

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

FEB 07 2019

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on behalf
of JASON WYLIE,
Petitioner,

v.

ALLEGHENY MINERAL
CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. PENN 2018-0158-DM
MSHA No. NE MD 2018-01

Mine Name: Bison Mine
Mine ID: 36-10107

DECISION
and
REDACTION ORDER

Appearances: Jason Wylie, pro se, Bridgeville, Pennsylvania;
Oscar Hampton III, Regional Solicitor, Andrea Appel, Deputy of the
Regional Solicitor, Matthew Epstein, Esq., Office of the Solicitor,
Philadelphia, Pennsylvania for the Secretary of Labor;
Patrick Dennison, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania
for Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2) (the "Act"), by the Secretary of Labor ("the Secretary") on behalf of Jason Wylie against the Allegheny Mineral Corporation ("Allegheny"). Before me is a Settlement and General Release Agreement between Wylie and Allegheny that resolves all matters at issue with respect to Wylie's compensatory relief. This proceeding is limited to the issue of Wylie's entitlement to compensatory relief. Both Wylie and the Secretary remain as parties in this case until disposition of this matter through settlement or adjudication.¹ Due to the extraordinary circumstances of this case in which the Secretary continues to object to the propriety of Wylie's decision to settle, it is necessary to provide the procedural history in this matter.

The captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was initially assigned to Judge Paez. Order of Assignment, unpublished Order (April 5, 2018). During Judge Paez's consideration of this matter, on or about August 16, 2018, Judge Paez was

¹ Commission Rule 4(a) states, in pertinent part, "[i]n a proceeding instituted by the Secretary under section 105(c)(2) of the Act . . . the complainant on whose behalf the Secretary has filed the complaint is a party" 29 C.F.R. § 2700.4(a).

informed by the Secretary that the discrimination case brought by the Secretary on Wylie's behalf had settled. Second Amended Notice of Hearing, unpublished Order at 1 (Oct. 3, 2018) (ALJ Paez). However, Judge Paez was subsequently informed that the Secretary had withdrawn his settlement offer. *Id.* Judge Paez summarized his understanding of the rationale for the withdrawal by noting, “[a]lthough the case [had] settled in all other respects,” the Secretary subsequently withdrew his consent to the settlement agreement because “the Secretary object[ed] to a confidentiality agreement between Wylie and Allegheny Mineral Corporation that would keep confidential Wylie's back-pay settlement amount.” *Id.* (footnote omitted).

Shortly after the Secretary advised Judge Paez that the tentative settlement agreement resolving the issue of Wylie's compensatory relief had been withdrawn, Wylie communicated to the Commission his continuing desire to settle. Specifically, in an email dated September 28, 2018, Wylie advised the Commission:

This settlement proceedings [*sic*] is getting way out of control now. I agreed to a[n] amount [of compensatory relief] and now feel like it has stalled out to nothing. I have tried to move on but [it is getting] ridiculous. When I agreed to settle I was and am ready to move on but have yet to get anywhere as far as finalizing or receiving my settlement. I don't want to go to court and I just want to move on. *It has been long enough and for the [sic] MSHA to fight the court and without my settlement is absurd.* Thank you for reading my email I just want my thoughts on the matter known.

Allegheny's Resp. to Sec'y's Mot. to Recons., Ex. C at 1, (Nov. 5, 2018) (emphasis added).

This matter was reassigned to me from Judge Paez on October 11, 2018, after Judge Paez contemporaneously recused himself from further deliberations. Order Placing Documents Under Seal and Notice of Recusal, unpublished Order (Oct. 11, 2018) (ALJ Paez); Order of Reassignment to Judge Feldman, unpublished Order (Oct. 11, 2018).

Given Wylie's clearly expressed desire to settle, the captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was severed from the Secretary's civil penalty proceeding in the newly created Docket No. PENN 2018-0275. Severance Order 40 FMSHRC ___ Slip. op. at 4 (Oct. 23, 2018). The Severance Order noted that the captioned discrimination proceeding in Docket No. PENN 2018-0158-DM was solely limited to issues concerning the merits of Wylie's discrimination complaint and his claim for relief. *Id.*

The Secretary challenged the procedural basis for severance of the compensatory relief and civil penalty issues in a Motion for Reconsideration filed on October 26, 2018. *See* Sec'y's Mot. to Recons. Severance Order. The Secretary's Motion to Reconsider the October 23, 2018, Severance Order was denied on November 8, 2018. Order Denying the Sec'y's Mot. for Recons., 40 FMSHRC, ___ Slip op. at 3. The Secretary's motion was denied because severance was consistent with the Commission's Rules, the Federal Rules of Civil Procedure, and relevant Commission case law. *Id.* at 2-3. Specifically, Commission Rule 1(b) provides, in pertinent part: “on any procedural question not regulated by the Act . . . the Commission and its Judges

shall be guided so far as practicable by the Federal Rules of Civil Procedure” 29 C.F.R. § 2700.1(b). Rule 42 of the Federal Rules of Civil Procedure authorizes a judge to issue orders avoiding unnecessary delay or prejudice, or such orders that expedite and/or economize proceedings. Fed. R. Civ. P. 42(a)(3), 42(b).

With respect to case law, the Commission eschews prejudicing a complainant as a consequence of actions taken by the Secretary in a 105(c)(2) proceeding. *See Sec’y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986). Severance enables Wylie to expeditiously receive the identical compensatory relief that was tentatively accepted but subsequently withdrawn by the Secretary in August, 2018. Moreover, it is inexplicable that the impediment to Wylie’s timely receipt of compensatory relief has been based on the Secretary’s adamant refusal to accept confidentiality of settlement terms as a quid pro quo for settlement despite the Secretary’s history of routine acquiescence to confidentiality of settlement terms that resolved 105(c)(2) proceedings. *See, e.g., Secretary of Labor o/b/o Pedro Iglesias v. Titan Florida, LLC*, 39 FMSHRC 1678 (Aug. 2017) (ALJ); *Secretary of Labor o/b/o Jerry M. Caudill v. Leeco, Inc.*, 20 FMSHRC 532 (May 1998) (ALJ); *Secretary of Labor o/b/o Frank Scott v. Leeco, Inc.*, 18 FMSHRC 648 (April 1996) (ALJ); *Secretary of Labor o/b/o Danny Shepherd v. Adena Fuels, Inc.*, 15 FMSHRC 1438 (July 1993) (ALJ).

Finally, severance is consistent with the Commission’s decision in *Sec’y of Labor o/b/o Clemmie Callahan v. Hubb Corp.*, 20 FMSHRC 832 (Aug. 1998) (“*Callahan*”). In *Callahan* the Commission distinguished a discrimination complainant’s interest in resolving his complaint in a 105(c)(2) proceeding from the Secretary’s interest in establishing a violation of section 105(c) in a pertinent civil penalty proceeding. *See Callahan*, 20 FMSHRC at 837-39. In other words, Wylie’s settlement with Allegheny would not preclude the Secretary from prosecuting his civil penalty case. However, consistent with *Callahan*, Wylie does not need the Secretary’s approval to settle his discrimination claim. *Id.* Moreover, as a party in a 105(c)(2) proceeding, Wylie has an unfettered right to settle his discrimination case.

In support of his opposition to the severance, the Secretary asserts, contrary to Wylie’s September 28, 2018, email representations to the Commission, that Wylie “has embraced [the] desire to serve the broader public purpose of deterring future discrimination and does not want his to be the test case allowing the routine confidential resolution [of] discrimination cases.” Sec’y’s Mot. to Recons. Severance Order at 5 (Oct. 26, 2018). The Secretary’s portrayal of Wylie as a trailblazing miner who is committed to subordinating his receipt of significant compensatory relief to his purported “desire to serve the broader public purpose of deterring future discrimination” strains credulity. This is particularly so in view of the frustration expressed by Wylie in his September 28, 2018, email regarding the ‘absurdity’ of MSHA (the Secretary) interfering with his desire to settle.

In view of the questionable statements the Secretary has attributed to Wylie, it became clear that a telephone conference with Wylie, as well as with all attorneys of record, was necessary to ascertain Wylie’s wishes. *See Order Scheduling Prehr’s Tel. Conf.*, 41 FMSHRC ___ Slip op. (Jan. 9, 2018). Consequently, a recorded conference call was conducted on

January 22, 2019, to hear directly from Wylie whether he wished to accept the settlement terms proposed by Allegheny, or, whether he wished to pursue his discrimination claim at an evidentiary hearing.²

During the January 22, 2019, telephone conference, Wylie readily and without hesitation indicated he wished to agree to the settlement terms, including that the settlement terms remain confidential. Tr. 7-9. Wylie stated, “[a]t first the terms were fine” but he did not understand the “confidentiality thing.” Tr. 7. Consistent with his September 28, 2018, email, Wylie expressed his regret that “[i]t dragged on. I felt like I was pushed into a corner, but it is what it is. I’m going to be happy that we can all walk away from this as soon as possible, sir.” Tr. 11.

To place the divergent interests of Wylie and the Secretary in perspective, it is necessary to reconcile Wylie’s September 29, 2018, affidavit submitted to the Commission by the Secretary from Wylie’s repeated unequivocal statements made directly to the Commission concerning his interest in settlement. The Secretary acknowledges that he does not represent Wylie in this proceeding. Tr. 14. Nevertheless, Wylie’s affidavit was submitted as an exhibit to the Secretary’s opposition to the settlement motion for the purpose of demonstrating Wylie’s strong opposition to confidentiality. Sec’y’s Opp’n to Settlement Mot., Ex. A (Nov. 29, 2018). The affidavit is instructive for several reasons. For example, paragraph eight of the affidavit avers:

I understand and agree *with the concerns of the Secretary* that any resolution of this matter without public inclusion of the amount of back wages due makes it harder for miners to assert their rights in future Mine Act discrimination cases by decreasing awareness of successful enforcement actions.

Sec’y’s Opp’n to Settlement Mot., Ex. A at 4 (Nov. 29, 2018) (emphasis added).

Paragraph eight is revealing in two respects. First, it is apparent that the Secretary has been the driving force behind the demand for public disclosure, as the Secretary’s interest in public disclosure preceded Wylie’s. Second, the Secretary’s reliance on paragraph eight to evidence Wylie’s overriding concern for public disclosure is an apparent attempt to mask the Secretary’s self-serving interest in this unfortunate situation.³

² Transcript references to the January 22, 2019, telephone conference will be cited as “Tr.” followed by the page number.

³ As discussed herein, I am concerned about the Secretary’s efforts to act in Wylie’s best interests. For example, obviously administering the oath encourages truthfulness that is essential to the judicial process. Yet the Secretary objected to the fact that Wylie’s statements during the telephone conference would be given under oath based on the disconcerting claim that the swearing-in process is intimidating. Tr. 5. In fact, it is clear the Wylie did not feel intimidated, as he appeared to be relieved that he had the opportunity to “speak freely” during the conference call. Tr. 6, 7.

The Secretary also relies on paragraph seven of Wylie's affidavit that states that Wylie "understand[s] that [he] ha[s] the right to settle [his] claim for back wages regardless of whether the Secretary wishes to do so." *Id.* at 3. However, the extent of Wylie's understanding in this regard is suspect as there is no evidence that Wylie was aware that confidentiality terms have historically been agreed to by the Secretary in 105(c)(2) proceedings.

In attempting to insulate himself from Wylie's expressed frustrations regarding feeling "pushed into a corner" and Wylie's desire to extricate himself from his dilemma "as soon as possible," the Secretary provides a self-serving explanation that seeks to blame the Commission for Wylie's predicament:

[T]he most important thing that's occurred thus far is the statement by Mr. Wylie that he said he was pushed in the corner. There is absolutely no basis either in the current case law that has been promulgated by the Commission or any statutory promulgation by the United States Congress nor in the rules that allows a court *sua sponte* to impose a settlement on a complainant who is not represented. The Callahan case involves a complainant that was represented from the beginning of that litigation. Mr. Wylie does not have a lawyer as the court indicated in his initial comments to Mr. Wylie expressing the concern about Mr. Wylie being intimidated, and Mr. Wylie actually stating that he was somewhat intimidated by this process. The court has used its authority, I believe, inappropriately to get a settlement to force Mr. Wylie into a settlement.

Tr. 14.

The objections proffered on behalf of the Secretary during the telephone conference are noted. Suffice it to say, there is nothing in the procedural history of this matter to support the Secretary's claim that "the court has used its authority . . . to force Mr. Wylie into a settlement." *Id.* On the contrary, it is significant that, but for the issue of confidentiality, the Secretary previously agreed to identical settlement terms with respect to Wylie's compensatory relief as early as August 2018. Second Amended Notice of Hearing, unpublished Order at 1 (Oct. 3, 2018) (ALJ Paez). It is regrettable that Wylie has yet to receive his compensatory relief during this approximate six month intervening period. Finally, I am not aware of, nor has the Secretary cited, any case law that supports the proposition that the Commission disfavors confidentiality of settlement terms in discrimination cases brought pursuant to section 105(c) of the Act.

It is the initial November 6, 2017, Complaint Wylie filed with MSHA that serves as the predicate for this discrimination proceeding. Compl., Ex. A (Feb 23, 2018). As previously noted, as a party, Wylie has the right to settle his discrimination complaint. To hold otherwise would be inconsistent with the Commission's holding in *Callahan*. Placing the procedural history in this proceeding in perspective will be helpful in the event that the Secretary continues to believe that severing these matters is unjustified, or, that he is otherwise aggrieved by the approval of the subject settlement terms between Wylie and Allegheny.

ORDER

Consistent with Wylie's eagerness to accept the settlement terms, including confidentiality, expressed during the telephone conference, less than 24 hours after the telephone conference, Wylie provided the Commission with a signed copy of his Settlement and General Release Agreement with Allegheny on January 23, 2019. During the Conference call, counsel for Allegheny agreed that the performance of the terms of the settlement with respect to Wylie's compensatory relief would be completed within 30 days of the date of this Decision. Tr. 9.

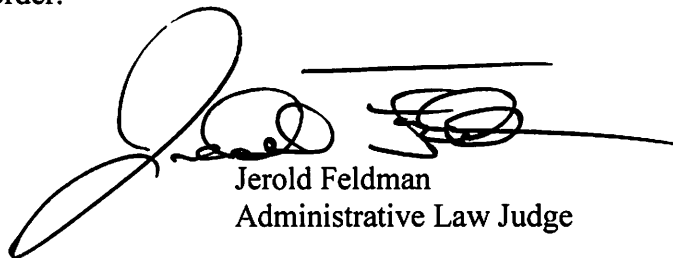
The subject settlement terms resolve all matters in issue with respect to Wylie's relief. Consequently, **IT IS ORDERED** that the Settlement and General Release Agreement between Allegheny and Wylie **IS APPROVED** and that Allegheny provide Wylie with the compensatory relief provided for in the settlement agreement within 30 days of the date of this Decision.

IT IS FURTHER ORDERED that upon confirmation of Wylie's timely receipt of his compensatory relief, the subject discrimination proceeding in Docket No. PENN 2018-0158-DM **SHALL BE DISMISSED**.

IT IS FURTHER ORDERED that unredacted copies of the settlement terms and the January 22, 2019, telephone conference transcript shall be placed under seal.

IT IS FURTHER ORDERED that a redacted copy of the January 22, 2019, telephone conference transcript deleting all references to the amount of Wylie's compensatory relief will not be sealed.⁴

Nothing herein shall preclude the Secretary from pursuing the civil penalty case in Docket No. PENN 2018-0275. In this regard, the Secretary has requested a hearing in the civil penalty matter in Docket No. PENN 2018-0275. The date and location of the hearing will be specified in a subsequent order.


Jerold Feldman
Administrative Law Judge

⁴ To preserve the pending issue of confidentiality, the parties were initially advised that the transcript of the telephone conference would be placed under seal. Order Scheduling Prehr's Tel. Conf., 41 FMSHRC ___ Slip op. at 2 (Jan 9, 2019). However, the parties were subsequently advised that a redacted copy that deletes all references to the amount of the agreed upon compensatory relief sufficiently preserves the issue of confidentiality, and thus would not be placed under seal. Tr. 3.

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