CCASE:
SOL (MSHA) V. HARLAN FUEL
DDATE:
19800926
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) ON BEHALF OF: BURL JOHNSON, APPLICANT	Review of Application for Temporary Reinstatement Docket Nos. KENT 80-328-D BARB CD 80-24 Smith No. 12 Mine

v.

HARLAN FUEL COMPANY,
RESPONDENT

DECISION

Appearances: Thomas Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant Eugene F. Fidell, Esq., and F. Frank Lyman, Esq., LeBoeuf, Lamb, Leiby & MacRae, Washington, D.C., for Respondent

Before: Judge Melick

This case is before me pursuant to Commission Rule 44, 29 C.F.R. 2700.44,(FOOTNOTE 1) upon a request for hearing effectively filed by the Harlan Fuel Company (Harlan) on August 26, 1980, on the Order of Temporary Reinstatement issued by Chief Administrative Law Judge James A. Broderick.(FOOTNOTE 2) A timely hearing was held in Abingdon,

Virginia, on September 2, 1980, at which the parties appeared and presented evidence. The sole issue before me is whether the Secretary's finding in this case (that the complaint of discrimination, discharge or interference filed by Burl Johnson was not frivolously brought) was arbitarily or capriciously made. Footnote1, supra. Whether or not there was in fact a violation of the anti-discrimination provisions of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq., hereinafter the "Act") is clearly not an issue at this time. Preliminary hearings under Rule 44(a) are thus similar in nature to preliminary hearings in criminal matters wherein a possible abuse of government power may be prevented through the early intervention of a judicial officer who makes only an interim determination of whether the government has a prima facie case. Rule 5, Federal Rules of Criminal Procedure, 8 Moore's Federal Practice, Ch. 5.1. Under Rule 44(a) the function of the administrative law judge is similarly to prevent an abuse of government power by making an interim determination at an early date as to whether the Secretary's finding (that the complaint of discrimination was not frivolously brought) was arbitrarily or capriciously made.

Since the evidence necessary for reaching a decision on this issue is by its very nature peculiarly within the possession of the Secretary I ordered the production of, over the Secretary's objection, the information and data used by the Secretary in making his decision to apply for the temporary reinstatement of Mr. Johnson. In light of the Secretary's objection that the entire file was privileged under Commission Rule 59 (29 C.F.R. 2700.59),(FOOTNOTE 3) I first examined that file in camera. I thereafter ordered photocopies of those portions of the file that I found not to violate Commission Rule 59 to be released to the operator and admitted into evidence. I ordered photocopies of the remainder of the file to be sealed and not to be opened except by order of the Commission or court having jurisdiction for its examination on any appeal that might be taken.

The disclosed evidence consisted primarily of statements made by the two miners alleging unlawful discharge, and by their foreman. The statements of the miners are consistent and suggest that the complainant's discharge was the direct result of his refusal to work under unsafe roof conditions. Sufficient facts are alleged that, if true, could constitute a violation of section 105(c)(1) of the Act. While the statement of the mine foreman indicates, not surprisingly, a differing view of the events it only points out that issues of fact and credibility may have to be resolved at a later hearing, on the merits of the complaint. These are not however issues that can be finally resolved at this preliminary hearing and so long as there is some evidence which reasonably tends to show that the Secretary's finding was not arbitrarily or capriciously made then that finding will be upheld.

In presenting its case Harlan submitted copies of reports completed by an MSHA inspector based on his apparent inspection of the safety violations cited by Mr. Johnson as a basis for his discrimination complaint.(FOOTNOTE 4) According to the MSHA inspector no "imminent danger" existed at the time of his inspection. This evidence was not included in the report given to those MSHA officials who made the decision on behalf of the Secretary to file the application for temporary reinstatement. The evidence was admitted as possibly reflecting upon the issue of whether the Secretary's finding was arbitrarily or capriciously made. I gave little weight to that evidence, however, since it was never clarified that the area examined by the MSHA inspector was precisely the same area that was complained of by Johnson and since the operator conceded that additional roof support had been added and other action taken after Johnson's complaint and before the MSHA inspection.

"Arbitrary and capricious" is a characterization of a decision or action taken by an administrative agency that is willful and unreasonable and taken without consideration of, or in disregard of, facts or without determining principle. Black's Law Dictionary, 5th edition. "Frivolous" means of little weight or importance. A pleading is frivolous when it is clearly insufficient on its face * * * and is presumably interposed for mere purposes of delay or to embarrass the opponent. Black's Law Dictionary, supra. I find that these definitions appropriately reflect the meaning of the terms as used in Commission Rule 44. Within this framework, it is clear that the Secretary's finding (that the complaint of discrimination brought by Burl Johnson was not frivolously brought) was not arbitrary or capricious. That finding was not unreasonable nor can it be said that it was taken without consideration of, or in disregard of, the factual evidence or without determining principle. There is ample

evidence in the record, excluding the privileged evidence not disclosed, to support this conclusion. Therefore, the Order of Temporary Reinstatement issued by Judge Broderick on August 26, 1980, is continued in effect. My bench decision to that effect rendered September 2, 1980, is therefore affirmed.

Gary Melick
Administrative Law Judge

~FOOTNOTE_ONE
1 29 C.F.R. 2700.44(a) provides in substance as follows:
"An application for reinstatement shall state the Secretary's finding that the complaint of discrimination, discharge or interference was not frivolously brought and the basis for his finding. The application shall be immediately examined, and, unless it is determined from the face of the application that the Secretary's finding was arbitrarily or capriciously made, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon issuance. If the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made. The Judge may then dissolve, modify or continue the order."

~FOOTNOTE_TWO
2 Since Judge Broderick's Order of Temporary Reinstatement was not issued until August 26, 1980, I find that the premature request for hearing, received by the Commission on August 25, 1980, was effectively filed on August 26, 1980.

~FOOTNOTE_THREE
3 29 C.F.R. 2700.59 provides as here relevant that "ÕaÊ Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner."

~FOOTNOTE_FOUR
4 At hearing, Harlan also requested that counsel for MSHA, Mr. Piliero, be subpoened to testify inasmuch as Mr. Piliero was admittedly one of the authorized representatives of the Secretary who took part in the final decision to apply for temporary reinstatement. It also requested at hearing that subpoenas be issued to other persons in MSHA who took part in that final decision. Upon the Secretary's motion to quash and based on the inability of Harlan to proffer any relevant area of inquiry to present to these witnesses, I granted the motion to quash. 29 C.F.R. 2700.58(c). I also found that the request for subpoenas was untimely and that Mr. Piliero would be unable at that stage of the case to withdraw as trial counsel and obtain alternate counsel to represent MSHA. I observe, however, that under the ABA, Code of Professional Responsibility, DR 5-101 and DR 5-102, a lawyer who is a potential witness to a proceeding should withdraw from the case. MSHA should be on notice that the

testimony of persons making the decision to apply for reinstatement might in an appropriate case become relevant in a temporary reinstatement hearing and it should act accordingly in selecting trial counsel in such cases.