

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

IN RE:

SX-18-MC-12

**VIRGIN ISLANDS DEPARTMENT OF LABOR
DIVISION OF OCCUPATIONAL SAFETY AND
HEALTH SUBPOENA RE: VIRGIN ISLANDS
WATER & POWER AUTHORITY WORKPLACE
INVESTIGATION OF J. JULIUS DEATH**

Appearances:

JOSEPH N. PONTEEN, ESQ.

Assistant Attorney General

St. Croix, USVI

For Petitioner

LORELEI FARRINGTON, ESQ.

General Counsel

Virgin Islands Water and Power Authority

St. Thomas, USVI

For Respondents

MEMORANDUM OPINION

THIS MATTER is before the Court on the Virgin Islands Department of Labor Division of Occupational Safety and Health's (hereinafter "VIDOSH") Emergency Petition For Enforcement of the Virgin Islands Department of Labor Division of Occupational Safety and Health Subpoena Duces Tecum (hereinafter "Petition") filed on February 27, 2018. The Virgin Islands Water and Power Authority (hereinafter "WAPA") filed a response on March 12, 2018. For the following reasons, the Petition shall be denied.

BACKGROUND

Jason Julius (hereinafter "Julius"), an employee of WAPA, passed away on September 12, 2017, because of a job-related accident. Andre Smith, Sr. (hereinafter "Smith"), Compliance Safety and Health Officer, was assigned by the VIDOSH to investigate the incident. (Opp'n at

2). WAPA management employees Niel Vanterpool (hereinafter “Vanterpool”) and Clinton T. Hendrington (hereinafter “Hendrington”) were scheduled to be interviewed by Smith on January 30, 2018. However, the January 30, 2018, interview was cancelled after Vanterpool and Hendrington allegedly declined a recorded interview. (Opp’n at 5). Dean Andrews (hereinafter “Andrews”), Director of the VIDOSH, allegedly advised them that he would issue a subpoena ordering an interview recorded by a stenographer. (Opp’n at 7).

On or about February 12, 2018, VIDOSH served WAPA with a *subpoena duces tecum*, through Rupert Pelle (hereinafter “Pelle”), WAPA’s Chief Administrative Officer. The subpoena required WAPA to appear before Andrews and to produce nine separate categories of documents on February 20, 2018. (Opp’n at 8). Pelle was also served with *subpoenas ad testificandum* issued to Hendrington and Vanterpool requiring them to also appear before Andrews on February 20, 2018. (Id). In response to the subpoena, WAPA issued a letter dated February 16, 2018 stating that “VIWAPA and its management employees are unable to respond in this matter as these subpoenas are deficient in authority, execution, and/or service.” (Id., Ex. K, Letter dated February 16, 2018).

On February 27, 2018, the Government filed the instant Petition for an order enforcing the subpoena executed on February 12, 2018.

JURISDICTION

Title 4, Section 76 of the Virgin Islands Court vests this Court with subject matter jurisdiction over all civil matters. 4 V.I.C. §76. Although this matter was given a miscellaneous action number, it is considered to be a civil action in all pertinent respects. *See Gov’t Emps. Ret. Sys. v. Gov’t of the V.I. Office of the Attorney Gen.*, 64 V.I. 205, 212 n.1 (V.I. Super. Ct. 2016). *See also In re Moorhead*, 27 V.I. 74, (V.I. Terr. Ct. 1991) (“[I]n this court, miscellaneous civil

numbers are assigned to all special proceedings which are non-criminal in nature ... and they are in every other respect ‘civil actions’” (citations omitted)). Furthermore, the Superior Court has jurisdiction to enforce administrative subpoenas. 24 V.I.C. §37(b). Therefore, this Court has subject matter jurisdiction over this matter.

DISCUSSION

The VIDOSH asserts that “the subpoena is authorized by law and [is] entitled to enforcement by this Court.” (Pet. ¶17). WAPA counterargues that the Petition should be denied because the subject matter is moot since “the Closing Conference completed the investigation for which the subpoena was sought.” (Opp’n at 10). The Court notes that filing the instant Petition indicates that the VIDOSH’s investigation is still ongoing and that the issues pertaining to enforcement of the subpoena are not moot. Thus, this argument fails.

Next, WAPA argues, without bolstering its argument with any legal authority, that “this court lacks subject matter jurisdiction.” (Opp’n at 10). WAPA’s bare assertion will not be addressed because it is not properly before the court.¹ Furthermore, the Court has already determined that it has jurisdiction over the Petition pursuant to 4 V.I.C §76 and 24 V.I.C. §37(b).

WAPA also argues that the Petition to enforce the subpoena should be denied because the subpoenas are deficient and improperly issued. (Opp’n at 10-13).

¹ See *Gerald v. R.J. Reynolds Tobacco Co.*, Nos. ST-10-CV-631, ST-10-CV-692, 2017 V.I. LEXIS 150, at *37 (V. I. Super. Ct. Aug. 29, 2017) (noting that a bare assertion made without citing any legal authority is not properly before the court); see *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) (“The rules that require a litigant to brief and support his arguments ... before the Superior Court, are not mere formalistic requirements. They exist to give the Superior Court the opportunity to consider, review, and address an argument”); see also *Bertrand v. Mystic Granite & Marble, Inc.*, 63 V.I. 772, 782 (V.I. 2015) (“[S]imply stating a principle of law without any argument or explanation of how it applies to the case at hand is not sufficient to fairly present the issue to the Superior Court”) (citing *Yusuf v. Hamed*, 59 V.I. 841, 851 n.5 (V.I. 2013)). See also V.I. R. Civ. P. 11(b)(5).

The issues before the Court are (1) whether the VIDOSH has the authority to regulate WAPA; (2) whether Andrews had the authority to execute the subpoena; and (3) whether the subpoena was properly executed according to the appropriate governing statutory authority.

A. The VIDOSH has the authority to regulate WAPA.

The first issue is whether the VIDOSH has the authority to regulate WAPA. The Virgin Islands Occupational Safety and Health Act (hereinafter “VIOSHA”), codified in Title 24, Chapter 2 of the Virgin Islands Code was enacted by the Legislature “to regulate commerce within the Territory of the Virgin Islands and to provide for the general welfare, to assure so far as possible every public sector employee in the Territory safe and healthful working conditions....” 24 V.I.C. §31(b). Title 24, Section 36(a)(1) of the Virgin Islands Code empowers “the Commissioner of Labor, or the Commissioner's authorized and accredited representatives,” “to investigate, develop and gather data regarding all aspects of occupational safety and health with respect to public sector employers and employees.” 24 V.I.C. §§32(1) & 36(a)(1).

Under the VIOSHA, the term “‘employer’ means the government of the Virgin Islands, its department, agencies, instrumentalities, or political subdivisions, if any.” 24 V.I.C. § 32(4). An employee is defined as “any individual employed by the Government of the Virgin Islands, its departments, agencies, instrumentalities, or political subdivisions, if any.” 24 V.I.C. § 32 (3).

WAPA is “a body corporate and politic constituting a public corporation and autonomous governmental instrumentality of the Government of the Virgin Islands.” 30 V.I.C. § 103(a). According to Section 122, the VIOSHA is generally applicable to government instrumentalities. 30 V.I.C. § 122. As a government instrumentality and a public-sector employer, WAPA is an “employer” within the meaning of the VIOSHA. 24 V.I.C. §32(4). The Court must now determine whether WAPA can be regulated by the VIDOSH.

Title 30, Section 121 of the Virgin Islands Code restricts the jurisdiction of government agencies to regulate WAPA.

No officer, board, commission, department or other agency or political subdivision of the Virgin Islands shall have jurisdiction over the Authority in the management and control of its properties and facilities, or any power over the regulation of rates, fees, rentals and other charges to be fixed, revised and collected by the Authority, or any power to require a certificate of convenience or necessity, license, consent, or other authorization in order that the Authority may acquire, lease, own and operate, construct, maintain, improve, extend or enlarge any facility. 30 V.I.C. § 121.

However, the Legislature carved out an exemption in Title 30, Section 122 of the Virgin Islands Code subjecting “WAPA only to laws that are specific to WAPA or that apply generally to independent instrumentalities.” *See V.I. Pub. Servs. Comm’n v. V.I. Water & Power Auth.*, 49 V.I. 478, 480 (V.I. 2008) (Section 122 refers to ‘any law made specifically applicable to the Virgin Islands Water and Power Authority (WAPA) or generally applicable to independent instrumentalities of the Government.’); 30 V.I.C. § 122.²

In the case at bar, Section 122 subjects WAPA to laws that apply generally to independent instrumentalities of the government. Since the VIOSHA is generally applicable to government instrumentalities, and Section 122 subjects WAPA to laws that apply generally to independent instrumentalities of the government, it follows that WAPA’s occupational safety and health practices can be regulated by the VIDOSH.

² Nothing in this chapter shall be construed as exempting the Virgin Islands Water and Power Authority from any law made specifically applicable thereto or generally applicable to independent instrumentalities of the Government of the Virgin Islands, whether such law was enacted before, on, or after February 14, 1980. 30 V.I.C. § 122.

B. Andrews, Director of the VIDOSH, has the authority to investigate all aspects of occupational safety and health practices at WAPA and issue subpoenas.

The second issue is whether Andrews, Director of the VIDOSH, has the authority to issue subpoenas. In its Petition, the VIDOSH asserts that Andrews “is authorized by 29 U.S.C.S. §161(1), 29 U.S.C.S. §657(b), 24 V.I.C. §36, and 24 V.I.C. §37(b) to issue a subpoena duces tecum to WAPA.” (Pet. ¶7). WAPA argues that “[t]he subpoena served on WAPA is incorrectly issued by Mr. Dean Andrews as Director of the Virgin Islands Division of Occupational Safety and Health.” (Opp’n at 14). WAPA further argues that “24 V.I.C. §37(b) clearly reserves the subpoena power in an investigation only to the Commissioner of DOL by using the clear language stating that ‘the Commissioner may require the attendance and testimony of witnesses and the production of evidence under oath.’ (Id.).

The Virgin Islands Legislature (hereinafter “Legislature”) developed Title 24, Section 37(b) of the Virgin Islands Code, mostly word-for-word, from the federal statute, 29 U.S.C.S. §657(b); and both statutes are identical in all material respects. *See e.g. Coral Mgmt. Grp., LLC v. Gov’t of the United States V.I.*, 66 V.I. 552, 557 n.2 (V.I. 2017) (“Because the Virgin Islands Legislature modelled [4 V.I.C. § 33(b)(1)] after a federal statute, 28 U.S.C. § 1292(a)(1)- (2), that is virtually word-for-word identical in all material respects, this Court construes the statutes alike.”) (citations omitted). Consequently, both statutes should be construed alike. *See In re Le Blanc*, 49 V.I. 508, 523 (V.I. 2008) (statutes with similar language and purpose are construed alike) (citing *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428, 93 S. Ct. 2201, 37 L. Ed. 2d 48 (1973) (“similarity of language ... is, of course, a strong indication that the two statutes should be interpreted *pari passu*.”); *Cherokee Nation of Ok. v. Leavitt*, 543 U.S. 631,

644, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005) (“it is important to provide a uniform interpretation of similar language.”).

“The first canon of statutory interpretation states that, if the language of a statute is clear and unambiguous, no further analysis is required in order to discern the meaning of that language.” *See Dupigny v. Tyson*, 66 V.I. 434, 440 (V.I. 2017) (collecting cases). “All the statutory language must be given effect when doing so does not undermine the legislative intent.” *Id.* “When interpreting a statute, ‘the court must look to the statute's language, structure, subject matter, context, and history — factors that typically help courts determine the statute's objectives and thereby illuminate its text.’” *See id.*

As previously mentioned, the Legislature’s purpose and policy in enacting the VIOSHA was “to better protect its public-sector workers [in the Territory]” and “to assure so far as possible every public-sector employee in the Territory safe and healthful working conditions and to preserve our human resources.” 24 V.I.C. § 31(a) & (b). To effectuate the VIOSHA’s purpose and policies, the Legislature enumerated eleven strategic goals including, *inter alia*, “providing an effective enforcement program” and “authorizing the Commissioner of Labor to set or adopt mandatory occupational safety and health standards applicable to public-sector workplaces within the Virgin Islands.” 24 V.I.C. § 31(3) & (9). “The term ‘Occupational Safety and Health Standard’ means a standard that requires conditions or the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” 24 V.I.C. § 32 (5). In furtherance of these strategic goals, the Legislature “established in the Department of Labor, a Division of Occupational Safety and Health headed by a Director who has the rank of Assistant

Commissioner and is responsible for the administration and operation of the Occupational Safety and Health Program.” 24 V.I.C. § 45(a).

When carrying out investigatory duties, Section 37(a) empowers “the Commissioner or his authorized representatives, upon presenting appropriate credentials to the government official in charge of the public-sector workplace to enter a public-sector facility and conduct inspections or investigations.” 24 V.I.C. § 37(a)(1) & (2). Moreover, “[i]n making his inspection and investigations under this chapter, the Commissioner may require the attendance and testimony of witnesses and the production of evidence under oath.” 24 V.I.C. § 37(b). Section 32(1) explicitly states that “the term ‘Commissioner’ means the Commissioner of Labor, or the Commissioner's authorized and accredited representatives.” 24 V.I.C. §32(1).

In the case at bar, WAPA argues that Andrews, the Director of the VIDOSH, has no authority to issue subpoenas. (Opp’n at 13). In support of this argument, WAPA asserts that “24 V.I.C. § 37(b) clearly reserves subpoena power in an investigation only to the Commissioner of the DOL, by using the clear language that ‘the Commissioner may require the attendance and testimony of witnesses and the production of evidence under oath.’” (Id. at 14). WAPA further argues that “[t]he fact that the Legislature purposefully and intentionally created Section 37(b) separate from ... 24 V.I.C. §37(a), a section which allowed for delegation of the Commissioner’s power to a representative, and worded 24 V.I.C. §37(b) to exclude the “or his authorized representatives” undoubtedly shows the intent to reserve the Commissioner’s authority to issue subpoenas to government agencies and instrumentalities without delegation.” (Opp’n at 14). The Court rejects these arguments.

As previously mentioned, Andrews is the Director of the VIDOSH. Section 45(a) explicitly states that the Director of VIDOSH has the rank of Assistant Commissioner and is

responsible for the administration and operation of the Occupational Safety and Health Program. 24 V.I.C. §45(a). Section 37(b) states that “[i]n making his inspection and investigations *under this chapter*, the *Commissioner* may require the attendance and testimony of witnesses and the production of evidence under oath.” 24 V.I.C. § 37(b) (emphasis added). Applying the plain language of the definition of “Commissioner” in Section 32(1) to Section 37(b), the term “Commissioner” as stated in Section 37(b), also refers to an authorized and accredited representative of the Commissioner of the Department of Labor. This is in alignment with the Legislature’s goals of “providing an effective enforcement program.” 24 V.I.C. § 31(b)(9). Which follows that Section 37(b) vests Andrews, the Director of the VIDOSH, —an authorized and accredited representative of the Commissioner of the Department of Labor—with the authority to require the attendance and testimony of witnesses and the production of evidence under oath. Ergo, Andrews has the statutory authority to investigate WAPA, issue an administrative subpoena, and petition the Superior Court for enforcement of the subpoena. *See Black’s Law Dictionary* 1563 (9th ed. 2009) (An administrative subpoena is “[a] subpoena issued by an administrative agency to compel an individual to provide information to the agency. The subpoena may take the form of a *subpoena ad testificandum* or *subpoena duces tecum*.”).

C. The subpoena was not executed in accordance with the appropriate governing statute.

The final determination is whether the subpoena should be enforced. WAPA argues that the subpoena was not properly executed and cannot be enforced because the VIDOSH did not issue the subpoena under the controlling statute— 24 V.I.C. §37(b). The Court agrees with WAPA.

Generally, “statutes granting power to administrative agencies are strictly construed as conferring only those powers granted expressly or by necessary implication.” *See V.I. Narcotics Strike Force v. Gov’t of the V.I. Pub. Emples. Rels. Bd.*, 60 V.I. 204, 213 (V.I. 2013) (citations omitted). “Although courts will enforce a duly issued administrative subpoena, when the document is challenged, courts will verify whether it comports to the governing statutory authority.”³ *See Gov’t Emps. Ret. Sys.*, 64 V.I. at 220 (citation omitted).

The VIDOSH is an administrative agency created and existing under the Virgin Islands Occupational Safety and Health Act codified in Title 24, Section 45(a) of the Virgin Islands Code. 24 V.I.C. § 45(a). As previously discussed, the Legislature granted Andrews, the current Director of the VIDOSH, with the authority to “require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses must be paid the same fees and mileage that are paid witnesses in the Superior Court of the Virgin Islands.” 24 V.I.C. § 37(b).

Bypassing Section 37(b), Andrews executed the subpoena under the federal statute, “29 U.S.C 667 [sic].” *See Subpoena Duces Tecum* dated February 12, 2018. However, Section 667 does not give Andrews the authority to issue a subpoena. For the reasons stated above, Section 37(b) is the correct governing statutory authority. Consequently, the subpoena was issued pursuant to the wrong governing authority. Ergo, the subpoena is unenforceable and will be quashed.

³ Virgin Islands Rule of Civil Procedure 45 applies to subpoenas issued by the court, an attorney or a court clerk after a case has been filed in furtherance of litigation. V.I. R. Civ. P. 45(a)(2) & (3). Consequently, Rule 45 does not govern an administrative subpoena issued by an administrative agency pursuant to a governing statutory authority in furtherance of an investigation. Since the procedure governing administrative subpoenas is not prescribed by the Virgin Islands Rule of Civil Procedure, the Court will rely on the Supreme Court of the Virgin Islands precedents and the Virgin Islands Code. V.I. R. Civ. P. 1-3.

CONCLUSION

Based on the foregoing analysis, the Petition will be denied, and the subpoena quashed. WAPA's occupational safety and health standards can be regulated by the VIDOSH. Andrews, the current Director of the VIDOSH with the rank as Assistant Commissioner has the authority to require the attendance and testimony of witnesses and the production of evidence under oath by issuing a subpoena that comports with Section 37(b). The Subpoena Duces Tecum dated February 12, 2018 was issued pursuant to "29 U.S. C 667 [sic]"—the incorrect governing statutory authority. Therefore, the subpoena cannot be enforced and shall be quashed. An Order consistent with this Memorandum Opinion follows.

DATED this 26 day of July, 2018.

ATTEST:

Estrella George
Clerk of the Court


HAROLD W. L. WILLOCKS
Administrative Judge of the Superior Court

By:


Deputy Clerk

Dated:

7/27/18