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Due Process and Employee Safety: Conflict in OSHA Enforcement Procedures

The controversial Occupational Safety and Health Act of 1970 continues to capture the attention of legislators, courts and commentators. Millions of dollars are at stake—the amounts employers have paid out for mandated improvements and penalty assessments. Employers have recently launched constitutional challenges to the Act, alleging in some cases that the enforcement procedures violate due process rights.

3. 24 3-1/2 x 6-1/4, 409 U.S. 541 (1967); M. Stokes, supra note 2, at 83; Hornberger, Occupational Safety and Health Act of 1970, 21 CLEV. ST. L. REV. 1, 9-11 (1972); cf. Note, Area Search Warrants in Border Zones: Almeida-Sanchez and Camara, 84 Yale L.J. 355 (1974). The issue, however, has been mooted by the decision of the Secretary to obtain a warrant if the employer refuses to permit an inspector to enter. 29 C.F.R. § 1903.4 (1974).
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due process. Perhaps the most compelling due process concern arises from the possibility of transforming a penalty of $1000 into one of over $100,000 solely by exercising the statutorily provided right of appeal. Congress has considered this problem, but has yet to arrive at a positive solution.

This Note will analyze the due process allegations, keeping them always in the perspective of the Act's primary purpose: providing for the safety of employees. The precise problem is how to minimize the dangers to employees while preserving due process for the employer who may be forced to make irretrievable expenditures before he has a hearing and judicial review. Statutory amendments will then be suggested and examined.

I. The Enforcement Proceedings

In order to assure safe working conditions, the Act empowers the Secretary of Labor, through his designees, to inspect workplaces for violations of safety and health standards. If a violation is found, a citation is issued which often carries a proposed penalty. The citation describes the dangerous condition and specifies an "abatement period," a reasonable number of days for the employer to put an end to the violation. For examples of proposed amendments, see 4 BNA OCC. SAF. & HEALTH REP. 380, 395, 490, 493, 520 (1974); § 2822, 93d Cong., 1st Sess. (1973); H.R. 15533, 92d Cong., 2d Sess. (1972); H.R. 15560, 92d Cong., 2d Sess. (1972); H.R. 15936, 92d Cong., 2d Sess. (1972); H.R. 15926, 92d Cong., 2d Sess. (1972). See 1972 Oversight Hearings 238 (testimony of Richard Berman, Labor Relations Attorney for the U.S. Chamber of Commerce); 1972 Oversight Hearings 326 (testimony of Sen. Curtis).

10. Act § 8(a)(1), 29 U.S.C. § 657(a)(1) (1970): In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized— (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer. If the employer objects to the inspection, the Secretary has administratively decided to obtain a warrant before entering, 29 C.F.R. § 1903.4 (1974).
13. Act § 10(a), 29 U.S.C. § 659(a) (1970). The amount of the penalty is determined by reference to § 17 of the Act, 29 U.S.C. § 666 (1970). Section 17 provides for a penalty of up to $10,000 for a willful violation, § 17(a); up to $1000 for a serious violation, § 17(b); up to $1000 for a nonserious violation, § 17(c); and up to $1000 for every day of non-abatement, after the abatement period set forth in the citation has run, § 17(d). It is not necessary to propose a penalty after issuing a citation except in the case of a serious violation.
to the violation. The employer is given 15 working days during which to contest the citation or the proposed penalty. Should the employer decide not to contest during the 15 working day period, the citation and penalty become self-executing and not subject to review by any agency or court. However, if the employer does contest the citation or the penalty, he will be given a hearing before a judge of the Occupational Safety and Health Review Commission (OSAHRC). An order of the Commission judge may be reviewed by the three-member OSAHRC. The decision of the Commission, or of the judge, if the Commission denies review, is appealable to the federal court of appeals for the appropriate circuit or for the District of Columbia.

II. Due Process Considerations

Constitutional due process requirements must be satisfied in determining the penalties and orders directed at an employer, regardless of whether the decision is made at the administrative or judicial level.

15. Act § 10(a), 29 U.S.C. § 659(a) (1970). Section 5(a) of S. 2823, supra note 8, proposes extending the period to 30 days.
16. Act § 10(a), 29 U.S.C. § 659(a) (1970); If within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty...the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.
17. Act § 10(c), 29 U.S.C. § 659(c) (1970). The judge here is the hearing examiner noted in Act § 12(e), 29 U.S.C. § 601(d) (1970). Pursuant to 29 C.F.R. § 2200.1(f) (1974), the term judge is used. The judges are distinct from the three members of the Commission. Service of the notice of contest must be made not only upon the Secretary, but also upon affected employees, 29 C.F.R. § 2200.7(g) (1974), or their authorized representative, 29 C.F.R. § 2200.7(f) (1974). The Secretary must file a complaint within 20 days of the notice of contest, 29 C.F.R. § 2200.33(a) (1974), and the employer must answer the complaint within 15 days after it has been served upon him, 29 C.F.R. § 2200.33(b) (1974).
18. Such review is discretionary. The petition must be submitted within 25 days of the Commission judge's decision. Act § 10(c), 29 U.S.C. § 659(c) (1970); 29 C.F.R. § 2200.91(b) (1974). Unless a member of the Commission decides to grant review, the order of the judge becomes final 30 days after its issuance, with the silence of the Commission constituting a denial of the petition. 29 C.F.R. § 2200.91(d) (1974). If the Commission grants review, no order will become final until 30 days after the judge's decision has been reviewed. Ordinarily, there is no oral argument before the Commission. 29 C.F.R. § 2200.33(e) (1974).
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Exactly what constitutes due process may depend on the circumstances, but an evidentiary hearing is required when a right is terminated or property taken.

Since the courts have the right to test the constitutionality of the actions of the other two branches of government, judicial review of the administrative hearing is necessary. This review need not include a de novo trial of the facts. If the Act had only to meet these two due process requirements, it would be unobjectionable; both an evidentiary hearing and judicial review are available.

Employers, however, have mounted other attacks. Some have alleged that due process is denied because the Secretary simultaneously functions as prosecutor and fact finder. Since the Commission or one of its judges reviews the violations, the allegation must be based on an suspension); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (denial of the right to purchase alcohol); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of public assistance payments); Federal Deposit Insurance Corporation v. Hanover Bank and Trust Co., 399 U.S. 306 (trust modification); Granini v. Oregon, 294 U.S. 385 (1914) (foreclosure).


ference of the United States 896, 899 (1972). For a contrary view, including a listing of all federal agencies able to levy penalties without de novo judicial review, see Judge Gibbon's dissenting opinion in Frank Irey, Jr., Inc. v. OSAHRC, 2 BNA OCC. SAFETY & HEALTH REP. 1283, 1294-95 n.10 (5th Cir., Nov. 4, 1974).

assumption that the Commission is unable to function independently of the inspectors. The Commissioners, however, are appointed by the President, and the Secretary has no power to remove them. Moreover, their decisions are reviewable only in the court of appeals. Employers therefore are able to have a hearing which satisfies due process because the Commission is independent of the Secretary.

Employers have also alleged that the penalties violate due process because they are self-executing. But that does not make the procedure violative of due process as long as there is an opportunity for a hearing before the penalty becomes effective and collectible. If the employer chooses not to contest within the 15 working days allotted, he will have waived the right to a hearing; structuring such a waiver into the procedure is not violative of due process.

Even though the formal procedures of the statute satisfy the foregoing due process requirements, a “chilling factor” may in practical effect deny a hearing and judicial review; herein lies the serious due process objection. The chilling factor is the possibility that the abatement period will expire before a hearing and judicial review have been completed. If an employer does not abate within the time period

34. Another potential chilling factor, not considered in the text, is the power claimed by the Commission and its judges to increase penalties over what the Secretary proposes. The power is derived from the use of the word “modifying” in Act § 10(c), 29 U.S.C. § 659(c) (1970). In the following cases, proposed penalties have been increased: e.g., REA Express, Inc. v. Brennan, 495 F.2d 822 (2d Cir. 1974) (proposed penalty of $900 increased to $1,000 by hearing examiner); The Marino Dev. Corp., 2 BNA Occ. Saf. & Health Rep. 1260 (Rev. Comm’n, Oct. 9, 1974) (proposed penalty of $500 raised to $700 by hearing examiner, lowered back to $500 by the Review Commission); Republic Creosoting Co., 1 BNA Occ. Saf. & Health Cas. 1124 (Rev. Comm’n 1973) (proposed penalty of $600 raised to $1,000 by hearing examiner, but overruled by Review Commission which vacated the entire penalty). In the following cases penalties were reduced: Skyline Lumber Co., 2 BNA Occ. Saf. & Health Rep. 3034 (hearing examiner, June 5, 1974) (from $565 to $240); Tony Volante Sewer Serv., 2 BNA Occ. Saf. & Health Rep. 3079 (hearing examiner, July 15, 1974) (from $700 to $200); Martin Masonry Co., 2 BNA Occ. Saf. & Health Rep. 1342
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allotted in the citation, a non-abatement penalty accumulates at a rate of up to $1000 a day.\(^3\) It is not uncommon for abatement periods to be only 30 days.\(^4\) In contrast, the average time from the day a contest notice is filed until a decision is rendered is 114 days for a judge, 198 days for a judge and the Commission,\(^5\) and approximately an additional year if review extends to a court of appeals.\(^6\) With this time disparity, a $1000 penalty could easily be transformed into one of over $100,000 due to non-abatement.

Currently, however, a stay of the running of the abatement period is usually granted during both the hearing and review stages. With such a stay, the employer has no fear of penalties accumulating because the allotted number of days will be available after the Commission or court has come to a decision. The chilling effect only occurs, therefore, when the employer, during either the administrative or judicial proceedings, must go forward without a stay.

At the administrative level, the abatement period does not begin to run until a final order of the Commission has been entered.\(^7\) However, a stay of the running of the abatement period is usually granted during both the hearing and review stages. With such a stay, the employer has no fear of penalties accumulating because the allotted number of days will be available after the Commission or court has come to a decision. The chilling effect only occurs, therefore, when the employer, during either the administrative or judicial proceedings, must go forward without a stay.

At the administrative level, the abatement period does not begin to run until a final order of the Commission has been entered.\(^8\) How-
ever, the abatement period will be treated as having begun when the citation was issued if the Secretary decides that the employer is contesting only the amount of the penalty, is initiating review without good faith, or is appealing solely to delay or avoid penalties. In effect, therefore, the Secretary can withdraw what is otherwise an automatic stay.

Filing an appeal for judicial review does not act as an automatic stay of the running of the abatement period. Rather, the court of appeals has the discretionary power to grant a stay, if requested. The effect...
of having to proceed without a stay is the same at either the administrative or judicial level.

If an employer is denied a stay and the abatement period ends before the proceeding terminates, he risks owing more than the sum of the original penalty and the abatement cost, should a decision eventually be rendered against him. For example, an employer may be faced with an initial penalty of $1000 and an abatement cost of $10,000 on the one hand, and a possible 100-day review period on the other, carrying accumulated non-abatement penalties of $100,000. This threat of non-abatement penalties may coerce the employer into immediate abatement. It would then still be open to him to contest the initial penalty, of course, but where abatement costs are significant, the employer is probably more concerned with contesting that cost than with the original penalty.\(^4\) Coerced abatement would make an appeal futile. The employer, having abated the hazard, would avoid the accumulating penalties, but even a decision in his favor would not afford recovery of the abatement expenditure.\(^4\) At the most, the decision would provide precedent for parallel situations.

Thus coerced abatement, before an administrative hearing or judicial review is completed, forecloses consideration of the merits.\(^4\) The procedural decision to deny a stay will bury the real issues.\(^4\) Like an unreasonable filing fee, the threat of monumental penalties prevents an employer from challenging a government order directed at him.\(^4\) That order directly affects the use of his property, diminish-
ing liquidity or substituting one form of property for another. Yet the ability to have a hearing and judicial review, ostensibly provided in the Act, is made so burdensome for the class of employers forced to proceed without a stay that they may forego their constitutional right to challenge the order. This burden works a substantial diminution of an employer's right to a hearing. Unless justified by an exigent state need, this burden denies the employer due process of law.

III. Maximizing Employee Safety

In providing for the possibility of withdrawing or denying a stay, Congress intended to foster the goals of the Act. The health and lives of employees are at stake and quick abatement is meant to minimize the dangers which prompted passage of the program. Since the Act's objectives embody an important governmental interest, severely limit-
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ing procedural safeguards might be justified if no way existed to assure safety while affording a meaningful hearing and judicial review. However, as will be explored in this and the next section, procedural safeguards need not be diminished to achieve safety. The existence of workable alternatives makes the burden on employers forced to proceed without a stay a violation of due process.

Congress provided three methods for correcting dangerous conditions. First, in situations of imminent danger, the Secretary is empowered to seek a preliminary injunction or temporary restraining order. This temporary relief, provided by the district courts, supersedes any abatement periods contained in a citation. Second, where the potential for harm to employees is limited, delayed correction is acceptable and a stay of the abatement period can and should be provided throughout the proceedings. Between these two methods lies a third where a stay is withdrawn or denied. In this third category—between imminent and limited dangers—injunctive relief is not available, but quick corrective action nonetheless is desirable because employees may be injured. An example of corrective action which is not sufficiently urgent to mandate injunctive relief but might best be undertaken quickly is a sprinkler system in a flammable fertilizer factory. The danger, though not imminent, should be countered with quick abatement because the lives of employees are endangered by the risk of fire. In contrast, a ceiling currently releasing dangerous asbestos fibers into the air, for example, presents an imminent danger justifying injunctive relief.

When faced with a case where quick abatement is appropriate but where the danger is not so immediate as to justify an injunction, it makes sense for the Secretary and a court of appeals to be able to consider withdrawing or denying a stay. In particular, when an


53. Congress could decide to dispense with the third category and allow hazards not enjoinalbe to continue throughout the proceedings. This Note argues that the intermediate method is both appropriate and necessary, and it assumes Congress’s continued interest in maintaining it. In fact, if the Secretary and the Commission were to guarantee administratively that an employer will always proceed with a stay, Lance Roofing Co. v. Hodgson, 343 F. Supp. 683, 689-90 (N.D. Ga. 1972), they would, in effect, be amending the Act and defeating a congressional purpose. Cf. note 10 supra.
employer's legal claim is dubious and the amount involved is not significant when compared with his worth or earnings, there should be no hesitation in forcing him to proceed without a stay. Such a course of action creates a dilemma: coercing abatement by denying a stay protects employees' health and safety, but drastically impairs employers' procedural rights. Even employers with dubious legal positions may ultimately be victorious. The present statutory scheme cannot effectively give meaningful content to due process in all cases while simultaneously satisfying the goal of protecting employees. More importantly, narrowing the content of due process is unjustifiable because there are viable alternatives which allow safety to be achieved without rendering meaningless the right to a hearing and judicial review.54

IV. Alternatives

A

The amendment to the Act currently before Congress, S. 2823,55 would make the stay in the court of appeals automatic for 90 days after the commencement of an appeal or until the court has ruled on the motion, whichever is less. This proposed amendment would eliminate the possibility of a short abatement period ending before the court of appeals had ruled on the request for a stay, but it accomplishes little more toward relieving the employer's dilemma. Although it removes the pressure to file an immediate motion for a stay, the proposal does not eliminate the potential for a denial of due process through coercion after the rejection of the request.

The ability of this proposal to achieve its very limited purpose depends on whether 90 days is sufficient. If the court of appeals takes longer to rule on the motion, the possibility of a short abatement period ending before the court ruled would continue. At a minimum, this amendment should be coupled with an explicit provision for the expedited consideration of the motion for a stay.

B

A second alternative is to guarantee truly expedited proceedings at both the review56 and appeal levels.57 With such a procedure an auto-

54. See note 49 supra.
55. Supra note 8, § 5(e).
57. It is already provided that appeals are to be heard "expeditiously." Act § 10, 29 U.S.C. § 660(a) (1970). The House version of the bill which became the Act provided for
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An automatic stay,\(^6\) preserving due process, could be prescribed. Because a final decision would be rendered within a short time, the risks involved in exposing employees to dangerous conditions would be minimized. Delayed abatement would be tolerable if all the proceedings were over within a few months, rather than after more than a year.\(^6\) As the number of contested citations, 831 in a representative four month period in 1974,\(^6\) would seem to preclude quick proceedings in all cases, expedited action could be confined to cases where the Secretary requests it.

In the alternative, the stay procedure could remain discretionary, as it is now, but with expedited proceedings guaranteed any employer forced to proceed without a stay. To avoid coercing an employer into abating before he had a hearing and judicial review, all proceedings would have to be completed before the abatement period had terminated.

While expedited proceedings assure due process and safety, their availability must be real, not illusory. Court dockets are crowded and the consideration of other cases, such as criminal, environmental, and labor matters, often deserves more expedited action than is currently possible. Assuring due process and safety by providing for complete expedited procedures would, therefore, require a commitment to provide more funds at both the administrative and judicial levels.

Third alternative is to reimburse the employer for abatement costs if he is ultimately successful after a stay has been withdrawn by the Secretary or denied by a court of appeals. This would give an employer a purpose in litigating, preserve due process because an employer victory would be a meaningful one, and simultaneously assure employee safety. The reimbursements could be funded, at least partially, out of the penalties collected.\(^6\) To mitigate the financial burden upon the employer of having to abate beforehand, a program of short

\(^6\) See note 4 supra.
term loans could be added to the current funds and guarantees available from the Small Business Administration.62

Reimbursements for abatement costs are similar to provisions for reimbursing successful litigants for their attorney's fees and costs.63 In certain statutes, Congress has provided for the recovery of attorney's fees and costs from the government if it loses a case.64 The difference with reimbursing abatement costs is that such reimbursement would do more than just make the employer whole. After having irreversibly abated by making some improvement, the employer would be paid for his costs and would keep whatever he had purchased. For example, if a sprinkler system were installed at a cost of $5000, and the employer were then paid that sum, he would have both $5000 and the fire prevention system.

Congress might try to limit such windfall recoveries by reimbursing an employer only for what he would not have otherwise spent—a "normal course of business" rule. Such a policy, however, would be difficult, if not impossible, to implement because an employer could almost always argue that he would have spent nothing at that time. As an alternative, some attempt could be made to create a "net benefit" rule to determine what an employer's true costs were. For example, the $5000 sprinkler system might reduce fire insurance costs. The decrease in premium charges could be capitalized and subtracted from the initial expenditure.

A "net benefit" or "normal course of business" rule would help determine that portion of the expenditure which was coerced. Care would have to be taken not to construe such rules so broadly as to eliminate the reimbursement entirely, for without reimbursement the employer has no substantial purpose in challenging the order to abate. Either of these rules would mitigate the costs to the government of a reimbursement program, but costs would also be minimized because of the likely hesitancy of the Secretary and the court of appeals to


64. See, e.g., 7 U.S.C. § 210(f) (1970) (actions for damages based on an order of the Secretary of Agriculture under the Stockyards Act). For proposals with respect to the Act that employers be reimbursed for attorney's fees and costs if they are successful in court, see, e.g., 1972 Oversight Hearings, supra note 1, at 73, 78 (Congressman Anderson); 1972 Oversight Hearings 88 (Congressman McClure referring to H.R. 15539, supra note 8).
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withdraw or deny a stay. The risk of loss to the government would be justified only when abatement seemed desirable and the employer's chances of success seemed slim.

Since federal funds would be used for the reimbursements, the Secretary's power to determine whether an employer proceeds with or without a stay should be expanded by Congress to include not only the administrative level, but also appeals at the judicial level. With reimbursement assured a victorious employer, the court of appeals would have no reason to question the Secretary's determination. Needless to say, the Secretary would be wary about withdrawing or denying a stay. Any payments by the government would act as a strong incentive to clarify the standards and procedures of the Act so as to avoid future potential reimbursements.

Conclusion

While the general enforcement procedures under the Act seem to satisfy due process, the possibility for its denial lurks in the procedures involved in obtaining a stay. As long as stays are never withdrawn by the Secretary and are always granted by the courts of appeals, the problem will not surface. However, forcing an employer to proceed without a stay and thereby coercing abatement makes good sense in some circumstances if employees are to be protected. In order to allow such pressure, without violating due process, Congress should amend the provisions of the Act concerning stays of the abatement period.

Either the definite availability of expedited proceedings in both the Commission and the court of appeals, or a program of reimbursing employers for their abatement costs, if forced to abate without a stay, seems to satisfy the demands both of safety and of due process. While the windfall benefits that would accrue to those employers who gain reimbursements are troublesome, the policing effect upon a branch of the federal bureaucracy might be worth the cost. Regardless of which of the two alternatives is implemented, their availability makes it certain that Congress cannot justify weakening the procedural safeguards of due process.

65. Cases where procedures or standards have been found defective include: Moser Lumber Co., 1 BNA Occ. Saf. & Health Cas. 3108 (hearing examiner 1973) (standard too vague) and Oberhelman-Ritter Foundry, 1 BNA Occ. Saf. & Health Cas. 3097 (hearing examiner 1973) (improperly promulgated standards).

66. Apprehension over reimbursements might thus result in a de facto program of automatic stays. However, pressure from employees and their unions should be sufficient to prevent the Secretary from thus abdicating his responsibility for employee safety.