

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 27, 2015

SECRETARY OF LABOR, MSHA,
on behalf of DAVID S. WOOD,
Complainant,

v.

HIGHLAND MINING COMPANY, LLC,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING¹

Docket No. KENT 2014-257-D
MADI CD 2014-08

Mine: Mine No. 9
Mine ID: 15-02709

ORDER TERMINATING TEMPORARY REINSTATEMENT

Before: Judge Moran

Respondent Highland Mining Co., LLC, has filed a motion and a supplemental motion to terminate the temporary reinstatement of Complainant David S. Wood. Subsequently, the Secretary filed his “Position on Highland Reduction in Force.” For the reasons which follow, the Court, with conditions included, terminates, for now, its Order of Temporary Reinstatement for David S. Wood.

On March 7, 2014, this Court ordered Respondent, Highland Mining Co., LLC, (“Highland”) to temporarily reinstate the Complainant and Highland complied with that Order.² Thereafter, on December 18, 2014, Highland filed its Motion to Terminate Temporary Reinstatement, applicable to Complainant, David S. Wood. Following that Motion, on January 6, 2015, Highland filed a “Supplemental Motion to Terminate Temporary Reinstatement” (“Supplement”). On January 26, 2015, the Secretary filed his “Position on Highland Reduction in Force” (“Secretary’s Position”). Prior to the Secretary’s filing, a conference call ensued on January 21, 2015, to discuss the motion and supplement.³

¹ **Error! Main Document Only.**Subsequent to the temporary reinstatement proceeding, the Secretary did opt to file a Discrimination Complaint, Docket No. KENT 2014-429. That proceeding is also before the undersigned.

² A clerical error required an amended order of temporary reinstatement to be issued on March 10, 2014. The March 7th Order’s effective date remained the same.

³ The Secretary failed to file a response to either the motion or the supplement, a perplexing situation, which failure was raised by the Court during the conference call. It was explained to the Court that the parties had been communicating with one another about the motion and the supplement and Highland acknowledged that to be the case. However, the Court had not been notified at all about those discussions. The Court then reminded both parties, but particularly the

In its Motion, Highland stated that “strategic options were being evaluated for the No. 9 Mine and that a mass layoff was planned.” Motion at 1. Pursuant to its obligations, Highland notified the United Mine Workers of America of the planned layoff, and that employees, including the Complainant, Mr. Wood, would be affected by it. Highland notes that a mine operator’s temporary reinstatement obligation is tolled when it is established that “an event has occurred that would have resulted in the end of the temporarily reinstated employee’s employment even but for the earlier alleged discriminatory event.” Motion at 3. Put another way, a temporary reinstatement can be tolled where a subsequent event, such as the closing of the mine, would have terminated a miner’s employment apart from any act of discrimination.

As the Commission noted in *Sec’y of Labor on behalf of Gatlin v. Kenamerican Resources*, 31 FMSHRC 1050 (Oct. 2009):

the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation or the time for which an operator is required to pay back pay to a discriminatee. *See Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 1638, 1639 (Sept. 1989) (holding that back pay is due to a discriminatee from the date of the unlawful discharge until the time of reinstatement or “the occurrence of an event tolling the reinstatement obligation”); *Wiggins v. E. Assoc. Coal Corp.*, 7 FMSHRC 1766, 1772-73 (Nov. 1985) (concluding that back pay award ended upon date of layoff). As a Commission Judge reasoned, “if business conditions result in a reduction in the work force the right to back pay is tolled because a discriminatee is entitled to back pay only for the period during which he would have worked but for the unlawful discrimination.” *Casebolt v. Falcon Coal Co., Inc.*, 6 FMSHRC 485, 499 (Feb. 1984) (ALJ) (citations omitted); *see also NLRB v. Federal Bearings Co.*, 109 F.2d 945 (2d Cir. 1940) (concluding that an employer should not be held in contempt for failing to reinstate a wrongfully discharged employee when depressed business conditions required a reduction in force). Thus, as noted by both parties (Pet. at 5; S. Resp. at 12), Commission precedent recognizes that a change in circumstances may be relevant to tolling economic reinstatement in a temporary reinstatement proceeding. *See generally Sec’y of Labor on behalf of Shepherd v. Sovereign Mining Co.*, 15 FMSHRC 2450 (Dec. 1993) (remanding to Judge to determine effect of operator's layoff on Judge's temporary reinstatement order). We therefore hold that the Judge erred in concluding that a miner must remain temporarily reinstated notwithstanding changing circumstances at the mine. The Commission has also recognized in remedial contexts that an operator has the burden of establishing “facts which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability.” *See,*

Secretary in this instance, that if the party receiving the motion wishes to be heard in opposition to it, there is an obligation to file its statement within 8 days following service, per 29 C.F.R. §2700.10(d) of the Commission’s Procedural Rules. At a minimum, the parties should have emailed the Court. The Secretary’s Position also speaks to another docket, involving a different Highland employee, similarly impacted by the layoff at the #9 mine and incorrectly listing the undersigned as the assigned judge. That other Docket, KENT 2014-483-D, is assigned to Judge Lewis.

Simpson v. Kenta Energy, Inc., 11 FMSHRC 770, 779 (May 1989) (citations omitted). The Commission has stated that, “[s]pecifically, the burden of showing that work was not available for a discriminatee, whether through layoff, business contractions, or similar conditions, lies with the employer as an affirmative defense to reinstatement and backpay.” *Id.* In such circumstances, the operator must make such a showing by a preponderance of the evidence.

Gatlin, 31 FMSHRC at 1054.

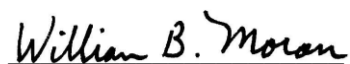
Highland thus accurately observes that “[i]n the context of temporary reinstatement, ‘a discriminatee is entitled to back pay **only for the period during which he would have worked but for the unlawful discrimination.**’” Motion at 3 (emphasis in motion). In its Supplement, Counsel for Highland informed that, as of “December 31, 2014, operations at the No. 9 Mine were permanently closed.” Supplement at 1. Accordingly, Highland asserts that it “has demonstrated that [its] mass layoff would have resulted in the end of Wood’s employment even but for the allegedly discriminatory events, Highland should be permitted to lay off Wood.” Supplement at 3. It therefore requests that the Court terminate its March 10, 2014, amended temporary reinstatement order. *Id.*

In the Secretary’s Position on the Highland Reduction in Force, he agrees that the temporary reinstatement order for Mr. Wood should be suspended and that Mr. Wood should be placed in non-pay status.⁴ The Secretary notes that he reserves the right to seek to re-open this matter should similarly situated employees be recalled to work at the Highland Mines or should a successor operator take over operations at the mine. Further, the Secretary moves that the Respondent be placed under an Order requiring it to inform the Court and the Secretary of Labor’s Counsel “should similarly situated employees be recalled to work at a mine owned or operated by Respondent or should the company be sold to an entity who is recalling similarly situated employees for work at mines which were owned or operated by Respondent.” Position at 1-2. The Court agrees and this Order incorporates the Secretary’s requests, as noted above.

⁴ **Error! Main Document Only.** It is again noted that the Secretary’s position also speaks to a different employee of Highland. The parties will need to present these issues to Judge Lewis, the judge handling KENT 2014-483-D.

ORDER

For the reasons listed above, the Temporary Reinstatement of Complainant David S. Wood in Docket No. KENT 2014-257-D, **is hereby terminated, effective January 28, 2015.** The Secretary retains the right to seek to re-open this matter should similarly situated employees be recalled to work at the Highland Mines or should a successor operator take over operations at the mine. The Court also orders that the Respondent is to so inform the Court and the Secretary of Labor and its Counsel should similarly situated employees be recalled to work at a mine owned or operated by Respondent or should the company be sold to an entity who is recalling similarly situated employees for work at mines which were owned or operated by Respondent.


William B. Moran
Administrative Law Judge

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