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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
EX REL. THOMAS C. WHITE,
COMPLAINANT
v.

VALLEY CAMP COAL COMPANY,
RESPONDENT

Complaint of Discharge,
Discrimination, or Interference

Docket No. WEVA 81-71-D
Docket No. HOPE CD 80-71

No. 15-A Mine

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Complainant;
Robert S. Stubbs, Esq., Jackson, Kelly, Holt & O'Farrell, Charleston, West Virginia, for Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor on behalf of Thomas C. White pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 801 et seq., the "Act," alleging that Mr. White was unlawfully discharged by the Valley Camp Coal Company (Valley Camp). An evidentiary hearing was held on February 10, 1981, in Charleston, West Virginia.

The specific issue in this case is whether Mr. White was unlawfully discharged by Valley Camp under section 105(c)(1) of the Act because of his safety-related activities at Valley Camp's No. 15-A Mine. Section 105(c)(1) reads in part as follows:

> No person shall discharge or in any other manner discriminate against * * * or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners * * * because such miner [or] representative of miners * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the

operator's agent * * * of an alleged danger or safety or health violation in a coal or other mine * * * or because of the exercise by such miner [or] representative of miners * * * on behalf of himself or others of any statutory right afforded by this Act.

If the Complainant proves by a preponderance of the evidence that he was engaged in a protected activity and that his discharge by the operator was motivated in any part by the protected activity then he has established a prima facie case under this section of the Act. Secretary ex rel. Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (October 1980). For the reasons set forth below, I find that Mr. White has indeed established such a case here.

Before his discharge on June 19, 1980, White was employed at the Valley Camp No. 15-A Mine as a beltman and was chairman of the union mine committee and the union health and safety committee. White was subsequently reinstated to his job with back pay as the result of an arbitration decision rendered August 18, 1980. White here seeks only a finding that he was unlawfully discharged for engaging in activities protected by section 105(c)(1) of the Act, and an order that his employment records be expunged of any reference to that discharge. (FOOTNOTE.1)

It is undisputed that White had, over an extended period of time, engaged in various activities which are clearly protected under section 105(c)(1). More particularly, Valley Camp concedes that White had "actively and vigorously enforced health and safety rights" and had always been active in reporting safety violations to the company and to state and Federal authorities. The last of these protected activities occurred on June 18, 1980. On the morning of that date, White was directed by Jeff Schoebel, the general mine superintendent, to replace certain roof bolts to correct a deficiency previously discovered by an MSHA inspector. White later decided that it was unsafe for him to work at the task without assistance. He telephoned outside the mine, reaching assistant superintendent Ray Lyons. He told Lyons on his safety concerns and requested alternate work. Lyons complied with the request but on the next day gave White a notice of suspension-with-intent-to-discharge.

While conceding that White had engaged in these protected activities, Valley Camp argues that its discharge of White was not motivated in any part

by these activities but rather was the direct result of its enforcement of a longstanding absenteeism policy. I conclude, however, that White's discharge was indeed motivated at least in part by his protected activities. In reaching this conclusion I have necessarily relied upon circumstantial considerations. One consideration is the close proximity in time between White's last protected activity and his discharge. He refused to perform work because of allegedly unsafe conditions on June 18, 1980, and was discharged early the next day. Another consideration is the evidence of threats and expressions by mine management of ill-will toward White because of his safety-related activities. It is uncontradicted that mine superintendent John Necessary had told White in early 1980 following a dispute over the abatement of an alleged safety violation that he did nothing but cause the company trouble. It is also undisputed that around April 1980, following another argument over safety conditions in the mine, Necessary threatened to fire White and to bar him from future employment in the coal industry. Around the same time, mine foreman James Lucas threatened physical injury to White after White had demanded safety chains for a mantrip. While it is true that Ray Lyons, the official who actually made the final decision to discharge White, was not among those to whom these remarks have been attributed, there is no doubt that he was subject to the influence of a clearly pervasive management attitude toward White's safety activities.

The final consideration supporting my conclusion is the assertion by Valley Camp of what I find to have been a flimsy pretext for its discharge of White, i.e., an alleged violation of a purported absentee policy. Valley Camp's own evidence shows that while this so-called absentee policy had been in effect for as long as 10 years, until 1980 no one had ever been discharged under it. Moreover, it was not a written policy and the unwritten policy, which ostensibly had been reannounced to all employees at a December 10, 1979, safety meeting, was subject to widely varying interpretations even among management.2 According to Assistant Superintendent Lyons, the policy consisted of four steps. First, if an employee were absent for 2 days within a 30-day period without medical excuse he would receive a verbal warning. Second, after two similar absences (for 2 days without medical excuse) in any subsequent 30 days, the employee would receive a written warning. After a third similar infraction, the employee would receive a 3- or 5-day suspension. After a fourth similar infraction, the employee would be discharged. According to Mine Foreman Lucas, on the other hand, it was only a three-step process and infractions other than unexcused absences could also be considered. Finally, according to statements attributed by Harold Knight, one of Valley Camp's witnesses, to superintendent John Necessary, management never intended in any event to uniformly enforce the policy that was announced to employees on December 10. I conclude from this evidence that indeed Valley Camp never had any single uniformly enforced absentee policy but rather had many policies loosely interpreted by each official and which could be arbitrarily invoked at their convenience to mask unlawful motivation for personnel action.

Even assuming, arguendo, that the four-step "policy" described by Ray Lyons was indeed invoked against White as alleged by Valley Camp, I find that it was an erroneous invocation because Valley Camp considered as the first step a violation that predated the announcement of the policy. According to Valley Camp, White received the first warning from Superintendent Necessary on December 3, 1979, but Valley Camp did not announce to employees that the policy was going to be enforced until the December 10, 1979, safety meeting. The newly announced policy was admittedly to be enforced only prospectively after that date. Within this framework of evidence I conclude that White had at most only three infractions under the program. Valley Camp's discharge of White under a four-step policy was therefore unwarranted. Under all the circumstances I conclude that the alleged invocation of such an absentee policy was indeed only a thinly disguised pretext for the discharge of White. I am accordingly persuaded that White's discharge was motivated by his protected safety-related activities.

It is apparent from the foregoing discussion that Valley Camp's alternative argument must also fail. It claimed that even assuming part of its motive for discharging White was unlawful, it was also motivated by White's unprotected violation of its absentee policy and that it would have discharged White in any event for his violation of that policy. Pasula, supra at page 2800; Secretary ex rel. Robinette v. United Castle Coal Company, 2 FMSHRC %y(3)6D (April 3, 1981). As the Commission said in Pasula, supra, on these issues the employer must bear the ultimate burden of persuasion. The employer must show that it did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. Inasmuch as I have concluded that Valley Camp did not during relevant times have in effect any clear, nondiscriminatory absentee policy and that even assuming that it had such a policy and that policy was the one invoked against White, that it was not properly invoked, it follows that Valley Camp has not met this burden of persuasion. I therefore conclude that Mr. White was discharged in violation of the provisions of section 105(c)(1) of the Act.

ORDER

It is ORDERED that Respondent expunge from its employment records any reference to its discharge of Thomas C. White on June 9, 1980.

Gary Melick
Administrative Law Judge

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~FOOTNOTE_ONE

The Secretary of Labor also petitions in this case on its own behalf for an order assessing a civil penalty against Valley Camp for violations of section 105(c) of the Act. The Secretary withdrew this request at hearing acknowledging that the operator

had not been given its rights pursuant to 30 C.F.R. Part 100. Valley Camp agreed however, to permit the introduction of evidence in the instant case regarding penalty criteria under section 110(i) of the Act and to waive its right to a subsequent hearing should any penalty be proposed and to allow the administrative law judge to render a decision in any subsequent penalty case arising before the Commission based on the record in this proceeding.

~FOOTNOTE_TWO

A written absentee policy was subsequently issued on September 15, 1980.