

North Carolina Department of Labor
Occupational Safety and Health Division
Bureau of Compliance

Field Operations Manual
Chapter XIII – Informal Conferences, Contested Cases and Disclosures



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Chapter XIII

Informal Conferences, Contested Cases and Disclosures

A. **Informal Conferences.**

1. **General.** NCGS 95-137(b)(1) allows an employer to either contest a citation or penalty, or request an informal conference (IFC) within 15 working days of receipt of a citation. If an IFC is scheduled, the employer is still allowed the option of contesting after the result of the IFC is determined. This process was designed to resolve disagreements in an informal manner and to reduce the number of contestments.
2. **Scheduling the Informal Conference.**
 - a. An employer has 15 working days from receipt of a citation to request an IFC. The IFC should be conducted within those 15 days.
 - b. If scheduling problems exist, an additional 5 working days may be allowed. No more than 20 working days should lapse from the employer's receipt of the citation to the district supervisor providing written notification of IFC results to the employer.
 - c. If an IFC is requested by the employer but cannot be held within 20 days, a "No Change" letter will be issued. From the date of the "No Change" letter, the employer would have 15 working days in which to contest and/or schedule, conduct, and receive a reply to an IFC.
 - d. Upon receipt of an informal conference request, the admin staff will stamp the request with the date received and this date will be used to help determine the number of days elapsed from the employer receipt of the citation to the date of the informal conference request.
3. **Conducting the Informal Conference.** The IFC is the employer's opportunity to present any questions, problems, concerns, evidence and/or abatement verification to the district supervisor. Even though these procedures refer to the conduct of the IFC by the district supervisor, the IFC may be conducted by one of the following the Occupational Safety and Health Division management representatives: director, assistant director, bureau chief, district supervisor or CSHO II. A CSHO II who conducts an IFC has the same authority as the district supervisor in the IFC process. A case file that requires bureau chief approval for citation issuance or closing the case file also requires bureau chief approval for settlement. A penalty reduction in a settlement agreement that exceeds \$1000 or a penalty reduction greater than 35%, requires bureau chief approval. This 35% reduction does not apply to penalties that were deleted based on information considered by the district supervisor during the IFC.

The district supervisor will consider the employer's information in a fair manner, giving thought to information that may not have been available during the inspection. Following the IFC, one of the following will occur:

- a. The district supervisor may modify the citation(s) based on information reviewed at the IFC. One reason may be to correct an error in penalty calculation or citation processing. Amended citations may be issued after the IFC
- b. The district supervisor may find that the work of the CSHO was proper and the case file complete. In this case, the district supervisor will give the employer a "No Change" letter that advises the employer of the right to contest the citation and/or penalties within 15 working days of receipt of the "No Change" letter.
- c. The district supervisor may draft an Informal Settlement Agreement (ISA) if it is determined it would be beneficial to employee safety and health or to expedite abatement or to resolve the case. Many ISA options are available to the district supervisor including, but not limited to, penalty reduction, modifying citations, mandating the establishment of safety and health guidelines, or requiring the correction of similar hazards at all company locations, or reducing the penalty. The ISA must specify that the employer waives the right to contest the citation issues and/or penalties agreed upon.

Note: If the employer signs the ISA, it must be posted at the workplace for three days or until all the items are corrected.

4. Results of the Informal Conference. The district supervisor will provide written notification to the employer of the results of the IFC. Where the employer has a designated representative, the district supervisor will verbally review any proposed ISA with the employer representative prior to sending any written notification. The Occupational Safety and Health Division management representative will provide written notification of IFC results to the employer. This notification will normally be one of the following: a cover letter and an amended citation(s), a cover letter/settlement agreement, or a letter of no change. The district supervisor can consider using a combination of the preceding three to reach an ISA.

The notification also includes information that the employer has 15 working days to contest if the settlement proposal is not acceptable. Once the notification is mailed to the employer, the district supervisor should not make any further contact with the employer that could be construed as extending the time limit the employer has to respond to the ISA. For example, an ISA may cover areas on which the district supervisor and employer agree along with a letter indicating no change may be provided for any issue(s) for which agreement is not reached. An ISA requiring a signature must be sent certified U.S. Mail. After signatures are secured, the ISA can be sent regular mail.

5. Post Conference Systems Update/Changes.

- a. The admin staff enters the changes that result from the IFC into the NCR via the 167-I, places a hard copy in the case file and completes the mailings as follows:
 - i. Changes to citations via ISA.
 - A. The admin staff mails a signed copy of the ISA and cover letter to the employer.

- B. The admin staff inserts the original copy of the ISA into the case file.
- C. The admin staff makes the appropriate entries on the Case File Summary sheet.
- D. The admin staff updates the OSHA-1B's as indicated in the ISA.

- ii. Changes to citations via amended citations (no ISA).
 - A. The admin staff processes a citation amendment form.
 - B. The admin staff forwards a copy of the amended citation with cover letter to the employer by certified U. S. Mail.
 - C. The admin staff forwards a copy of the amended citation with cover letter to the budget office.
 - D. The admin staff updates the 1Bs per the recommendation of the district supervisor.
- iii. No changes as a result of the IFC
 - A. The admin staff processes a "No Change" letter.
 - B. The processed letter is mailed to the employer.

6. Employee Representation.

- a. Employers are required to post a notice of the IFC for the information of their employees. Employees represented by a bargaining agent will be provided notice of the IFC by the employer and given the option of attending the conference.
- b. Employees who do not have a designated representative will be notified by the employer posting the "Notice to Employees of Informal Conference", which is part of the citation package. These employees may attend the IFC at the discretion of the district supervisor.
- c. *The person conducting the IFC will ask the employer at the beginning of the IFC whether the form in the citation package indicating the date, time and location of the conference has been posted as required.*
- d. *If the employer has not posted the form, the IFC may be postponed until such action is taken.*

7. Employee Rights. When an employee contests an abatement period, any IFC results pertaining to abatement dates must be agreed to by the employee prior to any finalized ISA.

B. **Contested Cases.**

1. **General.** The N.C. Occupational Safety and Health (OSH) Review Commission, created under NCGS 95-135, is an independent adjudicatory body. It consists of three members appointed by the governor. The OSH Review Commission provides employers and employees an opportunity for a hearing in matters associated with citations, proposed penalties and abatement periods as provided by the Act.
2. **Transmittal of Notice of Contest and Other Documents to OSH Review Commission.**
 - a. **Notice of Contest.** In accordance with the Rules of Procedure of the OSH Review Commission, the original notice of contest and envelope, together with all relevant documents as described in N. C. Field Operations Manual, Chapter XVI, Sections F.2.b.vi. and F.2.b.x. will be transmitted by the field office to the OSH Review Commission via facsimile (FAX) and certified U.S. Mail, except as specified in subsection (ii) below. This also applies to an employee notice of contest in which objections are made to the abatement period.
 - i. A copy of the notice of contest and a copy of the envelope that contained the notice of contest (with the postmark intact) will be retained in the case file.
 - ii. If the employer's notice of contest indicates they are contesting only the reasonableness of the abatement period, the district supervisor will immediately contact the employer to determine if the abatement period differences can be resolved as a Petition for Modification of Abatement and handled in accordance with the instructions on Chapter XVI. If the abatement period differences cannot be resolved, the communication from the employer will be treated as a notice of contest and forwarded to the OSH Review Commission. The district supervisor will delineate the result of this contact in the Case File Summary.
 - iii. If written communication is received from an employer containing objection, criticism or other adverse comment as to a citation or proposed penalty, but does not explicitly indicate that it is a notice of contest, the district supervisor will immediately contact the employer to clarify the intent of the communication. This clarification must be obtained within 10 working days after receipt of the communication so that if it is a notice of contest, the file may be forwarded to the OSH Review Commission within the allowed time if it is determined to be a notice of contest. If the district supervisor cannot contact the employer within then (10) working days, the communication will be treated as a notice of contest and forwarded to the OSH Review Commission.
 - iv. When the district supervisor determines that the employer intends the communication from iii. above to be a notice of contest, it will be transmitted to the OSH Review Commission in accordance with FOM Chapter XVI, Section F.2.b. If the employer did not intend the communication to be a notice of contest, it will be retained in the case file along with any additional correspondence to the employer.

- v. If the district supervisor determines that the employer intended the communication to be a request for an IFC, the employer will be informed that the employer has 15 working days from the receipt of the IFC results to contest the citation and/or penalty.
- vi. If a notice of contest is received, and no IFC has been requested or conducted, the district supervisor will contact the employer via telephone and confirm that the employer does not want an IFC prior to or instead of a contest. When an employer prefers an IFC, a notation of this decision will be placed in the case file.

3. Transmittal of Copies of Case Files to the Attorney General's office.

- a. When a notice of contest is received, it will immediately be date stamped.
- b. A copy of the case file will be made and forwarded to the attorney general's (AG's) office per FOM Chapter XVI Section F.2.b.xii. and xiii.

4. Communications with OSH Review Commission Employees. There will be no one-sided communication with the OSH Review Commission with respect to the merits of any case not yet concluded, including any member, officer, employee, or agent of the OSH Review Commission. OSH Division personnel will refrain from any direct or indirect communication regarding the merits of the case with hearing examiners or any members or employees of the OSH Review Commission. All OSH Review Commission inquiries and communications will be referred to the AG's office. Media requests and inquiries regarding contested cases will be referred to the Communications Division.

5. Dealing with Parties while proceedings are pending before the Commission.

- a. Clearance from the AG's Office. After the notice of contest is filed and the case is within the jurisdiction of the OSH Review Commission, there should be no investigations of or conferences with the employer without clearance from the AG's office. Such requests should be referred promptly to the AG's office for a determination of the advisability, scope and timing of any investigation, and the advisability of and participation in any conference. To the maximum extent possible, there should be consultation with the AG's office on questions of this nature so as to insure no procedural or legal improprieties.
- b. Inquiries. Once a notice of contest has been filed, all inquiries relating to the general subject matter of the citation and notification of penalty raised by any of the parties of the proceedings, including the employer and affected employees or authorized employee representative, will be referred promptly to the AG's office. All other inquiries, from prospective witnesses, insurance carriers, other government agencies, attorneys, etc., will be referred promptly to the AG's office.

Note: Cooperation with the AG's office in this area is important. There are practical advantages in having an attorney participate in these conferences. Moreover, serious questions of legal propriety could be raised about meetings with parties involved in hearings and litigation without the presence of counsel and about the discussion or disclosure to non-parties of any aspect of pending cases.

6. Responsibilities of Field Personnel.

a. District Supervisor

- i. Assure that the CSHO meets with the AG's office to discuss the case as soon as possible after notice of contest is filed. (District supervisor attendance is optional.)
- ii. Evaluate the results of the CSHO's meeting with AG's office and make appropriate recommendations regarding the contestment to the AG's office.
- iii. Assist the AG's office with preparation of the contested case file, including case documentation material.

b. CSHO.

- i. Schedule a meeting to discuss the notice of contest with the AG's office as soon as possible after the contestment is filed, and report the meeting results to the district supervisor.
- ii. Assure that a certified copy of the case file is available for the CSHO at the hearing site on the day of the hearing. Nothing from the original file will be submitted into evidence. Do not include medical records in the CSHO certified copy.
- iii. Assist the AG's office with the contest as appropriate, including augmenting or clarifying case documentation material.
- iv. Ensure that the final order is filed in the case file and that the final order data is entered in the NCR.

C. Disclosures.

Inspection or non-formal complaint case files are public information and the inspected or investigated company, employees, employee representatives, attorneys, next of kin, and the public in general can request copies for a minimal per page charge. Case files are redacted prior to release so that personal identifiers, medical records, names and other identifiers of witnesses and complainants, and trade secret information and records of accidents, injuries, illnesses and settlements received from the Industrial Commission are removed as required by and in accordance with NCGS 132-1.10; NCGS 14-113.20(b); 13 NCAC 7A.0900; NCGS 95-136; NCGS 95-152 and NCGS 132-1.2; NCGS 97-81 and NCGS 97-92.

1. *All requests for disclosures must be submitted in writing to Planning, Statistics and Information Management (PSIM) Bureau and should include as much of the following information as possible:*

- a. *Name, mailing address, and e-mail address of the requestor.*
- b. *Requestor's relationship to the employer.*
- c. *Name of the employer/company.*
- d. *OSH case file number (OSHA-1 or OSHA-7 No.).*
- e. *Date of inspection or investigation.*
- f. *Specific information requested from the case file (may be the entire file or any portion of the file).*

2. PSIM Bureau staff, based on scheduled hearing dates and other pertinent information, will determine the estimated date that the disclosure will be sent to the requestor.
3. *Case file information may be released as follows and will be redacted in accordance with NCGS 95-136 and other applicable requirements referenced in C. above:*
 - a. *Copies of citations and penalties may be released to the public after the citations have been received by the employer.*
 - b. *A redacted copy of an inspection case file may be released by the PSIM Bureau to the inspected employer or their attorney at any time after the citations or the in-compliance letter has been received by the employer.*
 - c. A disclosure request by an inspected employer or their attorney, prior to citation issuance, for photos or videos taken during an inspection must be in writing and submitted to PSIM. The employer should note in the request letter that they would like the photos prior to citations being issued. When the CSHO is made aware of the request, they will forward copies of the materials requested to the PSIM Bureau.
 - d. *A redacted copy of the case file may be released by the PSIM Bureau to any requestor after the citations and penalties become final order and if there are no other related case files associated with the specific file request. If there are other related case files which were generated from more than one company being inspected relative to a specific event, none of the related case files will be released to a third party requestor until all the related inspection case files meet the following criteria:*
 - i. Fifteen working days after the company receives the citations, if there is no notice of contest or request for an informal conference.
 - ii. *Thirty (30) calendar days after an Informal Settlement Agreement (ISA) is fully executed.*
 - iii. Thirty (30) calendar days after a Formal Settlement Agreement is approved by the OSH Review Commission.
 - iv. Thirty (30) calendar days after the OSH Review Commission releases a Final Order after a contested case has been heard *unless it is appealed.*
 - v. *If the Final Order of the OSH Review Commission is appealed, 30 calendar days after the entry of an Order that has become final because no appeal has been entered.*
 - e. *A redacted copy of a non-formal complaint file may be released to any requestor once the file is closed.*
 - f. A copy of a case file may be released to any NCDOL employee outside of the Occupational Safety and Health Division if approved by the director or assistant director of the Occupational Safety and Health Division. However, medical records contained in case files may only be released to the NCDOL Legal Affairs Division.
 - g. A copy of a case file may be released by PSIM to another local, state or federal agency (e.g. N.C. DHHS, N.C. DENR, federal OSHA, state legislator) if

approved by the director or assistant director of the Occupational Safety and Health Division. However, medical records contained in case files may only be released to the Attorney General's office for litigation unless the division has a notarized release per paragraph h. below.

- h. Personnel and medical records will be released only when permission is granted for release by the employee or their next of kin, the release is in writing, is notarized, and specifies the exact person and address to forward the documents.
4. The following list contains examples of documents or information contained in OSH investigative files which will not be released by the PSIM Bureau pursuant to a public records request. Any questions about whether a particular document or information within a case file can be released will be referred through the PSIM Bureau to the NCDOL Legal Affairs Division or the AG's office for clarification.
- a. The names or other identifying information of all witnesses and complainants (to include addresses, phone numbers, etc.), unless a written and notarized release, signed by the witness or complainant, is received that permits the release of such information to any persons or entities designated in the release.
- b. Statements that are in the handwriting of the witness or complainant unless a written and notarized release, signed by the witness or complainant, is received that permits the release of such information to any persons or entities designated in the release.
- c. *All social security numbers, birth dates, employer tax identification numbers, unemployment numbers, Dunn & Bradstreet numbers, drivers license numbers, state identification card numbers, passport numbers, identification card numbers issued by any foreign consulate, personal identification numbers (PIN), electronic identification numbers, e-mail names and addresses, internet account numbers, internet identification names, digital signatures, fingerprints, biometric data, passwords, or parent's legal surnames prior to marriage.*
- d. *Trade secret information or photographs/videotapes of trade secrets, which have been designated "TRADE SECRET". It is the responsibility of the CSHO and district supervisor to acquire input and evaluation of NCDOL Legal Affairs Division in order to designate and mark/label accordingly any trade secret information.*
- e. *Copyright protected materials.*
- f. *Photographs, videotapes or audio recordings of an official autopsy. The text of an official autopsy report is releasable, with applicable redactions.*
- g. *Inter- and intra-agency documents or memos between agency personnel and the AG's office or NCDOL Legal Affairs Division.*
- h. *Attorney working papers and/or opinions, including emails between the AG's office or NCDOL Legal Affairs Division and OSH Division personnel.*

- i. Personnel and medical records, except employee exposure records, unless permission is granted for release per paragraph C.3.h. above.
- j. Financial records, including but not limited to, checking or savings account numbers, debit card or credit card numbers, unemployment insurance numbers, or any other information or numbers that can be used to access a company or person's financial resources.
- k. *The Consultative Services Bureau survey reports and/or OSHA Data Initiative (ODI) Survey reports that are part of a case file are only provided to the employer who requested the consultative survey or were surveyed or their attorney, but are not to be released to the public. Anyone requesting ODI Survey date will be referred to the OSHA website for retrieval of ODI Survey data. (http://www.osha.gov/pls/odi/establishment_search.html)*
- l. ESC site search results.
- m. N. C. Rate Bureau information or history.
- n. Any optional information entered on any OSHA form, such as an OSHA-1, OSHA-36, or OSHA-7.
- o. *Any records of accidents, injuries, illnesses or settlements obtained directly from the North Carolina Industrial Commission.*

5. *Responsibilities.*

- a. *PSIM is responsible for responding to all requests, including NCDOL employee requests, for disclosure of information contained in OSH case files. This includes the transmittal of copies of the citations or an in-compliance letter. Where appropriate, field office personnel have the authority to send copies of citations to the inspected employer, the complainant, and the next of kin. When directed by PSIM, field office personnel may be asked to send copies of citations to other requestors.*
- b. Compliance field offices will respond to PSIM's requests for case file information within 2 weeks of the request date unless a specific date of return is specified as a result of a subpoena, hearing, etc. The case file will be processed and mailed per the procedures in FOM Chapter XVI, paragraph F.10.
- c. The CSHO is responsible for verifying the completeness of the file copy before it is forwarded to the PSIM Bureau. The CSHO will verify that all case file pages are properly photocopied, that all documents are as legible as the original documents, and that the procedures in FOM Chapter XVI, paragraph F.10. are followed.

6. Disclosure to Third Parties.

- a. No disclosure will be released to a third party until the following have been resolved:
 - i. The case file *and/or any related inspection file* is closed or a final order is rendered as in section C.3.d.; or,
 - ii. The requestor has been granted legal third party status.

7. Medical Records. When medical records are released per C. 3.h above, a copy of the released information is maintained by PSIM until the case is closed. The PSIM Medical Records Administrator will maintain these copies in a locked cabinet in the PSIM bureau chief's office. The records will be shredded when the case file is closed.