

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

NOV 08 2018

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

v.

ALLEGHENY MINERAL
CORPORATION,
Respondent.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

ALLEGHENY MINERAL
CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

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

Mine: Bison Mine
Mine ID: 36-10107

CIVIL PENALTY PROCEEDING

Docket No. PENN 2018-0275

Mine: Bison Mine
Mine ID: 36-10107

**ORDER DENYING SECRETARY'S MOTION
FOR RECONSIDERATION**

Before: Judge Feldman

These discrimination and civil penalty matters concern 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 "Mine Act" or "Act"), by the Secretary of Labor (the "Secretary") on behalf of Jason Wylie against the Allegheny Mineral Corporation ("Allegheny"). Before me is the Secretary's October 26, 2018, Motion to Reconsider the October 23, 2018, Severance Order. The Severance Order established and severed newly created Docket No. PENN 2018-0275 concerning the Secretary's civil penalty proceeding from Docket No. PENN 2018-0158-DM that is limited to issues concerning the merits of Wylie's discrimination complaint and his claim for relief. *Severance Order*, 40 FMSHRC ___ at 4, No. PENN 2018-0158-DM (Oct. 23, 2018). On November 5, 2018, Allegheny filed an opposition to the Secretary's request for reconsideration.

I. Discussion and Evaluation

The Severance Order is predicated on the Secretary's representation that the parties, including Wylie¹, had verbally agreed on settlement terms regarding both the relief to be awarded to Wylie and the amount of the civil penalty to be paid in this matter. However, the Secretary has, to date, prevented Wylie's receipt of his agreed upon monetary settlement relief by opposing Wylie's settlement terms solely on the basis of the Secretary's insistence that the amount of Wylie's relief must not be kept confidential.²

Wylie's desire to settle is well documented. In this regard, 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 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.

Resp. to Sec'y's Mot. to Reconsider, Ex. C at p. 1, (Nov. 5, 2018). Wylie's email was sent to Nicholas Desai, the law clerk of Judge Paez, who previously had been assigned to this case.

The Severance Order is consistent with the Commission's decisions in *Sec'y of Labor o/b/o Clemmie Callahan v. Hubb Corp.*, 20 FMSHRC 832 (Aug. 1998) ("Callahan"), and *Sec'y of Labor o/b/o Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986) ("Hale"). In *Callahan* the Commission distinguished a discrimination complainant's interest in settling 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. *Callahan*, 20 FMSHRC at 837-39. In other words, Wylie's

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 and may present additional information on his own behalf." 29 C.F.R. § 2700.4(a) (*emphasis added*).

² In the interest of clarifying this matter, Allegheny and Wylie's settlement terms only concern confidentiality with respect to the specific monetary amounts of Wylie's relief. This can be accomplished through a settlement motion that references an addendum containing the specific monetary terms of Wylie's relief, which will be placed under seal regardless of whether the Motion to Approve Settlement is ultimately granted or denied. The confidentiality of Wylie's monetary relief would not preclude posting that is commonly required by the Commission. Finally, while the amount of Wylie's relief may remain confidential, a decision approving settlement provides public notice of the disposition of Wylie's discrimination complaint.

settlement with Allegheny would not preclude the Secretary from prosecuting its civil penalty case.

Obviously, a miner should not be made worse off than he otherwise would have been because he is pursuing his rights in a 105(c)(2) proceeding brought by the Secretary rather than in a 105(c)(3) proceeding brought by the miner on his own behalf. *See Sec'y of Labor o/b/o Rieke v. Akzo Nobel Salt Inc.*, 19 FMSHRC 1254, 1259 (July 1997). In *Hale*, the Commission, in essence, noted that it eschews prejudicing a complainant as a consequence of actions taken by the Secretary in a 105(c)(2) proceeding. *See Hale*, 8 FMSHRC at 908. *Hale* concerned the Secretary's *inadvertent* late initiation of a 105(c)(2) discrimination proceeding on Hale's behalf. *Id.* In contrast, this matter concerns the detrimental delay in Wylie's receipt of the remedial relief that would presumably make Wylie whole that has been brought about by the Secretary's *conscious* litigation posture.

Finally, Commission Rule 1(b) provides, "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). As the Severance Order is consistent with both the Federal Rules of Civil Procedure and relevant Commission case law, **IT IS ORDERED** that the Secretary's Motion for Reconsideration of the Severance Order **IS DENIED**.

II. Procedural Framework

a. Discrimination Proceeding in PENN 2018-0158-DM

I construe Allegheny's opposition as reflecting a continuing interest in settlement. Consequently, Allegheny may wish to formally submit, in writing, a motion for approval of settlement that disposes of the issue of Wylie's relief. Any such motion must include the total amount of Wylie's monetary relief as well as an explanation of the calculation upon which the monetary relief is based.

Any settlement motion filed by Allegheny must be filed within 14 days of the date of this Order.³ Alternatively, if Allegheny is no longer interested in pursuing settlement of Wylie's relief, it should so advise within 14 days of the date of this Order. In such event, the discrimination and civil penalty matters will be scheduled for hearing.

Any opposition to Allegheny's settlement motion must be filed by the Secretary within 10 days thereafter. The opposition should specify why the remedial relief in the settlement motion is objectionable. The opposition should further specify the alternative relief sought. The Secretary should support any objection to the remedial relief contained in Allegheny's motion to approve settlement with a sworn affidavit by Wylie specifically stating the basis for his objection.

³ This Order supersedes the filing deadlines contained in the October 23, 2018, Severance Order.

Finally, Section 105(c)(2) of the Act authorizes the Commission to order such relief in a discrimination proceeding that “the Commission deems appropriate.” 30 U.S.C. § 815(c)(2). Consequently, any opposition filed by the Secretary should address whether the question of confidentiality is a judiciable issue rather than a matter committed to a Judge’s reasonable exercise of discretion.

b. Civil Penalty Proceeding in PENN 2018-0275

The Secretary has proposed a civil penalty of \$30,000.00 for Allegheny’s alleged violation of section 105(c)(1) of the act.⁴ 30 U.S.C. § 815(c)(1). Allegheny and the Secretary apparently previously had reached an informal settlement agreement with respect to the civil penalty to be imposed. If the parties continue to agree on this matter, a motion for approval of settlement must be submitted within 14 days of the date of this Order.

If Allegheny and Wylie agree to settlement terms with respect to relief, but Allegheny and the Secretary cannot agree on the issue of civil penalty, the civil penalty matter will be scheduled for adjudication. Any agreement between Allegheny and Wylie, in essence, constitutes Allegheny’s withdrawal of its contest of the fact of the violation of section 105(c)(1) that can be considered solely for the purposes of any relevant proceedings subsequently brought under the Mine Act. Consequently, any adjudication under such circumstances would be strictly limited to the issue of the appropriate civil penalty.⁵

⁴ Section 105(c)(1) provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... in any ... mine subject to this Act because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the ... mine of an alleged danger or safety or health violation in a ... mine, ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

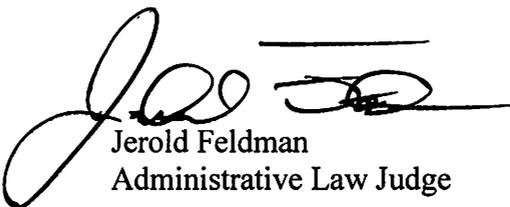
30 U.S.C. § 815(c)(1)

⁵ In *Callahan*, the 105(c)(2) complainant sought dismissal after admitting on the record that “there has been no violation of section [105(c)(1)] of the [A]ct[.]” 20 FMSHRC at 844. Callahan’s admission of no violation did not preclude the Secretary from litigating the fact of the violation is a separate civil penalty proceeding. Unlike *Callahan*, any settlement with respect to Wylie’s relief would remove the fact of the violation as an outstanding issue.

The Commission long ago noted that it is not bound by the method of computation utilized by the Secretary to arrive at his proposed civil penalty. *Sec'y of Labor v. Co-Op Mining Co.*, 2 FMSHRC 784, 785 (April 1980). Thus, the authority of the Commission to assess civil penalties *de novo* for 105(c)(1) violations of the Act is well established. *Sec'y of Labor v. Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). An issue in the civil penalty adjudication is whether the Secretary has abused his discretion by unreasonably delaying Wylie's receipt of relief in contravention of the remedial goals of the antidiscrimination provisions of section 105(c) of the Act. If so, the dispositive question is whether such delay should be considered as an aggravating factor that warrants a reduction in the Secretary's proposed civil penalty.

Finally, the record amply reflects the issues in this case. Enough is enough. Consequently, the Secretary's November 6, 2018, reply to Allegheny's response to the Secretary's motion for reconsideration, and any response by Allegheny thereto, have not been authorized and will be given no consideration.

Any procedural questions concerning the matters discussed herein should be directed to my Law Clerk, Noah Meyer, at nmeyer@fmshrc.gov or (202) 233-4010.



Jerold Feldman
Administrative Law Judge

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