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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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AUG 29 2014

MARSHALL J. JUSTICE,	:	DISCRIMINATION PROCEEDING:
Complainant,	:	
	:	Docket No. WEVA 2014-559-D
v.	:	MSHA Case No. PINE-CD 2014-01
	:	
	:	
GATEWAY EAGLE COAL CO.,	:	Mine: Farley Eagle Mine
Respondent.	:	Mine ID: 46-01537
	:	
	:	

REQUEST FOR ENFORCEMENT OF SUBPOENA

Pursuant to Commission Rule 60(e), 29 C.F.R., 2700.60(e), the undersigned requests the Commission's General Counsel to undertake proceedings in the appropriate district court of the United States to enforce the subpoena issued by undersigned on July 11, 2014 (Exh. A). The undersigned further requests enforcement be limited to the Memoranda of Interview of Mine Safety and Health Administration Inspectors Steve Hall and Robert Puckett and related documents. The undersigned's request is made pursuant to the undersigned granting the Contestant's Renewed Motion to Enforce Subpoena (August 28, 2014) (Exh. C). Order Granting Complainant's Renewed Motion to Enforce Subpoena (August 29, 2014) (Exh. B). The Contestant's renewed motion was filed following his receipt of the Secretary's Response to Corrected Order Requiring the Secretary to Produce Documents for *In Camera* Review (August 28, 2014) (Exh. D). In the response, the Secretary declined to produce documents as ordered by the undersigned in his Corrected Order Requiring the Secretary to Produce Documents for *In Camera* Review (August 22, 2014) (Exh. E). The Corrected Order was issued upon consideration of the Complainant's Motion to Enforce Subpoena (August 11, 2014) (Exh. F). As explained in the Order Granting Complainant's Renewed Motion to Enforce Subpoena (Exh. B), it is the belief of the undersigned that enforcement of the subpoena is necessary to effectuate the Complainant's right to a full and fair hearing under Section 105(c)(3) of the Mine Act. 30 U.S.C. §115(c)(3).

David F. Barbour
David F. Barbour
Administrative Law Judge

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**ORDER GRANTING RENEWED MOTION TO ENFORCE SUBPOENA
AND
ORDER DENYING MOTION FOR LIMITED CONTINUANCE**

On August 22, 2014, the undersigned ordered the Secretary of Labor (Secretary) to produce for the undersigned's *in camera* review unredacted copies of the complete Memoranda of Interview (MOI) of Mine Safety and Health Administration Inspectors Steve Hall and Robert Pluckett and all related documents. Corrected Order Requiring the Secretary To Produce Documents for *In Camera* Review and Corrected Order Deferring Ruling On Complainant's Motion to Enforce Subpoena 6 (August 22, 2104) ("Corrected Order"). The undersigned also ordered the Secretary to submit a statement detailing the privileges, if any, he asserts apply to the documents and to specifically identify the parts of the documents to which the privileges apply. *Id.* The order is the result of counsel for the Complainant's Motion to Enforce Subpoena, filed with the Commission on August 11, 2014, and conferenced telephone discussions with the parties and counsel for the Secretary during which counsel for the Complainant considerably narrowed the scope of the subpoena by eliminating a witness and restricting the materials he is seeking. The undersigned concluded that under the subpoena as narrowed, counsel for the Complainant is seeking relevant, discoverable material. Corrected Order 5. The undersigned also concluded that in order to weigh the validity of counsel for the Secretary's privilege claims, if any, *in camera* review by the undersigned is required. Therefore, the undersigned deemed ruling on counsel for the Complainant's motion to enforce the subpoena to be premature, and the undersigned defer ruling on the motion until after the Secretary responded to the undersigned's order of *in camera* review. *Id.* 6. On August 27, 2014, the Secretary responded by declining to comply with the undersigned's order.¹ Sec's Response To Corrected Ord. Requiring the Sec. To Produce Doc's. for *In Camera* Review ("Sec's Response"). The Secretary maintains the proper venue for resolving the discovery issue is not the Commission, but rather is the federal district court where the Complainant must press his claims under FOIA and the Privacy Act. Sec's Resp. 5.

¹ An amended response containing slight, non-substantive edits of the initial response was filed the following day.

On August 28, 2014, counsel for the Complainant renewed his motion to enforce the subpoena and asked for a limited continuance while his right to access the requested material is resolved. Compl't's Renewed Mot. 2.

RULING²

I. The Subpoena

The undersigned will grant the Complaint's renewed motion as it pertains to enforcement of the subpoena. Clearly, the Secretary and the undersigned are at loggerheads. They have reached a point – albeit respectfully – where their views on the question of the Secretary's duty to comply with the subpoena are so fundamentally at odds, the only way they can be resolved is by the Commission dropping the matter or by it seeking enforcement of the subpoena in federal district court. As the undersigned stated in his Corrected Order, nothing less than the right of a section 105(c)(3) complainant to a fair and expeditious hearing on his or her complaint is at stake. Order 5-6. If the Secretary's view prevails, such a complainant when seeking relevant, discoverable material resulting from the Secretary's investigation will be relegated to the long and arduous process of obtaining the information via a FOIA request, a request that almost certainly will be followed, as it has been in this case, by a protracted proceeding in federal district court. This is not how Congress envisioned section 105(c)(3) to work. Congress intended section 105(c) to provide an expeditious avenue for relief to miners who suffered discrimination, and it delegated to the Secretary the duty to rigorously and promptly enforce miners' rights in this regard. Implicitly recognizing that the Secretary is not infallible, Congress further provided that when, after investigating the matter, the Secretary concluded discrimination had not occurred, a miner might proceed on his or her own behalf under section 105(c)(3). While not a party to a section 105(c)(3) proceeding, the Secretary remains, as Judge Manning put it, "inexorably tied" to the case. *Hazel Olson v. Triton Coal Co.*, 25 FMSHRC 649, 654 (Oct. 2003) (Order Requiring The Secretary of Labor to Produce Documents for *In Camera* Review). This is because the Secretary's investigation of the miner's complaint is a necessary predicate to a section 105(c)(3) proceeding, and because should the miner prevail on his own, the Secretary must initiate a civil penalty against the respondent company to deter future discriminatory conduct. Thus, the Secretary has an interest in, and a duty to effectuate all of, section 105(c), not just conveniently selected parts. The undersigned regretfully concludes that the Secretary, with his FOIA and Privacy Act arguments and his refusal to comply with the undersigned's order, is at best myopic to both his section 105(c) duties and to the Complaint's rights under the Mine Act.³

² Given the immediacy of the problem, the undersigned is ruling on the Complainant's renewed motion without waiting for the Secretary's response.

³ The undersigned notes that Judge Manning rejected similar FOIA and Privacy Act arguments put forward by the Secretary and rightly noted that, "Commission administrative law judges have independent authority to require the production of documents in cases before them." *Hazel Olson*, 23 FMSHRC 649 at 655.

To recall the Secretary to his Mine Act duties and to effectuate the Compl't's Mine Act rights, the undersigned believes he has no choice but to grant the Complainant's renewed motion and to request the Commission's General Counsel to initiate proceedings in the appropriate district court of the United States for enforcement of the subject subpoena. 29 C.F.R. § 2700.60(e).

II. The Continuance

Complainant requests a "limited continuance."⁴ Compl't's Renewed Mot. 2. Complainant cites a "lack of clarity around the unresolved dispute over the subpoena" and "ongoing, good faith settlement discussions." *Id.* In his Corrected Order the undersigned anticipated such a request and advised the parties he would not continue the matter. He noted that the proceeding had been continued once previously and that waiting for the subpoena dispute to be resolved will likely be akin to Waiting for Godot. Corrected Order 3. The undersigned stated that rather than close the record at the end of the hearing, he will almost surely leave it open until the dispute is finally decided or until otherwise advised by the parties, at which point, with the assistance of the parties, he will determine what other action, if any, is necessary. *Id.* 3-4.

The undersigned also notes that the parties have been engaged in settlement discussions for several months. The discussions have yet to yield an agreement. It seems unlikely that additional time will produce a different result.

For these reasons, the Complainant's request for a limited continuance is **DENIED**. The hearing will convene as scheduled at 8:30 a.m., on Wednesday, September 3, in Madison, West Virginia.


David Barbour
Administrative Law Judge

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⁴ Complainant states that Gateway has no objection to the request (Compl't's Renewed Mot. 2) and in an e-mail to the undersigned, counsel for Gateway affirms Complainant's representation.

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