783 F.2d 58 (6th Cir. 1986). The Court stated:

It is also clear that enforcement of the [OSHA] Act is the sole responsibility of the Secretary. [Citations omitted.] It is the Secretary, not the Commission, who sets the substantive standards for the workplace, and only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe working conditions, 29 U.S.C. ? 658. A necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer. [Citations omitted.] The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced over employee or union objections. Its authority plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation.

474 U.S. at 6-7.

Based on the foregoing authorities, we conclude that the Department has unreviewable

¹ This is in contrast to settlement agreements between the employer and the Department, where employees are permitted to file objections to the reasonableness of any abatement dates in the settlement agreement. Upon receipt of any such objections, the Board is authorized to schedule a conference or hearing. 8 AAC 61.195(c) and (d).

prosecutorial discretion to withdraw a citation, and the Board does not have the authority to consider the merits of employee or union objections to the withdrawal. Consequently, we must dismiss the citation in this case.

ORDER

Citation 1, Item 1, and the proposed penalty are DISMISSED.

DATED this 3rd day of June, 1997.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

/s/

Timothy O. Sharp, Chairman

/s/

James J. Ginnaty, Member