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STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:

NEW YORK STATE THRUWAY AUTHORITY/
NEW YORK STATE CANAL CORPORATION,

Petitioner,

To Review Under Section 101 of the Labor Law:
A Notice of Violation and Order to Comply under
Article 2 of the Labor Law, dated February 9, 2007,

- against -

THE COMMISSIONER OF LABOR,

Respondent,

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL
1000, AFSCME, AFL-CIO,

Intervenor.

DOCKET NO. PES 07-004

INTERIM
RESOLUTION OF DECISION

WHEREAS:

On June 16, 2008,[1] Petitioner New York State Thruway Authority/New York State Canal Corporation (together, Canal Corporation or Petitioner) filed a motion to set aside a Notice of Violation and Order to Comply (Notice and Order) that the Commissioner of Labor (Commissioner), through the Department of Labor's Public Employee Safety and Health Bureau (PESH), issued against the Canal Corporation. In the alternative, the motion asks the Board to dismiss the Notice and Order unless within 30 days of the Board's decision the Commissioner complies with certain previously demanded discovery. The Commissioner opposes the motion. The Board denies the motion to set aside the Notice and Order; declines to rule at this time on the adequacy of notice given to Petitioner; and grants, in part, that branch of the motion seeking compliance with previously demanded discovery.

[1] Unless otherwise noted, all dates are in 2008.

STATEMENT OF THE CASE[2]

1987 and 1990 Variances and Amended Decision P-002-99.

Safety and Health Standard 29 CFR 1910.23(c)(3), providing employees with protection from falls, requires that "[r]egardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board." In 1987, the Department of Labor (DOL) issued a permanent variance from Standard 29 CFR 1910.23(c)(3) to the New York State Department of Transportation (DOT) for the dam at Erie Canal Lock 14. In 1990, a second permanent variance of the same kind was granted for Locks 10 through 15. The canal system includes eight dams along the Mohawk River; however, similar variances were not sought for Locks 8 and 9 apparently because they were within a different DOT region. In or about November 1992, operation and management of the canal system was transferred from DOT to the Petitioner, which subsequently petitioned DOL for a single permanent variance covering all the Mohawk River dams (Locks 8 through 15), identical to the variances on the Standard that had previously been issued.

After a hearing, DOL granted the Canal Corporation's petition by Amended Decision P-002-99, which was filed in the Office of the Commissioner on December 17, 2001 "with all of the conditions as set forth by the Department of Labor and as set forth by the facts herein."

Under a section entitled "Finding of Fact," Amended Decision P-002-99 finds that "the Canal Corporation has complied with all of the conditions for all of the dams which variances have been issued including the ones not originally included in the variances which were issued" and observes that the testimony of employees, supervisors, and union representatives uniformly reflects the opinion

> "that the installation of a railing would present additional safety issues for [employees] and would impede their ability to get the work done safely. The proposed railing would be an obstacle to employees who must access areas beyond the railing and impede pole use by getting them stuck between railings or lodged against them. Maneuvering around and over rails could and probably would create additional hazards."

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[2] The facts recited are based on the contents of the Board's file in this matter and the undisputed facts in the parties' pleadings, including Amended Decision P-002-99 in which the Department of Labor granted the Canal Corporation's petition for a permanent variance. The Amended Decision is annexed to the Canal Corporation's petition for review as Exhibit B, and the Commissioner's answer admits that Exhibit B of the petition is Amended Decision P-002-99. The answer similarly admits the paragraph of the petition annexing the Notice of Violation and Order to Comply. It should be noted that the answer denies the paragraph of the petition that annexes PESH Investigation Narrative; however, we take that denial to be with respect to the petition's description of the Narrative rather than a denial that the annexed document is the Narrative.

Fatality and PESH Investigation Narrative.

On December 7, 2006, an employee of the Canal Corporation drowned after falling into the Erie Canal at Lock 9. On December 8, 2006, PESH Safety and Health Inspector Sherri Raponi inspected Lock 9 (Inspection Number 309396893); her investigation was limited to the fatality. On February 8, 2007, she issued an Investigation Narrative (Narrative) which describes her investigation and states her findings.

According to the Narrative, at a December 8, 2006 conference opening the investigation, a member of the Canal Corporation's staff gave Raponi a copy of a Canal Corporation "staff directive which was prepared to comply with a variance that was issued [by DOL] for required work at the Lock." Also according to the Narrative,

> "[t]he variance permitted [Petitioner] to perform work without installed railings on the upstream side of the catwalks (lower) on the dams without tying off employees during work activities on the catwalk (lower) provided that the following conditions identified within the variance approval were met:
>
> > 'All employees traversing the lower walkway across the dam shall wear a Coast Guard approved floatation [sic] device properly fitted for size and buoyancy;
> >
> > 'Work parties or activities on the lower walkway shall consist of two employees acting in a mutual work/lookout capacity;
> >
> > 'Any and all employees who will work on the lower walkway, whether full time or on an "as needed" basis shall receive appropriate documented training prescribed in a manner by the Petitioner insuring that the employees are qualified to perform the work and are thoroughly knowledgeable of the potential hazards.'
> >
> > "A barge mounted crane shall be used in clearing large debris masses.
> >
> > "Life rings and emergency numbers are maintained at the dam site for emergency use."

The Narrative reports that at a January 5, 2007 closing conference with representatives of the Canal Corporation, PESH, the Thruway Authority, and employees' collective bargaining representative, Raponi "explained" that the Canal Corporation would be cited for violations of 29 CFR 1910.23(c)(3), 29 CFR 1910.23(e)(1), 29 CFR 1910.23(e)(3)(iv), and 29 CFR 1910.132(d)(1).

The Narrative restates three conditions of the variance that Raponi finds that the Petitioner should have adhered to: employees crossing the dam on the lower catwalk "shall wear a Coast Guard approved floatation [sic] device, properly fitted for size and buoyancy"; work on the catwalk should involve "at least two employees, acting in a mutual work/lookout capacity. (The crew of two or more must be close enough to communicate.)"; and all employees who work on the lower walkway are required to receive "appropriate, documented training" that insures

that they are "qualified to perform the work and are thoroughly knowledgeable of the potential hazards. (Initial training and review to be held annually.)"

The Narrative sets out the respects in which the Raponi finds that the Petitioner failed to meet the conditions of the variance:

> "The floatation [sic] devices provided to the employees who work on the lower walkways (Type III) were not adequate for the conditions which are typically found at the locks. Type III floatation [sic] devices are shown to be effective in calm, inland water and in places where there is a good chance of a quick rescue. Therefore, the Coast Guard approved floatation [sic] devices that were provided to the employees were not fitted for buoyancy.
>
> "On December 7th, 2006, there were only two employees working on the lower walkway at Lock 9. According to witnesses, the two employees were at opposite sides of the lock. This is not considered a 'mutual work/lookout capacity'. The employees were not provided with radios or cell phones and therefore could not communicate effectively.
>
> "The last documented training for employees who perform work on the lower walkways was conducted on February 16, 2001. This information was provided by the employer."

The Narrative notes that "[t]wo of the five conditions for the variance were met. A barge mounted crane was available for clearing large debris masses and life rings and emergency numbers were maintained." However, it concludes that "[i]n light of the fact that [the Canal Corporation], knew that the hazard of falling off of the catwalk existed (by applying for a variance) and that they [sic] knowingly did not adhere to the conditions of the variance . . . . , the violations will be classified as 'willful'."

February 9, 2007 Notice of Violation and Order to Comply.

On February 9, 2007, the Commissioner issued a Notice of Violation and Order to Comply (Notice and Order) against the Canal Corporation based on Inspection Number 309396893. The Notice and Order finds that the Canal Corporation failed to comply with the terms of variance P-002-99 at Locks 8 through 15. Recited in bold lettering before each of the four violations found is the statement: **"These violations are issued for failure to comply with the terms of variance P-002-99."**

The Notice and Order finds that each of the violations cited was willful, sets November 5, 2007 as the date by which three of the violations must be abated and March 8, 2007 as the deadline for abating the fourth, and recites each violation as follows:

> "Citation 1 Item 1
> 29 CFR 1910.23(c)(3): Standard railing(s) and toeboard(s) on opensided floor(s), walkway(s), platform(s), or runway(s), adjacent to or above dangerous equipment:
>
> "(a) NYS Canal Corporation-The exposed edge (upstream side) of the lower catwalk on Locks #8 through #15 were not guarded by a standard railing.

"*Note: A standard railing shall consist of top rail, intermediate rail, and posts, and shall have a vertical height of 42 inches nominal from the upper surface of the top rail to the floor, platform, runway, stair, or ramp level. The intermediate rail shall be approximately halfway between the top rail and the floor, platform, runway, stair or ramp."

"Citation 1 Item 2
29 CFR 1910, [sic] 23(e)(1): A standard stair or platform railing shall consist of top rail, intermediate rail, and posts, and shall have a vertical height of 42 inches nominal from upper surface of top rail to floor, platform, runway, or ramp level. The top rail shall be smooth-surfaced throughout the length of the railing. The intermediate rail shall be approximately halfway between the top rail and the floor, platform, runway, tread, or ramp.

"a) NYS Canal Corporation-The exposed edge (upstream side) of the lower catwalk on Locks #8 through #15 were not guarded by a standard railing.

"Citation 1 Item 3
29 CFR 1910.23(e)(3)(iv): Railings were not capable of withstanding a load of at least 200 pounds applied in any direction at any point on the top rail:

"(a) NYS Canal Corporation-The exposed edge (upstream side) of the lower catwalks at Locks #8 through #15 were not guarded with railings that were capable of withstanding a load of at least 200 pounds applied in any direction at any point on the top rails.

"Citation 1 Item 4
29 CFR 1910.132(d)(1): Employer did not perform a hazard assessment of the workplace to determine if hazards are or are likely to be present in the workplace, which would necessitate the use of Personal Protective Equipment:

"(a) NYS Canal Corporation-The hazard assessment was considered inadequate because the employer had not provided, nor required the use of, adequate personal floatation [sic] devices for employees engaged in lower catwalk operations at Locks #8 through #15."

Proceedings before the Board.

The petition.

On April 6, 2007, the Canal Corporation filed a petition with the Board, challenging the reasonableness and validity of the Notice and Order. In particular, the petition asserts that the Notice and Order fails to allege specific facts to support a conclusion that Petitioner did not comply with variance P-002-99 and challenges the abatement requirement that Petitioner construct standard railings, which requirement Petitioner objects is inconsistent with both its employees' safety, DOL's rationale for granting variance P-002-99 in the first instance, and which materially alters variance P-002-99 without affording Petitioner the requirements of notice and an opportunity to be heard before a variance may be revoked.

The petition also challenges the Notice and Order's findings that Standards 29 CFR 1910.23(e)(1), 29 CFR 1910.23(e)(3)(iv), and 29 CFR 1910.132(d)(1) were violated and were willful violations; the findings of multiple violations for the same alleged deficiency in asserted contravention of the PESH Field Manual and that Standard 29 CFR 1910.23(c)(3) was violated when variance P-002-99 assertedly controls; and the findings that Petitioner did not comply with conditions of variance P-002-99 and did not comply with conditions that Petitioner alleges that the Notice and Order added to the variance.

Intervention of Civil Service Employees Association.

On April 17, 2007, a copy of the petition was served on Counsel to DOL and sent to the collective bargaining representatives for Petitioner's employees. By interim decision dated May 23, 2007, the Board granted the application of collective bargaining representative Civil Service Employees Association (CSEA) to intervene in this proceeding for limited purposes at hearing.

The subpoenas.

Upon Petitioner's application and pursuant to the Board's Rules of Procedure and Practice (Rules) 65.20 (d), the Board issued two subpoenas on April 30, 2007. The first subpoena commanded DOL's PESH Bureau to produce on or before May 17, 2007, "a complete copy of the case file in the custody or control of [DOL/PESH] for Inspection number 309396893" for Petitioner's counsel. The subpoena specified the documents to be produced:

> "all documents reflecting PESH's decision to issue the Notice of Violation and Order to Comply . . . to the [Petitioner] on February 9, 2007, including: the autopsy of [the deceased employee]; inspection reports; narrative reports; safety manuals; books and reference manuals; expert opinions; field reports; witness interviews and statements; PESH forms; OSHA forms; correspondence or email exchanged by and between PESH officials and any third party, including [CSEA], with regard to the [Notice and Order]; or any other documents, internal memorandum, or emails created by PESH officials and/or [DOL] personnel, with regard to the [Notice and Order]."

The second Board-issued subpoena commanded DOL's PESH Bureau to produce on or before May 17, 2007, "a complete copy of the case file in the custody or control of [DOL/PESH] for Inspection number 309397164" for Petitioner's counsel. The documents that the subpoena specified be produced were, as relevant here, the same and/or similar as those with respect to the Notice and Order above except the second subpoena concerned the Failure to Abate Violation and Order to Comply (Notification) issued to the Petitioner on April 9, 2007.

The Answer.

On May 15, 2007, the Commissioner filed an answer to the petition. It generally denies the material allegations of the petition.

The answer affirmatively alleges that the 1987 variances for work performed at Lock 14 were from standards 29 CFR 1910.23(e)(1) and 29 CFR 1910.23(e)(3)(iv) in addition to Standard 29 CFR 1910.23(c)(3); that the 1990 variances for work performed at Locks 10, 11, 12, 13, and 15 were from Standards 29 CFR 1910.23(c)(10), 29 CFR 1910.23(e)(1), and 29 CFR

1910.23(e)(3)(10); and that the variances granted in both 1987 and 1990 were conditioned upon the following three conditions:

> "(1) all employees traversing the lower walkway across the dam shall wear a Coast Guard-approved flotation device properly fitted for size and buoyancy; 2) work parties or activities on the lower walkway shall consist of at least two employees acting in a mutual work/lookout capacity; 3) Any and all employees who will work on the lower walkway whether full time or on an 'as needed' basis, shall receive appropriate documented training prescribed in a manner by the Commissioner insuring that the employees are qualified to perform the work and be thoroughly knowledgeable of the potential hazards."

Continuing, the answer affirmatively alleges that when the Petitioner sought a variance from Standard 29 CFR 1910.23(c)(3) for work performed at Lock 9, the Petitioner "represented . . . that it would implement various alternative safety measures" and that these would include the three conditions that were assertedly imposed on the 1987 and 1990 variances for work performed at Locks 10 through 15.

The answer asserts that as a result of Amended Decision P-002-99, on or about December 11, 2001, Petitioner issued Canal Directive #2001-4, requiring employees to "observe numerous conditions when working on lower catwalks" and that the conditions include:

> "1) work parties or activities on the Lower Catwalk shall consist of at least two (2) employees acting in mutual/lookout capacity; 2) All employees performing work on the Lower Catwalk must, at a minimum, wear Personal Protective Equipment including but not limited to a Coast Guard approved flotation device that is properly fitted for size and buoyancy and is fully zipped, buttoned, snapped or otherwise connected; and 3) all employees working on the Lower Catwalk must receive appropriate documented training and that after initial training, employees shall participate in review of the terms and conditions of the variance, which review shall be held annually and whenever an employee is discovered to be not following proper procedures, and which review must be documented."

The answer states that as a result of the December 8, 2006 investigation of the fatality at Lock 9, the Commissioner made the following determinations with respect to Locks 8 through 15:

> "i. That the Petitioner had failed to provide a proper Coast Guard-approved flotation device properly fitted for size and buoyancy; more specifically, at the time of the fatal incident [the deceased] was wearing a Type III/V Industrial Life Preserver, which device is effective for use only in calm, inland water and in places where there is a good chance of quick rescue. Given the conditions at Lock #9, the Petitioner should have provided Type I flotation devices to employees. Accordingly, the Respondent determined that, given such conditions, the Petitioner had failed to provide a flotation device properly fitted for buoyancy;
>
> "ii. That [the deceased] had been working with only one other employee at the time of the fatal incident; [the deceased] and such other employee were, at the time of the incident, working at opposite sides of Lock #9 at a considerable

distance from each other. Accordingly, [the Commissioner] determined that these employees were not working in a mutual/lookout capacity;

"iii. That according to training records provided by the Petitioner, the last documented training for employees working on Lock #9 occurred on February 16, 2001, prior to the issuance of Amended Decision P-002-99. Accordingly, [the Commissioner] determined that these employees had not received appropriate documented training prescribed in a manner by the Commissioner insuring that the employees were qualified to perform the work and be thoroughly knowledgeable of the potential hazards."

Finally, the answer alleges that the Commissioner's "regular practice and procedure [is] that when an employer is not in compliance with the terms of a variance, the standard for which violations are written shall be the standard for which the variance is granted"; Labor Law § 27-a(5)(c) authorizes the Commissioner to inspect "areas of the premises in which there is reason to believe that a violation exists" as well as to inspect premises alleged to have violations; on these bases, the Commissioner issued the February 9, 2007 Notice and Order finding that the Canal Corporation failed to comply with the standards 29 CFR 1910.23(c)(3), 29 CFR 1910.23(e)(1), 29 CFR 1910.23(e)(3)(iv), and 29 CFR 1910.132(d)(1) for Locks 8 through 15.

The Reply, the Production of Documents, and Petitioner's Demand for a Bill of Particulars.

By letter dated May 16, 2007, the Canal Corporation requested an extension of time of ten days to reply to the answer to allow it time to first review the records that the Commissioner produced in response to the two Board subpoenas that the Canal Corporation served on May 2, 2007. Shortly thereafter, it made the same request with respect to service of a demand for a bill of particulars on the Commissioner. On consent of the Commissioner, the Board granted both requests.

After the Commissioner's counsel sent the Canal Corporation's counsel a letter, purportedly enclosing a full and complete copy of the relevant DOL file, Petitioner's counsel advised the Board that

"[u]pon inspection of the documents produced by [DOL], it is clear that the production is incomplete . . . I spoke with [Commissioner's counsel] who confirmed that it is likely some of the documents requested were not produced. [Commissioner's Counsel] has advised me that he is looking into the matter, and will contact me with additional information."

Based upon the asserted incomplete document production, the Board extended through July 3, 2007, Petitioner's time to reply and serve a demand for a bill of particulars. An email from the Commissioner's counsel to the Board confirmed that DOL's document production was incomplete and stated that "I cannot, at present, make specific representations as to the exact date on which the requested documents will be produced (as they must be located and copied by PESH)."

Having not received complete responses to its subpoenas by late June 2007, the Petitioner asked for an extension of time to August 2007, on consent of the Commissioner, to reply and demand a bill of particulars.

A July 11, 2007 letter from the Commissioner's counsel to Petitioner's counsel states that it encloses "a full and complete copy of the file kept concerning inspection number 309397164 (Notice of Failure to Abate) [and] that many of these documents bear number 309396893 as this was the original inspection which led to the Notice to Comply that the Petitioner failed to abate." Petitioner's counsel responded, requesting confirmation that DOL "conducted a diligent search for all responsive documents, including electronically stored documents and e-mail. . . . [and] that no documents have been withheld pursuant to a claimed privilege or applicable exemption."

On July 31, 2007, Petitioner filed a reply to the Commissioner's answer and a demand for a bill of particulars that was served on the Commissioner.

The Commissioner's Objection and Motion to Strike Six Items in Petitioner's Demand for a Bill of Particulars.

The Commissioner provided the particulars that Petitioner demanded with the exception of the following numbered demands[3] to which, on August 8, 2007, she objected and moved to strike pursuant to Board Rule 65.17(b):

> 10. "Set forth all documents, materials, OSHA guidelines, opinions, laws, rules, or regulations, that Respondent contends supports its determination that Canal Corporation's employees were not working in a 'mutual/lookout capacity' as alleged in paragraph 10(h)(ii) of the Answer.
>
> 12. "[Provide] reference to any documents, materials, OSHA guidelines, opinions, law, rules, or regulations that illustrate [the statement of what constitutes the exact training that the Commissioner prescribes.]
>
> 19. "Set forth all documents, materials, OSHA guidelines, opinions, laws, rules, or regulations that Respondent contends supports its determination that the Canal Corporation can be cited for failure to comply with Canal Directive #2001-4.
>
> 31. "Set forth all documents, materials, OSHA guidelines, opinions, laws, rules, or regulations, that Respondent contends supports its determination that the conditions of P-002-99 required a Type I flotation device for Canal Corporation employees.
>
> 32. "Set forth all documents, materials, OSHA guidelines, opinions, laws, rules, or regulations, that Respondent contends supports its determination that 'a Type III/IV Industrial Life Preserver' is effective for use only in calm water.
>
> 33. "Set forth all documents, materials, OSHA guidelines, opinions, laws, rules, or regulations, that Respondent contends supports its determination that 'a Type

[3] There were 38 items in Petitioner's Bill of Particulars.

III/IV Industrial Life Preserver' is not effective for use in places where there is a good chance of fast rescue."

The grounds for the motion to strike were that the information demanded is not the proper subject of a bill of particulars, Petitioner has already been provided with "the full contents of the Respondent's investigatory file. . . . [and] is currently in possession of all facts known to the Respondent as of this date"; the documents and materials were already provided and are otherwise available to Petitioner; the demands do not seek amplification of the pleadings or limitation of issues or factual information; and the demands "seek to know the theory of law and legal arguments upon which the Respondent will rely to prove her case at hearing."

Petitioner opposed the motion, representing that the Commissioner's counsel advised that "certain" documents from the investigatory file had not been produced and for the additional reason that "a privilege log to justify withholding documents on privilege grounds" had not been provided. Petitioner requested that the Commissioner be precluded from offering evidence or relying on authority not previously provided.

Pre-hearing and Case Management Conferences; the Commissioner's Bill of Particulars and Response to Subpoenas.

On January 17, the Board conducted a pre-hearing telephone conference in which all of the parties participated. As relevant here and confirmed by letter of January 22, the parties agreed that a ruling on the Commissioner's motion to strike would be put off until a second telephone conference on March 3; the Commissioner's attorney would provide Petitioner with a privilege log of documents within DOL's investigatory file that were withheld; the Commissioner would withdraw from the Notice and Order redundant violations – that is, where more than one violation was issued for a single hazardous condition; and a hearing on the appeal would be scheduled for April 29 and May 6-7.

As confirmed by letter dated March 5, during the March 3 telephone conference the Commissioner's objections to six items of Petitioner's demand for a bill of particulars and her motion to strike were denied in full. Once again, the Commissioner's attorney agreed to amend the Notice and Order by eliminating multiple violations for each hazard, to respond to the six items of Petitioner's demand for a bill of particulars that were the subject of the motion to strike, and to produce a description of the internal communications that were not included when the contents of DOL's file was earlier produced; all were promised by March 25.

By letter to the Board dated April 7, the Commissioner's attorney states that he anticipates responding to the outstanding items in the bill of particulars "by the close of business on . . . April 9, 2008." An April 9 letter from Petitioner's attorney to the Commissioner's attorney states his concern that DOL has continually failed "to adequately comply with the Board issued subpoenas and the Canal Corporation's numerous FOIL requests." The letter stresses that the subpoenaed documents include email and electronically stored documents and confirms that DOL's attorney stated that no search for email or electronically stored documents had been performed.

Enclosed with Petitioner's April 9 letter was a copy of an April 23, 2007 FOIL request to DOL on behalf of Petitioner concerning, in part, both DOL's Inspection number 309397162 and a Notification of Failure to Abate Violation and Order to Comply issued on April 9, 2007 against

Petitioner. Also enclosed were copies of email exchanges on April 1, 2 and 3 between him and Commissioner's counsel concerning DOL's failures to produce the privilege log, conduct an email and electronically stored document search pursuant to subpoenas, produce the records resulting from such a search, and serve responses to six items in Petitioner's demand for a bill of particulars.

In the enclosed April 3 email message, Commissioner's counsel promises to answer the outstanding bill of particulars by the close of business the next day, but states that Petitioner's "email requests . . . may be outside the scope authorized by the IBA, as well as being overbroad. In fact, it may not even be possible for us to technically comply with your email discovery request." In response, Petitioner's counsel confirms his understanding that DOL has not conducted a search of its electronically stored records, makes suggestions and attempts to cooperate with DOL on the electronic search, and points out that the Commissioner's time to object to the subpoenas is long passed.

On April 14, the Commissioner filed the following responses to the previously unanswered items of Petitioner's demand for a bill of particulars.[4]

> "10. The turbulent water adjacent to where the Petitioner's employees were working creates an extreme hazard (risk of sever injury or death), which hazard requires that employees who are engaged in clearing debris from the subject locks should work in pairs so they can monitor each others whereabouts as well as the work environment, thereby working in a 'mutual/lookout capacity' PESH uses the "buddy system' standard (copy of 'buddy system" definition attached hereto).
>
> "12. The Petitioner's Staff Directive and the variance itself require annual training. The written "Report and Recommendation" dated August 27, 1987 recites the testimony of the Petitioner's safety officer . . . that appropriate employee training, prior to working on the dams, would be a documented prerequisite to working on the walkway.
>
> "19. The Petitioner failed to comply with paragraph number two of the Canal Directive, which requires 'appropriate documented training'. Relative to the issues of training, the Petitioner is in violation of 29 CFR 1910.132(f), Subsections 1 and 4.
>
> "31. The Petitioner's hazard assessment should have been sufficiently comprehensive to determine proper equipment for all levels of hazard adjacent to locks, but the Petitioner merely noted and reacted to the phrase 'inland waters' as found in the Coast Guard's definition for Type III flotation devices; P-0002-99. [sic] The Petitioner is in violation of 29 CFR 1910.132(c) and (d) Subsections 1(i) and 2.
>
> "32. The Petitioner's own documents from the United States Coast Guard indicate the specific capabilities of the various technical levels for each type of floatation [sic] device. In an April 4, 2004 interpretation letter from OSHA on the issue of requirements to use U.S. Coast Guard-approved life jackets for workers

[4] The bill of particulars is dated October 10, 2007 in apparent error.

> performing construction work over or near water, OSHA states 'Note, though, we are addressing only the OSHA requirement – specific types of vests have to be provided in certain situations in order to comply with applicable Coast Guard requirements.' (Copy of letter attached)
>
> "33. It is the Respondent's contention that the 'good chance of fast rescue' is not a controlling factor relative to proper review of any Coast Guard approved floatation [sic] device. The Respondent notes that, even if fast rescue were a factor, at the time of the subject accident the Petitioner was in violation of 29 CFR 1926.106 subsection (d), which requires '**At least one lifesaving skiff** shall be immediately available at locations where employees are working over or adjacent to water' (Emphasis in actual text). No such skiff was present on the day of the subject accident."

At an in-person conference with Board staff on April 14, the Petitioner objected to these items of the Commissioner's bill of particulars, especially the citations to violations of Standards beyond those in the variance. Also at the conference, the parties agreed that by April 23 the Commissioner would produce any non-privileged documents that were not previously provided.

In an April 16 letter to Commissioner's counsel, Petitioner asserts that the Commissioner's bill of particulars is "unacceptable." The letter states that the only Standard relevant to the appeal is 29 CFR 1910.23(c)(3) because it is the only Standard from which variance P-002-99 was granted and asks that the bill of particulars be withdrawn and resubmitted without any references to Standards other than 29 CFR 1910.23(c)(3) and without reference to terms and conditions that are not required by variance P-002-99. On the latter basis, the letter asks the Commissioner to resubmit particulars 10, which refers to "mutual/lookout capacity," and 12, which refers to "annual training."

The April 16 letter also protests that the Commissioner's answer to demand 19 does not provide any authority for her to substitute Canal Directive #3001-4 for the terms of the variance and is therefore non-responsive. Petitioner requests that either the Commissioner respond to the demand or state that she does not have such authority. Similarly, the letter asserts that the Commissioner's responses to demands 31-33 are non-responsive "because they provide no authority to support [DOL's] contention that a Type I flotation device was required." Petitioner requests that the Commissioner disclose those Coast Guard standards that she relies on, if any, and observes that the Commissioner's finding that the deceased employee

> "was not properly fitted for buoyancy needs to be explained and supported by citation to some identifiable standard that the Canal Corporation was expected to follow. Merely stating that a Type I vest provides more buoyancy than a Type III is not enough. [She should] explain . . . why, under the circumstances, a Type I was the only reasonable choice. . . ."

The letter further requests that if reference to "mutual/lookout capacity" is not removed from the bill of particulars, that the Commissioner provide a bill that is internally consistent in explaining that phrase. The letter notes that at 8 of her bill of particulars, she defines working in "mutual/lookout capacity" as workers close enough to communicate, while at 10 of the bill she defines "mutual/lookout capacity" as "the buddy system" and relies on a Wikipedia definition of "buddy system" as people operating "as a single unit." Further, Petitioner objects to any

reference to the "buddy system" unless the Commissioner establishes that she, through PESH, formally adopted such system and communicated the requirement to the Canal Corporation before the date of the fatality.

Petitioner's letter also notes that the Commissioner "did not seek to revoke or modify" the subpoenas that the Board issued and therefore waived all objections as to their scope, but that even if she had made a timely objection, her "current position, that [she] has no duty to search [the] computer system for electronic documents or email, is not supportable and cites judicial authority. Petitioner offers to work with the Commissioner on the electronic search in finding the most cost-effective and reasonable approach to producing the data and suggests a "sampling system" for conducting the search as "least costly and time consuming" and a format that would be acceptable to Petitioner and easy for DOL. Petitioner's counsel concludes the letter by asking to be advised of the "steps [DOL] is willing to take to ensure a diligent search for electronically stored documents has been made."

There followed further correspondence from Petitioner's counsel to both the Board and Commissioner's counsel summarizing the Commissioner's unmet obligations and unmet deadlines. On May 28, the Commissioner's counsel wrote the Board what he described as "a courtesy update as to the status of discovery" and to request a telephone conference to set a hearing date. He stated that a search of email communications of five DOL staff members had been "initiated" and that such emails, if any are found, should be forwarded to the Petitioner by the end of June 3. The letter states that DOL "is not disregarding any discovery requests, but is attempting to be both comprehensive and accurate." The letter then objects to the discovery demands at-issue on some of the same bases that the Board rejected in denying the Commissioner's motion to strike over a year earlier. The letter concludes that DOL would, nonetheless, respond to Petitioner's April 16 letter on or before June 6 and that a privilege log would be produced after the Commissioner completes her responses to the discovery requests.

By letter dated May 29, Petitioner's counsel wrote the Board "correcting" the characterization of the history of discovery as set out in Commissioner's counsel's letter of May 28 and reciting some of the history relevant to the subpoenas: when Petitioner questioned the completeness of the responses to its subpoenas and learned that no search for electronic documents was ever made, the Commissioner's attorney asserted that such a search was unnecessary, but that after further discussion an agreement was made to conduct the electronic search. Petitioner had then demanded that certain PESH employees (Sherri Raponi, Chris Jay, Norm Labbe, and Maureen Cox) search their electronically stored documents and email correspondence and retrieve all that relate to citations against the Petitioner and that "the entire [DOL] email database (from December 2006 to present) be searched for the terms: 'PES 07-004' '309396893' '309397164' 'Len' 'P-002-99' 'Erie Canal Locks' 'Lock 9' 'mutual lookout' 'Type I' 'mutual work/lookout' and 'tailgate training'." The May 29 letter notes that while the May 28 letter of Commissioner's counsel indicates that individual computers have been searched, the letter does not address the request for a search of DOL's database and reserves Petitioner's right to have such a search.

In closing, Petitioner's May 29 letter urges that it is premature to schedule a hearing until it receives complete responses to its subpoenas and bill of particular demands, and that "[t]his is regrettable because [Petitioner] is unfairly prejudiced by the repeated delays solely cause by [DOL's] conduct. Because of this significant prejudice, [Petitioner] intends to seek dismissal of the citations based upon due process grounds."

After the instant motion was filed on June 16, by letter dated July 25 the Commissioner's attorney states that "[a] diligent search was performed . . . for any emails containing the terms" that Petitioner suggested. The letter reports that 53 relevant messages were found, but that the Commissioner invokes a "deliberative process privilege," exempting all of these from disclosure "since they were all related to specific decisions facing the Respondent." No further information is provided to establish the deliberative process privilege. Also asserted is that the attorney-client privilege protects 14 of the 53 email documents from disclosure and that 4 of the 14 documents are further shielded from disclosure because they were "created in anticipation of litigation." Enclosed with the July 25 letter is a list of the names of those who sent, received, or forwarded the 14 email documents and the documents' dates; apart from identifying those persons who are attorneys, the list provides no further information.

The Instant Motion.

Observing that the Commissioner has neither met any of the imposed and/or agreed-upon deadlines for discovery nor requested an extension of time for meeting them, on June 16, 2008, Petitioner filed a motion asking the Board to issue an Order:

> "(a) granting the relief demanded in the Petition, setting aside the [Notice and Order] in its entirety;
>
> "(b) in the alternative, granting the Canal Corporation a conditional Order of dismissal, unless the Commissioner provides the following within 30 days:
>
> > "(i) an amended bill of particulars limited solely to conditions incorporated in variance P-002-99, or authorities that explain its interpretation of the actual conditions of the variance;
> >
> > "(ii) a complete production responsive to the IBA issued subpoenas, including, a diligent search for and production of all electronic documents and emails;
>
> "(c) and for such other and further relief as the [Board] determines just and proper."

Petitioner urges that it has "consistently taken the position that the terms of the variance were met, and if the Commissioner is not satisfied that the terms of the variance are adequate to protect Canal Corporation employees, it [sic] should move to modify the conditions of the variance, not cite the Canal Corporation for non-existent terms of the variance." It argues that the due process requirements of the Fifth and Fourteenth Amendments to the U.S. Constitution and the State Administrative Procedure Act (SAPA) § 301(1) and (2) require that the Commissioner provide Petitioner with adequate notice of the violations alleged and a meaningful opportunity to be heard within a reasonable time and that the assertedly constantly changing theories of liability in conjunction with delay have resulted in substantial prejudice that can be cured only by setting aside the Notice and Order.

The Board set July 16 as the deadline for the Commissioner to file a response to Petitioner's motion and denied a request of Commissioner's counsel for an extension of time to

July 28 in the absence of Petitioner's consent. By letter dated July 23, Petitioner gave its consent. The Commissioner opposes the motion and requests that a hearing date be set at the Board's "earliest possible convenience." Petitioner filed a detailed reply on August 4.

DISCUSSION

Petitioner Was Not Denied the Opportunity for a Hearing within a Reasonable Time.

In support of its argument that it has not received reasonable opportunity to be heard, Petitioner relies on SAPA § 301(1), which provides that "[i]n an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time" and on this basis, urges dismissal of the Notice and Order. In *Matter of Walia v Axelrod,* 103 AD 2d 1007, 1008 (4th Dept 1984), the Appellate Division unanimously reversed Supreme Court Erie County and, quoting from the Court of Appeals' decision in *Matter of Sarkisian Bros. v State Div. of Human Rights*, 48 NY2d 816, 818 (1979), said that "the mere passage of time normally will not constitute substantial prejudice in the absence of some showing of actual injury;" a party urging violation of SAPA § 301(1) must also show "substantial prejudice resulting from delay." *See also Matter of Cortlandt Nursing Home v Axelrod,* 66 NY2d 169 (1985).

The Commissioner denies that there has been unreasonable delay, that Petitioner has been prejudiced by the time that has elapsed, and that the Commissioner is responsible for delay. Her papers state that she "has no control over the Board or the pace at which its hearings are conducted," and that delay is attributable to Petitioner's "frivolous demands" and "unwarranted submission of documents" such as in the instant motion; indeed the papers assert that Petitioner's "attempts to delay the proceedings and/or harass [DOL] may be colorable as frivolous conduct."

The prejudice that Petitioner alleges involves, in the main, the Commissioner's failure to respond adequately or at all and within a reasonable time frame to Petitioner's subpoenas, demand for a bill of particulars, and demand for clarification of the bases for violations found against it, thereby prejudicing Petitioner's ability to formulate, develop and establish its case at hearing.[5] While the Board finds that the Commissioner has unreasonably delayed in her responses and that some responses are not adequate (*see* discussion below), we note that Petitioner has, at least on one occasion, consented to an extension of time for Commissioner's responses and that Petitioner might have brought the instant motion earlier than June 16. Most importantly, however, is that the failures and inadequacies that Petitioner asserts as the bases for the prejudice that it suffers are correctable. That is, the prejudice is not permanent and is addressed by the Board's decision here, ordering the Commissioner to comply with her obligations so that the Petitioner has the information and evidence it requires in order to prepare for hearing.

Finally, the important public policy concerns of protecting the health and safety of public employees that are implicated in this proceeding must be weighed against the prejudice that Petitioner alleges. We find that the public policy at issue trumps the temporary prejudice that Petitioner has experienced and requires that this case be further processed. In short, we find that Petitioner has not, on the record before us, established the "substantial prejudice" necessary to

[5] Petitioner alleges that it is also prejudiced by the accrual of a $185 daily fine. To date, there is no evidence of a fine in the record before the Board.

show that it has been denied the opportunity for a hearing within a reasonable time. Accordingly, we decline to grant the branch of the motion to set aside the February 9, 2007 Notice and Order.

Adequacy of Notice to Petitioner.

The Canal Corporation's complaint that the Commissioner has failed to provide adequate notice is based on: (1) the inconsistency that the Notice and Order simultaneously finds violations of Standards that are assertedly not addressed in variance P-002-99 and states that "these violations are issued for failure to comply with the terms of variance P-002-99"; (2) the Commissioner's bill of particulars asserting that Petitioner violated Standards that are either not cited in variance P-002-99, or are not cited in both variance P-002-99 and the Notice and Order; and (3) the asserted failures of the Commissioner to adequately respond to items 10, 12, 19, 31, 32, and 33 of Petitioner's demand for a bill of particulars, to search and/or produce relevant electronically stored documents and emails, and to produce an adequate privilege log. The Petitioner seeks an "explanation" of the Standards it is found to have violated and authority for being found in violation of Standards that variance P-002-99 does not address.

We expressly decline to rule at this time on Petitioner's contention that it can be found to have violated variance P-002-99 only if it is found to violate either the express terms of the variance or the assertedly sole Standard for which the variance was granted, that is Standard 29 CFR 1910.23(c)(3). Put another way, we do not now address Petitioner's argument that it cannot be found in violation of variance P-002-99 for not abiding by Standards (e.g., Standard 29 CFR 1910.132[d][1]) that the variance assertedly does not address or for not abiding by conditions (e.g., employees to use a Type I personal flotation device; adequate hazard assessment to be performed[6]; annual training to be performed; employees to work in a "mutual work/lookout capacity") that the variance does not expressly impose. Petitioner may later renew its objection to violations on these bases without prejudice.

We address the contentions of Petitioner and the Commissioner concerning redundancy of violations cited in the Notice and Order and the adequacy of the Commissioner's bill of particulars, document production, and invocation of privileges apart from our discussion regarding the adequacy of notice to Petitioner.

The Notice and Order Cites Multiple Violations for the Same Hazardous Condition

The Commissioner admits the allegation at ¶ 19 of the petition that "[m]ultiple violations for the same alleged deficiency, i.e. the failure to comply with the variance, is . . . improper because the field manual provides that 'under no circumstances should two standards be cited for the same exact hazard or deficiency.' Field Manual, Chapter IV, A.1.a.(5)." Based on this admission, at the January pre-hearing conference in this matter, the Commissioner's counsel advised that the citations to violations of two of the Standards in the Notice and Order would be

[6] Petitioner objects to being cited for a violation of Standard 29 CFR 1910.132(d)(1), which pertains to a hazard assessment, and for a failure to comply with an alleged condition of the variance to perform a hazard assessment because of inadequate notice, but also because the variance itself states that "[a] hazard assessment has been performed. It will be used in training." Petitioner urges that under the circumstances it is unfair for DOL to cite Petitioner "for a hazard assessment that it previously authorized for use in training."

withdrawn, which statement the Board confirmed in a letter to the parties. In her papers in opposition to this motion, the Commissioner does not dispute the Petitioner's counsel's affirmation that Citation 1 Item 2 and Citation 1 Item 3 of the Notice and Order were the citations to be withdrawn. Indeed, these Items cite two different Standards for the same deficiency cited in Citation 1 Item 1. (*See* Notice and Order at 4-5, *supra.*) Accordingly, Citation 1 Item 2 and Citation 1 Item 3 should be stricken from the Notice and Order.

The Commissioner's Responses to Items 10, 12, 19, 31, 32, and 33 of Petitioner's Demand for a Bill of Particulars Are Inadequate.

The Commissioner asserts that she has replied to "every single demand" in Petitioner's demand for a bill of particulars "with particularity and in good faith" and urges that "[a]ny issues or contentions not set forth . . . may be objected to if raised at hearing or through post-hearing submission." Petitioner argues that the Commissioner failed to adequately or appropriately respond to items 10, 12, 19, 31, 32, and 33 of Petitioner's demand for particulars. We agree. The purpose of a bill of particulars is to help prepare for and to prevent surprise at hearing. *Neissel v Rensselaer Polytechnic Institute*, 30 Ad3d 881 (3d Dept 2006).

Item 8 of Petitioner's demand for a bill of particulars requests a statement of what constitutes work in "mutual/lookout capacity," which in her answer to the petition, the Commissioner alleges that Petitioner failed to require of its employees. It is undisputed that in early August 2007, the Commissioner's response to item 8 was that work in "mutual/lookout capacity meant that employees work close enough to communicate with each other. Item 10 of Petitioner's demand[7] requests the documents, materials and/or authority that Commissioner relies on to find that Petitioner's employees were not working in "mutual/lookout capacity." The Commissioner's response in April 2008 to item 10 states in part that "[i]n enforcing "mutual/lookout capacity' PESH uses the 'buddy system' standard (copy of 'buddy system' definition attached hereto)." Attached to the bill is a Wikipedia excerpt defining "buddy system" as "a procedure in which two people, the buddies, operate together as a single unit so that they are able to monitor and help each other" and contemplates "close and frequent contact."

As the Commissioner's response to item 10 is inconsistent with her response to item 8 to the extent that it defines "mutual/lookout capacity" differently and more stringently than her previous answer, and as her response relies exclusively on the Wikipedia definition of "mutual/lookout capacity" and does not provide any other authority for finding that Petitioner's employees were not working in a "mutual/lookout capacity," we find that Commissioner's response to item 10 is not adequate. She should file a supplemental bill that responds to item 10 in a manner that is consistent with her response to item 8 and state with specificity the materials that she contends support her determination or, if appropriate, affirmatively state that she does not rely on any "documents, materials, OSHA guidelines, opinions, laws, rules, or regulations" in support of her determination.

Item 12 of Petitioner's demand requests "a detailed statement of what constitutes the exact training 'prescribed' by the Commissioner as referenced in" her answer to the petition and to refer "to any documents, materials, OSHA guidelines, opinions, law, rules, or regulations that

[7] Items 10, 12, 19, 31, 32, and 33 of Petitioner's demand for a bill of particulars are set out at 8-9, *supra*, and the Commissioner's responses are at 10-11, *supra*.

illustrate such 'prescribed' training." The Commissioner initially responded to the first part of item 12's demand, but objected to the part of the demand for documents and authority that illustrate the training that she prescribes. After the Board overruled her objection, she provided a response stating, in part, that "the variance itself require[s] annual training." Petitioner asks that the statement about the variance be stricken on the ground that nowhere in the variance is such a requirement stated. While we agree that a plain reading of the variance does not require "annual" training, we direct the Commissioner to file a supplemental bill that provides a clear and complete explanation for her contention that the variance requires annual training.

In response to item 19 of the demand for a bill of particulars, asking for a statement of all documents and authority that the Commissioner contends support her determination that Petitioner can be cited for failure to comply with Canal Directive #2001-4, the Commissioner states that "Petitioner failed to comply with paragraph number two of the Canal Directive, which requires 'appropriate documented training'." The Commissioner should file a supplemental bill that responds to item 19 and that states with specificity the materials that she contends support her determination or, if appropriate, affirmatively state that she does not rely on any "documents, materials, OSHA guidelines, opinions, laws, rules, or regulations" in support of her determination.

The Commissioner's response to item 31 is similarly inadequate. Asked to state the documents, materials, and authority that the Commissioner asserts support her determination that the conditions of variance P-002-99 required the Petitioner's employees to wear a Type I flotation device, her response states:

> "The Petitioner's hazard assessment should have been sufficiently comprehensive to determine all equipment for all levels of hazard adjacent to locks, but the Petitioner merely noted and reacted to the phase 'inland waters' as found in the Coast Guard's definition for Type III floatation devices; P-0002-99"

The Commissioner should file a supplemental bill that responds to item 31 and that states with specificity the materials that she contends support her determination or, if appropriate, affirmatively state that she does not rely on any "documents, materials, OSHA guidelines, opinions, laws, rules, or regulations" in support of her determination.

Items 32 and 33 of the Commissioner's bill are similarly unresponsive to Petitioner's demands that all documents and authority that support her contentions that a Type III/IV life vest is effective for use only in calm water and is not effective for use in places where there is a good chance for fast rescue be identified. She should file a supplemental bill identifying what she relies on to support her contention or stating that she does not rely on any documents, material or authority.

Commissioner's item 32 does cite and annex an April 4, 2004 OSHA interpretation letter on the issue of requirements for construction employees working over or near water to use US Coast Guard-approved life jackets; however that letter appears to be inconsistent with the Commissioner's assertion that a Type I life jacket was required here, or that a Type III vest was not in compliance with the variance. The April 4 OSHA letter provides:

> This is in response to your . . . letter to [OSHA] requesting clarification of the requirements under 29 CFR 1926.106(a) regarding the use of personal flotation devices. . . .
>
> We have paraphrased your question below:
>
> **Question:** Our employees are engaged in constructing bridges and highway overpasses from barges. When on the barges, they are less than 6 feet above the water. Is there a specific type of personal flotation device that we are required to provide the employees when performing this work?
>
> **Answer**
> Title 29 CFR 1926.106(a) requires that:
>
> Employees working over or near water, where the danger of drowning exists, shall be provided with U.S. Coast Guard-approved life jacket or buoyant work vests.
>
> In order to comply with § 1926.106(a), the employees must be provided a U.S. Coast Guard-approved personal flotation device (PFD). Section 1926.106(a) does not specify that any specific type or classification of approval is required. Therefore, irrespective of the type of approval (for example, whether the PFD is approved for commercial or recreational use, or as to a particular size boat or vessel, or whether the vessel or boat is inspected to not), as long as it has a Coast Guard approval, it will meet the § 1926.106(a) requirement.

A footnote following this quoted passage states:

> Note, though, we are addressing only the OSHA requirement – specific types of vests have to be provided in certain situations in order to comply with applicable Coast Guard requirements.

If the Commissioner relies on the footnote as saying that OSHA has adopted Coast Guard requirements for specific types of vests in certain situations that include the circumstances at issue here and that the Coast Guard requirements support her contentions here, then the Commissioner should state clearly that is what she means in a supplemental response to item 32 and should also cite the relevant Coast Guard requirements and the authority that shows that OSHA adopted them.

Items 19, 31, and 33 of the Commissioner's bill of particulars require additional consideration in that they assert that the Petitioner violated Standards 29 CFR 1910.132(c) and (d)(2), 29 CFR 1910.132(f)(1) and (4), and 29 CFR1926.106(d). There is no reference to any of these Standards in Amended Decision P-002-99, the PESH Inspector's Narrative, or the Notice and Order; they are only first asserted in a bill of particulars served well over a year after the Notice and Order issued; and they are raised in response to a demand initiated by the Petitioner.

To the extent that the Commissioner may be relying on the Standards referred to in items 19, 31, and 33 of her bill as authority for certain of her findings and/or contentions, her responses have not been stated in a way that makes clear that the Standards are noted only as authority for

her contentions. To the extent that the Commissioner may have referred to the Standards for other purposes, we cannot understand from reading her response what these other purposes are.

The very fact that we are unable to discern the purpose of alleging in items 19, 31 and 33 of the bill that the Petitioner violated Standards 29 CFR 1910.132(c) and (d)(2), 29 CFR 1910.132(f)(1) and (4), and 29 CFR1926.106(d) provides additional support for our finding that these items of the bill do not adequately respond to the Petitioner's demand. The Commissioner needs to restate her responses with clarity.

The Commissioner Has Not Fully Complied with the Subpoenas that the Board Issued and Has Failed to Establish Any Privilege Exempting Documents from Disclosure.

Electronically Stored Documents.

Petitioner's April 2007 subpoenas require the Commissioner to produce "all documents reflecting PESH's decision to issue" the February 9, 2007 Notice and Order and the April 9, 2007 Notification including email "exchanged by and between PESH officials and any third party, including [CSEA] . . . or any other . . . emails created by PESH officials and/or [DOL] personnel, with regard to" the Notice and Order and the Notification. The Commissioner did not raise any objection to the subpoenas when they were served, almost a year and a half ago, and her time for doing so has long since expired (Rule 65.20[b]; 12 NYCRR 65.20[b]).

Although the Commissioner's counsel asserts that a diligent search of certain email has been conducted and describes the nature of that search, nowhere does he affirmatively state that a search of electronically stored documents has been conducted. The Commissioner's obligation pursuant to the Board-issued subpoena is not limited to the production of emails, but also requires the production of documents including those that are stored electronically. The Commissioner's counsel has not stated that there are no electronically stored documents that are relevant here, yet neither has he produced such documents.

We find that the Commissioner is required to conduct a search of DOL's electronically stored documents for the period December 2006 to present using the following search or key terms: "PES 07-004," "309396893," "309397164," "Len," "P-002-99," "Erie Canal Locks," "Lock 9," "mutual lookout," "Type I," "mutual work/lookout," and "tailgate training." This search is to be distinguished from a search exclusively for email documents.

The Privilege Log Promised but Not Produced.

In August 2007, Petitioner complained that it had reason to believe that documents (hard copy) that were subject to its subpoena had been withheld as assertedly protected by the attorney-client privilege, but that no privilege log had been produced thereby preventing Petitioner from assessing whether there were legitimate grounds for invoking that privilege. In January and on multiple subsequent occasions, the Commissioner's attorney agreed to produce a privilege log covering the documents that had been withheld. To date, no such log has been produced. We find that such a log is necessary and require the Commissioner to produce such a log with sufficient information to ascertain whether or not the withheld documents are properly excepted from disclosure by the attorney-client privilege. The log should be filed with the Board and a copy served on Petitioner's counsel.

Generalized assertions of privilege "are unacceptable." *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 (1991); *Finkelman v Klaus*, 17 Misc 3d 1138A (Sup Ct Nassau County 2007). When the privilege is invoked to withhold the production of documents, the burden to establish the privilege falls on the party invoking it. *Spectrum Sys. Intl. Corp., supra.* Not every communication from counsel to client is privileged. "[F]or the privilege to apply when communications are made from attorney to client – whether or not in response to a particular request – they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship. [Citation omitted.]" *Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588, 593 (1989). The privilege applies when communications are made from client to attorney "for the purpose of obtaining legal advice" *Id.*

The information in the Commissioner's privilege log should include for each document asserted to be protected, as appropriate, the type of each document (*e.g.*, letter or memorandum or report), the document's subject matter, the identity of all recipients and their titles and/or functions, the identity and title or role of the author of the document and his/her relationship with the recipient(s), the document's date, and the circumstances in which the document was generated. Conclusory characterizations that the document withheld pertains to legal advice is not acceptable. *Spectrum Sys.*, 78 NY2d 371, *supra.*

The Privileges Invoked to Resist Production of Relevant Email Documents.

The Commissioner has not met her burden to show the applicability of the attorney-client privilege to the 14 email documents that were found in or about June pursuant to a search of DOL's computers and that Commissioner's counsel admits are relevant to this case. We find that the Commissioner should file a supplemental privilege log concerning each of the email documents at issue. The log should contain sufficient information to ascertain whether the attorney-client privilege is applicable to each email document, and a copy should be served on Petitioner's counsel.

The Commissioner also asserts that the 53 email documents that concededly involve this matter are covered by a deliberative process privilege and thereby exempted from production. No log or relevant information has been provided to establish that the 53 documents are covered by this privilege. Indeed, other than the 14 of these 53 documents that were listed as allegedly also being covered by an attorney-client privilege, we have no idea of the nature of these documents. Clearly, under these circumstances, the Commissioner has failed to meet her burden to establish the privilege, and we are unable to ascertain whether the privilege applies.

New York recognizes a deliberative process privilege within CPLR 3101(b) that excepts covered documents from disclosure. *New York Tele. Co. v Nassau County*, 2008 NY Slip Op 6596, 2008 NY App Div LEXIS 6427 (2d Dept 2008). To properly invoke the deliberative process privilege, the Commissioner must show that the documents withheld are "'predecisional,' that is, 'prepared in order to assist an agency decisionmaker in arriving at his decision.' [Internal citations omitted.]" *Hopkins v United States Dept. of Hous. and Urban Dev.*, 929 F2d 81, 84 (2d Cir 1991). She must also show that the documents withheld are

> "deliberative, that is, actually . . . related to the process by which policies are formulated. Thus the privilege focuses on documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which

> governmental decisions and policies are formulated. The privilege does not, as a general matter, extend to purely factual material. [Internal quotations and citations omitted.]" *Id.* at 84-85.

The "privilege does not cover materials related to the explanation, interpretation or application of an existing policy, as opposed to the formulation of a new policy [Internal quotation omitted.]." *DiPace v Goord,* 218 FRD 399, 403 (SDNY 2003). Furthermore, and as particularly relevant here, "[w]here the decision-making process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information [Citations omitted.]." *Burka v New York City Tr. Auth.*, 110 FRD 660, 667 (1986). Here, the process for finding the Petitioner in violation of Standards and conditions not expressly addressed or stated in variance P-002-99 is at issue, and we find that information, including email documents and electronically stored documents, relating to that process must be disclosed. The information is particularly necessary in light of Labor Law § 27-a (8)(c) which governs variances and states:

> "Any affected employer may apply to the commissioner for . . . [an] order for a variance from a standard promulgated under this section. . . The commissioner shall issue such . . . order if [she] determines on the record [of a hearing], after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations or processes used or proposed to be used by an employer will provide employment and places of employment which are as safe and healthful as those which would prevail if he complied with the standard. The . . . order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operating and processes which he must adopt and utilize to the extent they differ from the standard in question. Such . . . order may be modified or revoked upon application by an employer, any employee or employee representative, or by the commissioner on his own motion . . . . [Emphasis added.]"

Finally, the Commissioner claims that four of the email documents found relevant to this matter are privileged because they were "created in anticipation of litigation." As in the claims of privileges above, the Commissioner has the burden of establishing that the documents are indeed privileged as material prepared for litigation. *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647 (2d Dept 2004). In this regard, she must show that the email documents sought were prepared solely for litigation. *Id.; Friend v SDTC-The Ctr. for Discovery, Inc.*, 13 AD3d 827 (3d Dept 2004). Again, we find that the Commissioner should file a privilege log concerning each of the email documents at issue. The log should contain sufficient information to ascertain whether the "material prepared for litigation privilege" is applicable to each email document, and a copy should be served on Petitioner's counsel.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The asserted violation of a Wikipedia defined "buddy system" standard in item 10 of the Commissioner's bill of particulars be, and hereby is, stricken from the bill of particulars and the Commissioner be, and hereby is, barred from attempting to prove and/or argue that Petitioner violated such a standard or that such a standard defines work in a "mutual/lookout capacity"; and

2. Citation 1 Item 2 and Citation 1 Item 3 of the Notice of Violation and Order to Comply, finding violations of Standards 29 CFR 1910.23(e)(1) and 29 CFR 1910.23(e)(3)(iv), respectively, be, and hereby are, stricken from the Notice of Violation and Order to Comply and that the Commissioner be, and hereby is, barred from attempting to prove and/or argue that Petitioner violated these Standards; and

3. By November 24, 2008, the Commissioner shall serve and file a bill of particulars that is responsive to items 10, 12, 19, 31, 32, and 33 of Petitioner's demand for a bill of particulars, including a clear and complete statement explaining the Commissioner's contention that variance P-002-99 requires annual training and also including specific reference to the documents, materials, OSHA guidelines, opinions, law, rules, or regulations that she contends support her determinations that Petitioner's employees were not working in a "mutual/lookout capacity," that the Petitioner may be cited for failure to comply with Canal Directive #2001-4, that the conditions of variance P-002-99 required a Type I flotation device for Canal Corporation employees, that a Type III/IV Industrial Life Preserve is effective for use only in calm waters and that a Type III/IV Industrial Life Preserve is not effective for use in places where there is a good chance of fast rescue, or as applicable, stating that she does not rely on any such material, documents, or authority; and

4. In the event that the Commissioner fails to comply with paragraph 3 above, she be, and hereby is, barred from introducing evidence at hearing or arguing in reliance on any documents, materials, OSHA guidelines, opinions, law, rules, or regulations in support of her determinations that Petitioner's employees were not working in a "mutual/lookout capacity," that the Petitioner may be cited for failure to comply with Canal Directive #2001-4, that conditions of variance P-002-99 required a Type I flotation device for Canal Corporation employees, that a Type III/IV Industrial Life Preserver is effective for use only in calm waters, and that a Type III/IV Industrial Life Preserver is not effective for use in places where there is a good chance of fast rescue and will further bar her from introducing evidence at hearing or arguing that variance P-002-99 requires annual training; and

5. By November 24, 2008, the Commissioner shall respond to items 19, 31 and 33 of the Petitioner's demand for a bill of particulars with clarity and unambiguously explain the reason(s) for referring to any Standard(s) that the response might contain; and

6. By November 24, 2008, the Commissioner shall conduct a search of DOL's electronically stored documents for the period December 2006 to the present using the following search or key terms: "PES 07-004," "309396893," "309397164," "Len," "P-002-99," "Erie Canal Locks," "Lock 9," "mutual lookout," "Type I," "mutual work/lookout," and "tailgate training" and produce at the offices of Petitioner's counsel all non-privileged email and

electronically stored documents that Petitioner subpoenaed relevant to this matter along with a written description of how the search for such documents was conducted; and

7. In the event that the Commissioner fails to comply with paragraph 6 above, she be, and hereby is, barred from introducing evidence at hearing or arguing in reliance on any email or electronically stored non-privileged document relevant to this matter that she failed to produce; and

8. By November 24, 2008, the Commissioner shall produce at the Board's office for *in camera* inspection all documents that are claimed to be exempt from disclosure pursuant to the attorney-client privilege, a privilege log that provides sufficient information concerning each document for the Board to ascertain whether or not the document is exempt from disclosure under the attorney-client privilege, and proof of service of the privilege log on Petitioner's counsel; and

9. By November 24, 2008, the Commissioner shall produce at the Board's office for *in camera* inspection all documents that are claimed to be exempt from disclosure pursuant to the deliberative process privilege, a privilege log that provides sufficient information concerning each document for the Board to ascertain whether or not the document is exempt from disclosure under the deliberative process privilege, and proof of service of the privilege log on Petitioner's counsel; and

10. By November 24, 2008, the Commissioner shall produce at the Board's office for *in camera* inspection all documents that are claimed to be exempt from disclosure pursuant to any privilege other than attorney-client and deliberative process privileges, a privilege log that identifies the precise privilege being invoked for each document and that contains sufficient information concerning each document for the Board to ascertain whether or not the document is exempt from disclosure under the privilege invoked, and proof of service of the privilege log on Petitioner's counsel; and

11. In the event that the Commissioner fails to comply with paragraph 8, 9, or 10 above, such failure hereby constitute waiver of the correlative privilege. In the event of such waiver, the Commissioner shall produce at Petitioner's offices by December 1, 2008, all documents for which the privilege had been invoked; and

12. In the event that the Commissioner fails to produce the documents described in paragraph 11 above, she be, and hereby is, barred from introducing as evidence at hearing or arguing in reliance on any documents relevant to this matter that she failed to produce; and

13. Extensions of time for compliance with any provision of this order will be granted only for good cause shown by affidavit; and

14. Petitioner's motion be, and hereby is, denied in all other respects except that Petitioner may renew without prejudice its objection that it had inadequate notice of any violation of a Standard that variance P-002-99 does not address and any condition that variance P-002-99 does not expressly impose.

Anne P. Stevason, Chairman

Absent
Susan Sullivan-Bisceglia, Member

J. Christopher Meagher, Member

Recused
Mark G. Pearce, Member

Jean Grumet, Member

Dated and Signed in the Office of the
Industrial Board of Appeals,
at New York, New York,
on October 8, 2008.