FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 4, 1991

BRENT ROBERTS, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 91-896-R Cassette Nos. 46295881, et al.
	:	Peabody Coal Company
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID 15-02709 Camp No. 1 Mine

DECISION

Appearances: Michael T. Heenan, Esq., Lynn M. Rausch, Esq., Smith, Heenan and Althen, Washington, D. C. for the Contestant: James Crawford, Esq., Robert C. Snashall, Jr., Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Respondent.

Before: Judge Merlin

This case is a notice of contest filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), (hereafter referred to as the "Act" or "Mine Act") seeking to challenge a proposed revocation of contestant's status as a person certified by the Secretary of Labor to take respirable dust samples. The Secretary has filed a motion to dismiss accompanied by a supporting brief and contestant has filed a brief in opposition. Oral argument was heard on August 22, 1991.

The Act requires each mine Operator to continuously maintain an average concentration of respirable dust in the mines at or below prescribed limits. 30 U.S.C. § 842(b), 30 C.F.R. § 70.100. Operators must take accurate dust samples and submit them to the Secretary for analysis. 30 U.S.C. § 842(a), 30 C.F.R. § 70.201-70.210. Respirable dust sampling can only be done by a person who has passed a test on sampling given by the Mine Safety and Health Administration (hereafter referred to as "MSHA") and who has been certified by the Secretary to take the required dust samples. 30 C.F.R. § 70.2(c) and 30 C.F.R. § 70.202(a) and (b); 30 C.F.R. § 71.2(c) and § 71.202(a) and (b); and 30 C.F.R. § 90.2 and § 90.202(a) and (b).

Contestant in the present matter is a person certified by the Secretary to take dust samples in accordance with the procedures outlined above. On April 18, 1991, MSHA wrote contestant that information gathered during an investigation showed that he

failed to properly collect or ensure proper collection of respirable dust samples. Attached to the letter was a list of cassettes where samples allegedly were collected by contestant and the weight of the dust sample allegedly had been altered as indicated by abnormal white centers. The letter advised that MSHA was proposing to revoke contestant's certification to collect respirable dust samples and, if applicable, his certification to maintain and calibrate respirable dust sampling devices. Contestant was given 30 days to provide any information he believed might affect the proposed decision to revoke.

On May 15, 1991, the instant action was filed. But, on May 20, 1991, MSHA again wrote contestant stating that MSHA only needed to know if he intended to contest the revocation. Contestant was given 60 days to advise whether he intended to contest the revocation and was told that in the meantime within 30 days MSHA would send him information on procedures to be followed for certification revocation.

At this point it must be noted that on April 4, 1991, the Secretary issued 4,710 citations under section 104(a) of the Act, 30 U.S.C. § 814(a), to 508 mine operators involving 874 mines, alleging violations of 30 C.F.R. § 70.209(b), 71.209(b) and 90.209(b), on the ground that the weight of respirable dust cassettes submitted by operators to fulfill the sampling requirements had been altered and that a portion of the dust in the filters had been removed. Operators have filed more than 3,000 notices of contest with the Commission under section 105(d) challenging these citations. These cases, *now* pending before *an* administrative law judge of this Commission, are in the early stages of discovery. In re: Contests of Respirable Dust Sample Iteration citations, (Master Docket No. 91-1). However, apparently because of a plea bargain with the United States Attorney in criminal proceedings no citations were issued to contestant's operator regarding contestant's cassettes and therefore, there are no operator notices of contest with respect to them. (Hearing Transcript, pp. 27-28).

Most recently, on June 27, 1991, MSHA wrote contestant's counsel to advise that MSHA had determined to stay all pending revocation proceedings. MSHA's letter referred to the notices of contest filed by operators and further stated that there were several active criminal investigations involving abnormal white centers although no specific cases were identified. According to the letter the stay would remain in effect until further notice, but individual cases might be activated. Contestant was told that if the stay was lifted in his case he would be given 60 days to respond and revocation procedures would be given to him at that time.

The sequence of MSHA's letters to contestant demonstrates a retreat from the taking of immediate action against him. However, this in no way means that the Secretary has ceased activities of potential harm to contestant. The reference in the June 27 letter to the ongoing notices of contest filed by operators (Master Docket No. 91-1) is an acknowledgment that at the very least, issues and matters of general application arising in those contests may well be relevant to the continued status of contestant as a certified person.[1] As already noted, no citations were issued to contestant's operator, and no operator initiated contests exist with respect to his cassettes. Therefore, contestant would appear to be a stranger to the 3,000 operator suits. If contestant cannot take part in those contests, at some point the question will arise how he can be bound by any of the findings and conclusions reached therein. Also, of concern is how contestant could be affected by the plea bargain between his operator and the Government regarding his cassettes. Martin v. Wilks, 490 U.S. 755, 761-762 (1989); Gilbert v. Ben-Asher, 900 F.2d 1407, 1410 (9th Cir. 1990). In general, one would expect every effort would be made to avoid duplicative litigation, particularly in these dust cassette cases where so many persons and suits are involved.

In determining what other recourse, if any, is available to contestant, the nature of the rights arising from his certification must be ascertained. Contestant's certification may be likened to a form of license from the Secretary to perform his tasks and is therefore, akin to many other situations where individuals have been afforded safeguards against arbitrary deprivation. See e.g., driver's licenses: Mackey v. Montrym, 443 U.S. 1, 10 (1979); Dixon v. Love, 431 U.S. 105, 112 (1977); Bell v. Burson, 402 U.S. 535, 539 (1971); Scott v. Williams, 924 F.2d 56, 58 (4th Cir. 1991); horse trainer license: Barry v. Barchi, 443 U.S. 55, 64 (1979); day care center license: Chalkboard v. Brandt, 879 F.2d 668, 672 (9th Cir. 1989); horse owner license: Gamble v. Webb, 806 F.2d 1258, 1261 (5th Cir. 1986); warehouse license: Delahoussave v. Seale, 788 F.2d 1091, 1094 (5th Cir. 1986); pilot license: Pastrana v. United States, 746 F.2d 1447, 1450 (11th Cir. 1984). Contestant's certification also is analogous to a form of public employment where due process must be accorded before adverse action is taken. Federal Deposit Insurance Cornoration v. Mallen, 486 U.S. 230, 240 (1988); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985); Losan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982); Crain v. Board of Police Commissioners, 920 F.2d 1402

[1] Even where a contestant's operator has filed a notice of contest, MSHA's letter apparently contemplates a two-track approach whereby the individual would do nothing until his operator's case is decided. However, such an individual could seek to intervene in the operator's suit. 29 C.F.R. § 2700.4.

(8th Cir. 1990); Derstein v. State of Kansas, 915 F.2d 1410 (10th Cir. 1990). The foregoing decisions set forth what process is "due" in various situations in accordance with a balancing test which weighs private interests, risk of erroneous deprivation and the Government's interest. Mathews v. Eldridse, 424 U.S. 319, 335 (1976). In some instances a pre-termination hearing is constitutionally required. Logan v. Zimmerman Brush Co., supra, at 433-434, 436; Bell v. Burson, sunra, at 541-542. In others it is not. Mackey v. Montrym, supra, at 19; Dixon v. Love, sunra, at 115. But there must be some form of opportunity to respond before the property right is either infringed upon or taken away. Mathews v. Eldridge, sunra, at 333. Accordingly, the Secretary's certification of contestant undoubtedly constitutes a property right entitled to appropriate constitutional protections.

Insofar as the pleadings and briefs filed by the parties in this case are concerned, it appears that the Secretary has not adopted any procedures regarding decertification. It should be noted that the regulations do not expressly give her that authority. The proposed final rule contained such a provision, 42 Fed. Reg. 59294, 59296 (November 16, 1977), but the final rule did not, although the comments asserted the Secretary's right to decertify. 42 Fed. Reg. 23990, 23996 (April 8, 1980). However, certification of qualified individuals has been recognized as essential to the integrity of the dust sampling program. Consolidation Coal Company v. Federal Mine Safety and Health Review Commission, 824 F.2d 1071, 1087 (D.C. Cir. 1987); American Mining Consress v. Marshall, 671 F.2d 1251, 1259 (10th Cir. 1982); Consolidation Coal Company 8 FMSHRC 890, 901 (June 1986). If the sampling program is to'work, the Secretary must have the power to decertify. I believe she has that authority. Janik Pavina and Construction v. Brock, 828 F.2d 84, 91 (2d Cir. 1987); West v. Bersland, 611 F.2d 710, 720-723 (8th Cir. 1979); Touche Ross Securities and Exchange Commission, 609 F.2d 570, 579-580 (2d Cir. 1979).

Contestant's present position is, however, untenable because the Secretary has not come forward with any procedures whereby he can protest the proposed decertification. In his brief and at the hearing the Solicitor offered the assurance that once revocation proceeds, contestant will be given an opportunity for a pre-revocation hearing and for a full post-revocation hearing. (Solicitor's brief p. 19) (Hearing Transcript pp. 24-25, 29-30).

In light of the foregoing, the Mine Act must be examined to see if it can be found to afford contestant any relief with respect to his constitutionally protected rights. In their briefs the parties make extensive reference to the penalty provisions of the Act. After first contending that the Secretary has no authority to decertify, a position which as set forth above I reject, contestant asserts in the alternative that certain enforcement actions such as withdrawal orders may be

considered a form of civil penalty which can be contested pursuant to the Act. Under this theory contestant suggests that a proposed decertification is a proposed penalty which he is entitled to challenge before the Commission. (Contestant's brief pp. 6-8, 11-13). The Secretary's position is that the proposed revocation letter is not a civil penalty under the Act. (Solicitor's brief pp. 11-13).

It is clear that generically the term "penalty" includes punishments and sanctions which are non-monetary as well as monetary. Webster's Third New International Dictionary (1988), p. 1688. However, the pertinent inquiry here is not the various meanings of "penalty" permissible under general usage but how that term is used in the Mine Act. The antecedent of the present penalty provisions in sections 105 and 110 of the Mine Act is to be found in section 109 of the 1969 Coal Act. Both Senate and House Reports for the Coal Act explained the civil penalties, then being introduced into the law, solely in monetary terms. Every reference to civil penalties in the reports described them as fines of specified dollar amounts. S. Rep-. No. 411 and H.R. Rep. No. 563, 91st Cong., 2d Sess., reprinted in Lesislative Historv. Federal Coal Mine Health and Safetv Act, (hereafter referred to as "Legislative History@@) at 39, 92-93, 568-569, 594 (1970). Similarly, floor debate in both houses, regardless of the precise issue being discussed, e.g., mandatory nature of civil penalties or criteria to be used in fixing amounts, was always in terms of dollars. Legislative History, sunra, at 463-464, 509-510, 659, 717. After conference between the House and Senate, the Statement of the Manaaers on the Part of the House, delineated civil penalties in the same manner. Leaislative History, sunra, at 1033. Nowhere in the legislative history of the Coal Act is there any indication that anything other than monetary fines were being adopted.

In 1977, the original Senate and House Bills, amending the 1969 Coal Act, contained a provision entitled a "civil penalty closure order." S. 717 and H.R. 4287 95th Cong., 2d Sess., reprinted in Lesislative History of the Federal Mine Safetv Act of 1977 (hereafter referred to as "1977 Legislative History") at 136, 141, 159, 214, 219 and 237 (July 1978). This additional closure authority which was to be reserved for the most serious cases would have been proposed by the Secretary and assessed by the Commission after an opportunity for hearing in the same manner as monetary civil penalties. 1977 Lesislative History, sunra, at 85-86. However, after Committee hearings, both House and Senate bills omitted this provision and the Committee reports do not refer to it. In floor debate, Senator Schweiker explained that the civil penalty closure order had been deleted as too heavy handed and had been replaced with a provision for a notice followed by closure orders where an operator has a pattern of significant and substantial violations, 1977 Leaislative Historv, supra, at 1071-1074. Both House and Senate Committee reports

describe civil penalties under the 1977 Amendments as adopting the same monetary penalties that had been in effect under the Coal Act. H.R. 312 and S. 181, 95th Cong., 2d Sess., 1977 Legislative History, supra, at 365, 629. Civil penalty provisions were extended to non-coal mines and administrative procedures including the creation of this independent Commission were improved, but the reports make clear that only monetary fines are involved. 1977 Leaislative History, supra, at 375-376, 628-634 As in 1969, floor debate in 1977 demonstrated that civil penal-' ties meant only monetary fines. 1977 Leuislative Historv, at 906-907, 921-922, 1014, 1211-1212. The Joint Explanatory Statement of the Committee of the Conference similarly explained that only monetary fines are involved. 1977 Leaislative Historv, sunra, at 1335-1336.

In light of the foregoing, it is clear that the proposed decertification of contestant cannot be interpreted as a punishment falling within the civil penalty provisions of the Act. As set forth above, in 1977 Congress considered and rejected a civil penalty closure order. Instead, it left in place and reaffirmed the statutory distinction between civil penalties which are only monetary in nature and other sanctions such as withdrawal orders. Consequently, the penalty provisions of the Act afford no relief to contestant.

There remains for consideration whether contestant can challenge the proposed decertification under the general review provisions of the Act. Section 105(d) of the Act, 30 U.S.C. § 815(d), sets forth the parameters of Commission review of Secretarial actions as follows:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104; or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing... and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.... The rules of procedure prescribed by the Commission shall provide

affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section.

The Commission has adhered strictly to the terms of the statute in determining its jurisdiction. St has held that a representative of miners cannot contest a citation because the Act gives that right only to mine operators. U M.W.A. v. Secretary of Labor, 5 FMSHRC 807 (May 1983). In the same vein the Commission also held that miners and their representatives do not have the statutory right to contest the vacation of orders because section 105(d) does not confer that right upon them and Congress demonstrated in other provisions of the Act that it was fully aware of the discrete meaning of vacating an order. U.M.W.A. v. Secretary of Labor, 5 FMSHRC 1519 (September 1983). As the Commission stated, section 105(d) is clear and unambiguous in setting forth the extent to which miners and their representatives can institute challenges to the Secretary's enforcement of the Act. 5 FMSHRC at 1520.

Contestant recognizes the limited scope of review under section 105(d) as interpreted by the foregoing Commission decisions. However, he argues that those decisions are distinguishable from this case because they involved actions against operators, whereas here contestant himself may be the subject of enforcement action in the form of decertification. (Contestant's brief p.18). These contentions notwithstanding, I am bound by the Commission's consistent fidelity to the precise terms of the statute. Kaiser Coal Company, 10 FMSHRC 1165 (September 1988). The Mine Act, following the scheme first presented in the Coal Act, establishes a system whereby orders, citations and penalty assessments are issued to operators and pursuant to which operators may obtain administrative review of them. 30 U.S.C. § 814 and 820. Legislative History, supra, at 36-38, 565-566, 588-590, 713-714, 1029-1032; 1977 Leaislative History, supra, at 635-637. Whenever administrative review is available to someone other than an operator, the law carefully delineates to whom and under what circumstances such relief is available. The term "operator" is explicitly defined in the Act, 30 U.S.C. § 802(d), and contestant recognizes he does not fall within that definition. (Contestant's brief pp. 7-8). In addition, there is no basis to hold that any of MSHA's letters to contestant regarding decertification can be construed as a citation under the Act. The terms and conditions under which citations are issued are plainly spelled out in the Act and none of them exist here. 30 U.S.C. § 814.

It is not for the Commission or one of its judges to legislate a system of administrative review under the Mine Act which has no foundation in the law or legislative history. As explained above, contestant has significant rights which are entitled to due process protections, but implementation of those

protections must be found elsewhere. The review provisions of the Mine Act do not represent the only possible avenue of relief against every action the Secretary may take in the field of mine health and safety. And the Secretary's failure to provide appropriate remedies at this time does not endow the Commission with powers it does not otherwise possess. An administrative agency may not exceed the bounds legislated by Congress. As the Supreme Court has stated:

> However, the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.

Civil Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 322, (1961).

In light of the foregoing, this case must be and is hereby DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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