CCASE:
CONTESTS OF RESPIRABLE SAMPLE
ALTERATION CITATIONS
DDATE:
19920227
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

IN RE: CONTESTS OF RESPIRABLE SAMPLE ALTERATION CITATIONS

Master Docket No. 91-1

ORDER RECONSIDERING ORDER DENYING MOTION FOR PROTECTIVE ORDER

On January 17, 1992, I issued an order granting the Secretary's motion for a protective order to prohibit the deposition of Assistant Secretary William J. Tattersall, and denying the motion for a protective order to prohibit the deposition of former Administrator for Coal Mine Safety and Health Jerry L. Spicer.

On February 7, 1992, the Secretary filed a motion for reconsideration of the above order insofar as it denied the motion for a protective order barring the deposition of Mr. Spicer. The motion attached an affidavit of Administrator Spicer and portions of a transcript of deposition testimony of Edward C. Hugler taken on January 16, 1992. Contestants filed an opposition to the motion on February 19, 1992. The Secretary filed a reply to the opposition on February 25, 1992. The affidavit and the deposition testimony attached to the motion present additional relevant material in the light of which I reconsider my prior order.

I

To be asked to testify in a proceeding such as the one before me hardly constitutes harassment or annoyance, as the Secretary's motion implies. This is a very important case for the Government and the coal mining community, miners and managers. Prima facie, any person, in Government or industry, who has relevant knowledge may be required to testify. As my order stated, however, the Federal Courts have held that high level executive department officials may not be required to give oral testimony except in extraordinary circumstances. Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575 (D.C. Cir. 1985). The courts have not drawn a line separating high level officials from low level officials, nor has the Secretary suggested one, but it is clear that elected officials, Federal and State, are high level. Cabinet officers and other Presidential appointees are presumptively high level. Below that level the picture is not as clear. What is clear is that the extraordinary circumstances required to be shown to justify the deposition of a cabinet officer

or sub-cabinet officer are qualitatively different from those needed to depose a mid-level bureaucrat.

II

The rationale for protecting high level officials from compulsory testimony is, I think, two fold: First, the independence of the executive branch and the insulation of the actions and decisions of top Government officials from judicial (including administrative-judicial) inquiry. United States v. Morgan, 313 U.S. 409(1941); Peoples v. United States Department of Agriculture, 427 F.2d 561 (D.C. Cir 1970). Second, the avoidance of the disturbance that would result to the Government's primary task if officials were required to take time to give oral testimony. Community Fed. Sav. & Loan v. Fed. Home Loan Bank Bd., 96 F.R.D. 619 (D.C. 1983).

I mean no denigration of the position of the Coal Mine Administrator when I note that he is a lower level official than an Assistant Secretary, a Presidential appointee. To protect the latter from being required to testify is to recognize the qualified independence of the executive branch and incidentally to avoid the resultant disruption of Governmental functions. The Administrator's position is different: the most important reason to protect him from being required to testify is to avoid removing him from his critical official tasks, and thus interfering with Government business. As my order pointed out, because Mr. Spicer has retired, this reason no longer exists. Taking Mr. Spicer's deposition will not disrupt the Government's functions in the least. Questions which may impinge upon the Government's deliberative process privilege are, of course, subject to objection, which may be dealt with as any other objection at a deposition.

III

The Secretary argues that the testimony of Edward Hugler provides "an alternate source of the information Contestants propose to seek from Administrator Spicer". She states that the deposition shows that Spicer has no knowledge not also possessed by Hugler. Contestants assert that, on the contrary, the deposition shows that Spicer may have relevant knowledge that Hugler does not. In deciding this motion, I need only conclude that Spicer may have relevant information which was not available from Hugler. I am not in a position to analyze Hugler's deposition, only part of which is available to me, or to anticipate potential questions which may be asked of Spicer, but I conclude that the record before me shows that he may have such information. On reconsideration, therefore, I determine that the protective order to prohibit the testimony of former Administrator Spicer should be denied.

I do not, of course, by this order mean to indicate how I may

rule on any question of relevancy or privilege that may be raised at Mr. Spicer's deposition.

ORDER

On reconsideration of my order of January 17, 1992, the Secretary's motion for a protective order to prohibit the deposition of Administrator Spicer is DENIED.

James A. Broderick
Administrative Law Judge