FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

November 7, 2014

SCOTT MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

ORDER GRANTING MOTION TO QUASH SUBPOENA

This matter is before me based on a Complaint of Discrimination brought by Scott McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act"). McGlothlin seeks redress under section 105(c)(3) for an adverse action allegedly motivated by his application for the protections afforded to miners afflicted with pneumoconiosis under 30 C.F.R. Part 90.[1]

I. Background

During an October 28, 2014, telephone conference, the parties represented that, through discovery, the Complainant's wife Alicia McGlothlin produced e-mails concerning her husband's Part 90 status and his discrimination claim, with the exception of those e-mails that were claimed to have been previously deleted and those privileged or properly redacted. Mrs. McGlothlin is an employee of the Russell County, Virginia, Treasurers Office. Among the e-mails sought were those sent from her office computer.

On October 15, 2014, in an effort to determine whether spoliation has occurred, Dominion served a subpoena on the Russell County, Virginia, Treasurers Office seeking to obtain e-mails sent by Mrs. McGlothlin from its e-mail account server, including all archived and

[1] Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3").

hard drive backup data.[2] McGlothlin has filed a motion to amend this subpoena to, in essence, limit the information produced to only those e-mails already provided by Mrs. McGlothlin (again excluding privileged e-mails and those appropriately requiring redactions). I construe McGlothlin's motion to amend the subpoena as a motion to quash the subject subpoena.

II. Discussion

The general principles governing the analysis of discrimination cases under the Mine Act are well settled. In order to establish a case of discrimination under section 105(c) of the Act, the complainant has the burden of proving that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 817, 818 (Apr. 1981).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by factors unrelated to the miner's protected activity and that it would have taken the complained-of action in any event for the unrelated factors alone. *Pasula, supra*; *Robinette, supra. See also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

Thus, the issues in this discrimination proceeding are whether McGlothlin engaged in protected activity, and, if so, whether the adverse action complained of by McGlothlin was, in any part, motivated by McGlothlin's protected activity. Dominion may affirmatively defend by demonstrating that the adverse action complained of was taken solely for factors unrelated to any protected activity.

Commission Rule 56(b) provides that a party may obtain through discovery "any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). Dominion has already obtained e-mail documentation from Mrs. McGlothlin through discovery. As the issues in this proceeding are whether McGlothlin engaged in protected activity and Dominion's motivations, Dominion has not shown that the forensic recovery of the e-mails reportedly deleted by Mrs. McGlothlin, if retrievable, will lead to relevant evidence. In reaching this conclusion, I note that the commonly expressed argument that a document's relevance cannot be determined until it is seen is unavailing as it would result in limitless discovery.

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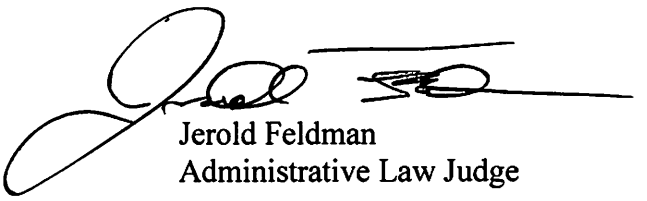
[2] My office routinely provides blank, signed subpoenas for the parties' appropriate use during discovery and in preparation for witness testimony. The provision and ultimate service of such subpoenas is not demonstrative of any acquiescence that they were properly served.

Notwithstanding the issue of relevance, Commission Rule 56(c) limits discovery, when appropriate, to relieve a person or entity from "oppression or undue burden or expense." 29 C.F.R. § 2700.56(c). In applying this limitation, it is noteworthy that Commission Rule 1(b) provides that on procedural matters not explicitly addressed by the Act's statutory provisions or the Commission's rules, the Commission's Judges may look to "any pertinent provisions of the Federal Rules of Civil Procedure." 29 C.F.R. § 2700.1(b). Federal Rule of Civil Procedure 26(b)(2)(B) provides specific limitations on the discovery of electronically-stored information. This provision limits the discovery of such information when it is "not reasonably accessible because of undue burden or cost." Rule 26(b)(2)(C)(i) of the Federal Rules of Civil Procedure also limits discovery when the information "sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

In the final analysis, it has not been shown that the information sought to be retrieved from Russell County, Virginia, Treasurers Office's database can be reasonably expected to lead to relevant evidence. Moreover, the retrieval of such information is precluded by Federal Rules of Civil Procedure 26(b)(2)(B) and 26(b)(2)(C)(i) because it would be unduly burdensome and duplicative.

ORDER

In view of the above, **IT IS ORDERED** that McGlothlin's motion to quash the subpoena as served on the Russell County, Virginia, Treasurers Office **IS GRANTED. IT IS FURTHER ORDERED** that Counsel for McGlothlin provide a copy of this Order to the Russell County, Virginia, Treasurers Office within ten days of its issuance.



Jerold Feldman
Administrative Law Judge

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