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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

ON BEHALF OF EUGENE MARSHALL,
APPLICANT

v.

CLINCHFIELD COAL COMPANY,
RESPONDENT

Complaint of Discrimination

Docket No. VA 79-64-D
(CD 78-268)

McClure No. 2 Mine

RULING ON MOTION AND ORDER OF DISMISSAL

This is a discrimination complaint filed by the Secretary on behalf of Eugene Marshall, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. By order dated August 3, 1979, the parties were placed on notice that this matter was scheduled for hearing on October 10, 1979. The record shows that all parties, including the Applicant, Mr. Marshall, were served in a timely manner with this notification of hearing (Footnote 1). Thereafter, on September 7, 1979, at a telephone conference in which counsel for both parties participated, the Secretary's motion to continue the hearing date was granted and, as counsel for the parties were then advised, the hearing was rescheduled to begin on October 23, 1979. The parties were again advised of this date by my order dated September 21, 1979. A copy of this order was sent by certified mail to all the parties. The copy sent to Mr. Marshall was returned, stamped by the Postal Service "Moved, left no address." A copy of a subsequent order issued on October 5, and sent to Mr. Marshall by certified mail was also returned by the Postal Service stamped "Moved, left no address."

On October 12, the Secretary filed with the undersigned a copy of a letter dated October 10, addressed to Mr. Marshall in which the Secretary outlines in detail his unsuccessful efforts to make contact with Mr. Marshall from September 6 until the date of the letter.

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Also, in that letter the Secretary advised Mr. Marshall that if he did not make contact with the Solicitor's Philadelphia Office by a certain date, a motion would be filed requesting that the proceeding be dismissed.

On October 19, 1979, the Secretary filed such a motion. Therein, the Secretary requests that the proceeding be dismissed without prejudice. As grounds for the proposed action, the motion states:

a. Applicant's undersigned trial attorney has been attempting since September 6, 1979 on an almost daily basis, to contact the complainant in this case, Eugene Marshall. He has made in excess of 20 telephone calls to Mr. Marshall's home phone, which is not being answered. He has contacted District 28 of the United Mine Workers of America, Mr. Marshall's local post office, and miners at Respondent's McClure No. 2 mine. No one knows of Mr. Marshall's whereabouts. In addition, further investigation by MSHA has failed to disclose Mr. Marshall's whereabouts.

b. Without the testimony of Mr. Marshall, Applicant can make no prima facie showing of discrimination.

c. On October 10, 1979 Applicant's attorney mailed a letter to Mr. Marshall's home address informing him that his case would be dismissed unless he contacted the office of the undersigned attorneys.

d. On October 12, 1979 the letter was returned to the office of the undersigned attorneys as undeliverable because Mr. Marshall had moved, yet had provided no forwarding address to his post office. [A copy of the envelope containing that letter was attached to the motion as Exhibit 1.]

e. As of October 17, 1979, Mr. Marshall has provided no forwarding address to his post office, and has informed no official of District 28 and, to Petitioner's knowledge, no employee of the McClure No. 2 Mine of his whereabouts.

Thereafter, on October 29, 1979, Respondent filed a response to the Secretary's motion in which it simply requests that Mr. Marshall's complaint be dismissed with prejudice. Respondent does not advance any argument in support of its request.

ORDER

From a review of the record and filings in this proceeding, it is apparent that the Secretary has expended considerable effort in pursuing this action on Mr. Marshall's behalf. It is equally apparent that the Respondent has expended a considerable effort in

