

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 16, 2013

SECRETARY OF LABOR, MSHA, on	:	DISCRIMINATION PROCEEDING
behalf of HAROLD W. PYEATT,	:	
Complainant	:	Docket No. CENT 2012-219-DM
	:	SC-MD 11-19
v.	:	
	:	
	:	
LINDSEY CONTRACTORS, INC.	:	Naruna Quarry
AND ITS SUCCESSORS,	:	Mine ID 41-04468
Respondent	:	

ORDER DENYING REQUEST FOR SUBPOENA

Before the Court is Respondent’s, Lindsey Contractors, Inc., request for issuance of a subpoena. Respondent’s request is for a subpoena duces tecum directed to APAC-Texas, Inc., (“APAC”) commanding that it produce certain documents. Respondent asserts that Complainant, subsequent to his termination by the Lindsey, obtained a similar position at APAC and that he was later terminated from APAC for reasons similar to his termination at Lindsey. Respondent maintains that “Complainant’s job performance as a quarry manager in his immediate, post-Lindsey employment is directly relevant to Lindsey’s claims and/or defenses in this matter that Complainant showed signs of poor job performance as a quarry manager.” Request for Issuance of Subpoena, (“Request”) at 3.

Respondent’s Request also seeks “written and/or oral discovery on all Complainant’s (post-Lindsey) employers from July 18, 2011 through the present” so that it may “determine what, if any, ‘differential back pay and employment benefits’ would be due Complainant if the Secretary (sic) were to find in his favor.” *Id.*

¹ If the Complainant prevails, it is *not* the Secretary, but rather the Court, in its role as an administrative law judge with the Federal Mine Safety and Health Review Commission hearing this matter, that makes the determination as to whether a discrimination complaint is upheld.

29 C.F.R. Part 2700, setting forth the Commission's procedural rules, provides at Section 2700.60(c) that "[t]he Commission or the Judge, as appropriate, shall revoke or modify the subpoena if it seeks information outside the proper scope of discovery as set forth in §2700.56(b) . . . or if for any other reason it is found to be invalid or unreasonable." *Dye v. Mineral Recovery Specialists*, 25 FMSHRC 170, (March 2003) (ALJ), *Secretary of Labor v. Martin Marietta Aggregates*, 20 FMSHRC 1239 (Oct. 1998) (ALJ).

Respondent's request is denied in both aspects. For the first ground, seeking information about the Complainant's post-Lindsey employment, the request is denied because it is immaterial to this proceeding. Complainant's post-employment experiences do not bear upon the issues regarding his employment interactions with Lindsey. That is, whatever those experiences may have been, they are not probative on the merits of Mr. Pyeatt's discrimination action here. This should be obvious but the point may be highlighted by noting that if the Complainant had an outstanding experience with some post-Lindsey employer, that would be equally immaterial to the present action and certainly could not be used by the Secretary to show that Lindsey must have discriminated against Mr. Pyeatt.²

As to the second aspect of the Request, in which the Respondent seeks "determine what, if any, 'differential back pay and employment benefits' would be due" should the Complainant prevail, this request is premature. The usual order is for a determination to first be made as to whether the Complainant's discrimination claim is upheld. Should that occur, the Court typically directs that the parties communicate and endeavor to reach an agreement as to damages and to then report back to the Court as to whether those terms could be amicably agreed-upon. It is only when those efforts are not fruitful, that the Court must become involved and consider appropriate discovery requests. *See, Dolan v. F & E Erection Co.*, 20 FMSHRC 847, (Aug. 1998) (ALJ).

For the reasons set forth above, Respondent's subpoena request is DENIED.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

² It is probably worth noting that the Court makes no finding or inference whatsoever regarding Mr. Pyeatt's post-Lindsey employment experiences, as there has only been an assertion by the Respondent regarding those experiences and because in any event, as noted above, they are not material.

Distribution:

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