CCASE:
CONTESTS OF RESPIRABLE
DUST SAMPLE ALTERATION
DDATE:
19920117
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS — MASTER DOCKET NO. 91-1

ORDER GRANTING IN PART AND DENYING IN PART SECRETARY'S MOTION FOR PROTECTIVE ORDER

On December 23, 1991, the Secretary of Labor filed a Motion for Protective Order to prohibit the taking of depositions of the Assistant Secretary of Labor and the former Administrator for Coal Mine Safety and Health. The motion was supported by a memorandum of law, and accompanied by an affidavit of Assistant Secretary of Labor William J. Tattersall. On January 7, 1992, Contestants represented by the law firms of Crowell & Moring, Buchanan Ingersoll, and Jackson & Kelly, filed an opposition to the motion. On January 14, 1992, the Secretary filed a reply to Contestants' opposition to the Secretary's motion. On January 16, 1992, Contestants represented by Williams & Connolly filed a motion to join the Opposition filed by the three law firms named above for the reasons set forth in the Opposition.

The Contestants notified counsel for the Secretary by letter of December 4, 1991, that they wished to depose William Tattersall, Leighton Farley, Jerry Spicer, Edward Hugler, Dennis Ryan and Willard Querry, and requested copies of telephone logs, diary entries, personal notes, calendars, memoranda and other documents dated between February 1, 1989 and April 4, 1991, relating to AWC issues. Counsel for the Secretary replied by letter dated December 16, 1991. He agreed to provide such of the requested documents which are not privileged and to make Hugler, Farley, Ryan and Querry available for depositions. He stated that a motion for a protective order would be filed to prohibit the taking of the depositions of Tattersall and Spicer.

I

Contestants state that Assistant Secretary Tattersall made the crucial decisions as to whether and when to issue the citations involved in these proceedings. Administrator Spicer was said to have been actively involved in these decisions as well as other relevant agency actions prior to the issuance of the citations. Tattersall participated in ten meetings between November, 1989 and March, 1991, "with other agency officials including Mr. Spicer" concerning dust sampling enforcement actions.

Contestants argue that the decision to void samples but not issue citations made in about March, 1990, and the decision not to issue an information notice to mine operators raise substantive issues "bearing on reasonable promptness and on other issues as well." Tattersall is said to be the primary source of information as to what matters were considered in the course of agency deliberations concerning these decisions. The agency decisions to void samples prior to March 14, 1990, and to void without citations after March 14, 1990, and finally to issue citations on April, 1991, are not explained. Assistant Secretary Tattersall should be required to explain these decisions "so that we may obtain an understanding of the citations and prepare appropriate defenses."

Finally, Tattersall must be made available for questioning about his public statements concerning AWC's which differ in significant respects from the deposition testimony of his subordinates. Contestants emphasize the extraordinary nature of the enforcement action represented by these cases - their size and scope involving as they do virtually the entire coal mining industry; the degree of the personal involvement of the Secretary and Assistant Secretary in issuing press releases, holding press conferences, testifying before Congressional Committees, etc., as distinguishing this case from those relied upon by the Secretary's counsel.

II

The Secretary argues that the Federal Courts "routinely" prohibit the taking of depositions from high-level government officials "especially where relevant information is available from lower-level agency personnel." The reasons for the rule are (1) the privilege attaching to agency deliberative processes, and (2) the disruption of the government's primary function which would result from permitting such depositions.

The rule applies not only in the case where an administrative record is involved but also where "the proposed inquiry relates to the exercise of statutory discretion."

The rule applies not only to cabinet members and heads of executive agencies but also "to lower-level but relatively highly placed decisionmakers within an agency."

Contestants have alternative sources for obtaining the requested information; in fact they have a "plethora of other avenues for obtaining any conceivably relevant information."

Tattersall and Spicer made the ultimate decisions to issue the citations involved here based on facts and recommendations from lower-level agency personnel who have already been deposed. Neither "has any specific knowledge of relevant facts which were not obtained in this manner."

III

It is important to keep in mind the nature of the present proceedings before the Review Commission. The forty seven hundred citations issued by the Secretary have been contested. Therefore, the citations are not final administrative action, and become final only when and if they are affirmed by the Commission. The penalties assessed by the Secretary, because they have been contested, are in the nature of proposals to the Commission to assess appropriate penalties for any violations charged in citations which are affirmed. For these reasons, the cases cited by both parties, such as Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) and Community for Creative Non-Violence v. Lujan, 908 F.2d 992 (D.C. Cir. 1990), holding that agency decisionmakers may be deposed only in cases where no administrative findings were made and a deposition is the only way to provide a record adequate for judicial review, are of limited precedential value, and not controlling. The Secretary in these proceedings does not make administrative findings. The findings and decisions will be made by the Review Commission after an adversary proceeding in which the Secretary has the burden of establishing the propriety of the citations and the appropriateness of the proposed penalties. In the course of that proceeding, a record will be made which we trust will be adequate for judicial review.

IV

The public statements of the Secretary and Assistant Secretary, whether to the Press or to Congress, are not matters before the Commission, and I will not consider them in deciding whether Assistant Secretary Tattersall or Administrator Spicer are subject to deposition. In an analogous situation, it is not uncommon for the Attorney General or other prosecuting authority to publicly announce criminal indictments. It could scarcely be maintained that this should subject these law enforcement officials to oral depositions in the cases covered by the indictments.

V

The general rule followed in the Federal Courts is that high-level executive department officials may not be required to give oral testimony by deposition or at trial except in extraordinary circumstances. Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575 (D.C. Cir. 1985); Wirtz v. Local 30, International U. of Operating Engineers, 34 F.R.D. 13 (S.D.N.Y. 1963); United States v. Northside Realty Associates, 324 F. Supp. 287 (N.D. Ga. 1971). Extraordinary circumstances may be established where the executive sought to be deposed has relevant information not available from any other source. Sweeny v. Bond, 669 F.2d 542 (8th Cir. 1982), cert. denied, 459 U.S. 878 (1982); Community Fed. Sav. & Loan v. Fed. Home Loan Bank Bd., 96 F.R.D. 619 (D.D.C. 1983); Amer. Broadcasting Companies v. U.S. Info. Agency, 599 F. Supp. 765

(D.D.C. 1984). On the other hand, where the agency has or is willing to respond by answering written interrogatories, furnishing documents and making lower-level officials available for deposition, there is no justification for requiring the testimony of an agency head or high-level agency official. Sweeny v. Bond, 669 F.2d at 546; Kyle Engineering Co. v. Kleppe, 600 F.2d 226 (9th Cir 1979); Wirtz v. Local 30, 34 F.R.D. at 14. The more senior the official to be deposed, the stronger the showing which must be made to require his testimony. Community Fed. Sav. & Loan, 96 F.R.D. at 621.

VI

Contestants argue that because Assistant Secretary Tattersall made "the crucial decisions whether and when to issue" the contested citations, he should be required to testify as to "the basis for the charges." This can hardly be considered an extraordinary circumstance permitting him to be called for deposition. See Simplex Time Recorder Co., 766 F.2d at 586. Nor can the fact that "he participated in 10 meetings between November 1989 and March 1991 . . . concerning various aspects of the dust sampling enforcement actions." In fact since other agency officials were present at the same meetings, this would argue against the necessity for deposing the Assistant Secretary. Section 104(a) of the Mine Act (30 U.S.C. 814(a)) requires the Secretary or her authorized representative to issue a citation to a mine operator if upon inspection or investigation she believes that the operator has violated any mandatory health or safety standard. Absent some showing of bad faith or utterly arbitrary action, why the Secretary or the Assistant Secretary decided to issue the citations is not relevant to this proceeding. As I stated earlier, she is required to prove the basis for the citations in this proceeding before an independent adjudicatory agency. The evidence presented in such a proceeding will establish whether there was a proper basis for the citations. The taking of the deposition of a member of the Cabinet or the head of an executive department "in order to probe the mind of the official to determine why he exercised his discretion as he did in regard to a particular matter" is improper, Northside Realty Associates, 324 F. Supp at 293, and in any event not relevant to the question whether an objective basis existed for the contested citations.

VII

The most cogent reason advanced for the proposed depositions is the alleged need to inquire into the basis for the time lag between the violations and the issuance of citations. This may be an issue because section 104(a) of the Act mandates the issuance of a citation "with reasonable promptness" when the Secretary believes that a violation has occurred. The Contestants have asserted but have not shown that Assistant Secretary Tattersall is the sole source of factual information concerning the timing of the issuance

of citations. In fact they have had the opportunity to propound interrogatories and to depose lower-level officials for such factual information. The Assistant Secretary made the ultimate decisions to issue the citations but, according to his affidavit, he relied upon facts and recommendations made by lower-level agency personnel and does not have "any specific knowledge of facts related to the samples or development of the evidence supporting the citations which was not communicated to me by such lower-level persons." Given the other sources of discovery available to contestants, including the written discovery which has been had, the depositions already taken, and those which the Secretary has agreed to provide, the contestants have the opportunity to discover the factual basis for the citations and for the timing of their issuance without deposing Assistant Secretary Tattersall.

I conclude that Contestants have not established extraordinary circumstances which would justify compelling the testimony of Assistant Secretary Tattersall.

VIII

The Assistant Secretary is, of course, a Presidential appointee and a member of the sub-cabinet. He is the head of the Mine Safety and Health Administration. He is clearly a high-level government official and "precisely the type of individual that governmental immunity is intended to protect." United States v. Miracle Recreation Equipment Co., 118 F.R.D. 100, 105 (S.D. Iowa 1987). As the Secretary noted in her motion, a major reason for the rule prohibiting the taking of depositions from high-level officials is the disruption which would result to the government's important activities, and the higher the level the official, the greater the disruption. Jerry L. Spicer, who was Administrator for Coal Mine Safety and Health during the time the alleged violations occurred and the contested citations were issued, is a lower-level official than the Assistant Secretary. Moreover, he is now retired. Therefore, no disruption to the government's functions would result from subjecting him to a deposition. He may have factual information concerning the decision to void samples but not issue citations in March 1990 and the decision not to issue an informational notice which may be relevant to the timeliness of the citations. The burden on the Contestants to justify taking Mr. Spicer's deposition is considerably lower than the burden to justify taking the Assistant Secretary's. I conclude that Contestants have met that burden, and have the right to take Mr. Spicer's deposition. Therefore, I will deny the motion for protective order as related to him.

ORDER

For the foregoing reasons, the Secretary's motion for protective order to prohibit the deposition of Assistant Secretary Tattersall is GRANTED; the Secretary's motion for protective order

to prohibit the deposition of former Administrator Spicer is DENIED.

James A. Broderick
Administrative Law Judge