



Recommendation 90-6

Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission

(Adopted December 17, 1990)

The Occupational Safety and Health Commission (OSHRC) is an independent agency charged with adjudicating contested citations and penalties brought against employers by the Occupational Safety and Health Administration of the Department of Labor (Labor). Labor is responsible for promulgating substantive safety and health standards, conducting workplace inspections and investigations, and prosecuting contested cases before administrative law judges (ALJs) at OSHRC. If an inspection discloses alleged violations, a citation describing the violation is issued along with a notice of proposed penalties. An employer who disagrees with a citation or proposed penalty can file, within 15 days of receipt, a simple notice of contest. Ordinarily, Department of Labor lawyers must respond to the notice of contest with a relatively detailed complaint, and employers must set forth allegations of facts which serve as the basis for affirmative defenses. The case is then handled through a litigation process that provides for discovery, motion practice, formal hearings governed by the Federal Rules of Evidence,¹ and written opinions.

OSHRC also offers parties another path, that of "simplified proceedings" which modify significantly the litigation process.² There are no pleadings; pre-hearing discovery and motion practice are expressly discouraged; and interlocutory appeals of an ALJ's ruling are not permitted. In lieu of pre-hearing discovery, the parties are required to engage in discussions with a goal of addressing settlement, narrowing issues in dispute, and developing an agreed statement of issues and facts. These unstructured discussions are supposed to occur within a reasonable time before a "conference/hearing," a hybrid procedure divided into two phases—a conference that can often operate as a dispute resolution tool and then an informal hearing that normally takes place on the same day. Under current OSHRC rules, any other party may request a simplified proceeding (subject to certain subject-matter limits) within 10 days after a

¹ 29 CFR 2200.71 (1989).

² 29 CFR 2200.202-.211 (1989). In addition, OSHRC's regulations provide for use of settlement judge procedures, 29 CFR 2200.101 et seq. A recent study for the Conference also examined OSHRC's use of this technique and concluded that OSHRC's procedures in this regard were consistent with Conference Recommendation 88-5, *Agency Use of Settlement Judges*, 1 CFR 305.88-5 (1990). Nothing contained herein is intended to detract from that recommendation.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

notice of docketing is received, and any other party may veto use of the device. The vast majority of requests for simplified proceedings come from *pro se* respondents, with the Department of Labor historically vetoing most of these requests. Evidence suggests where the simplified proceedings are agreed to—5% or less of OSHRC's national caseload—settlements are common.

While the basic concept of simplified proceedings is hardly controversial, putting it into practice has been. Several commentators have expressed concerns about the "underutilization" of these proceedings, and called for vesting in respondents or ALJs final authority for deciding whether to use them. Others caution that agreeing to use simplified proceedings could involve surrender of meaningful procedural rights at a point early in the case when one or more parties may be unaware of all the issues or evidence likely to be implicated. Some maintain that simplified proceedings are redundant since, in practice, they are not so different from the procedures that knowledgeable parties before OSHRC sometimes workout informally.

The Conference does not now take a position on these issues, or on the effectiveness of current OSHRC procedures.³ Major shifts in the structure of OSHRC simplified proceedings would themselves give rise to new uncertainties and difficulties of implementation. They should be undertaken only after careful analysis of the procedural, legal, policy, and practical implications. In the meantime, the Conference urges the Department of Labor and OSHRC to take steps to expand the use and effectiveness of simplified proceedings, especially those involving *pro se* respondents, as stated in the following recommendation.

Recommendation

1. The Occupational Safety and Health Administration (OSHRC) and the Department of Labor should develop rule or policies tailored to handling cases involving *pro se* parties of limited means in simple cases involving few alleged violations and low penalties. The Department of Labor should experiment selectively with the OSHRC has characterized as "simplified proceedings" in order to gain a broader base of experience and to obtain a clearer picture of the kinds of cases suitable for those proceedings. Department of Labor attorneys should adopt

³ The aforementioned study focused only on operation of settlement judge and simplified proceedings in certain cases before OSHRC. Further study may be useful to explore the operation of OSHRC's current adjudication procedures, including relevant structural and policy issues.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

a policy of promptly initiating discussions with *pro se* parties in an effort to narrow issues or resolve disputed matters. The Department should develop a set of criteria to assist its attorneys in deciding whether to request, or agree to requests seeking, use of simplified proceedings. OSHRC and the Department should also develop simplified paperwork, special *pro se* form answers and other documents, and other procedures to inform *pro se* parties more fully and thus enhance use of simplified proceedings.

2. OSHRC should modify its simplified proceedings to encourage parties to make greater use of them. For example, OSHRC should facilitate exchanges of information via short-form or oral pleadings and limited discovery in some cases. OSHRC should also take steps to ensure that its administrative law judges (ALJs) regularly enforce its rule⁴ requiring parties in simplified proceedings to discuss simplification and settlement.

3. OSHRC should continue the simplification of its procedures after study of the relevant issues and consultation with representatives of all affected interests, including the Department of Labor, employer associations, relevant bar committees, and unions. The objective should be greater use of the pre-hearing conference through involvement of the presiding judge in the case. Pre-hearing conferences could result in settlement of all matters in controversy or identification of those issues still requiring a hearing. If a hearing is found necessary, it should follow immediately and should be held before the ALJ who has identified in issues in controversy.

Citations:

55 FR 53271 (December 28, 1990)

___ FR ____ (2011)

1990 ACUS 27

⁴ 29 CFR 2200.206 (1989).