

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 6, 2023

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of ROBERT M. CARLUCCI,
Complainant,

v.

SPARTAN MINING COMPANY, LLC,
Respondent

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. WEVA 2023-0110
MSHA Case No. PINE-CD 2023-01

Mine: Road Fork No. 52
Mine ID: 46-09522

ORDER OF TEMPORARY REINSTATEMENT

Before: Judge Sullivan

Pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 801, *et. seq.*, and 29 C.F.R. § 2700.45, on December 19, 2022, the Secretary of Labor (“Secretary”) filed an Application for Temporary Reinstatement of miner Robert M. Carlucci (“Complainant”) to his former position with Spartan Mining Company, LLC (“Respondent”) at its Road Fork No. 52 Mine. The application’s certificate of service states that it was served on Respondent by electronic mail that same day, and otherwise satisfies the procedural requirements of Commission Procedural Rule 45(b) in that, among other things, it timely “states the Secretary’s finding that the miner’s discrimination complaint was not frivolously brought[,] accompanied by an affidavit setting forth the Secretary’s reasons supporting his finding[,] and includes a copy of the miner’s complaint to the Secretary” 29 C.F.R. § 2700.45(b).¹

According to Commission Rule 45(c), a request for hearing must be filed within 10 days following a respondent’s receipt of the Secretary’s application for temporary reinstatement. 29 C.F.R. § 2700.45(c). Respondent here filed no such request by the December 29, 2022 due date. Rather, upon assignment of this matter to the undersigned on January 5, 2023, the parties requested time in which to negotiate and submit an agreement under which the Complainant would receive economic reinstatement in lieu of immediately returning to work for Respondent. On February 3, 2023, the Temporary Economic Reinstatement Agreement (“Agreement”), signed by the Complainant and representatives of the Secretary and the Respondent, was submitted in this case.

Despite the lack of a request for a hearing and the filing of the Agreement, I am required to review the contents of the Secretary’s application to determine whether the complaint in this instance “was not frivolously brought.” 29 C.F.R. § 2700.45(c).

¹ The Discrimination Complaint (“Complaint”) filed with the Secretary’s Mine Safety and Health Administration by the Complainant is dated October 31, 2022, thus well within 60 days of the Complainant’s October 18 termination of employment. *See* 30 U.S.C. § 815(c)(2).

Section 105(c)(1) of the Mine Act provides that “[n]o person shall discharge . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a . . . mine” 30 U.S.C. § 815(c)(1). In the Application, as supported by his investigator’s affidavit, the Secretary alleges the following to establish the Complaint as having been not frivolously brought under section 105(c)(1) & (2):

- (1) After working at the mine for approximately 13 months at various positions, including roof bolter, the Complainant, during his October 18, 2022 shift, took a shuttle car out of service due to its brakes failing during his operation of it, and notified mine management;
- (2) Respondent’s agents immediately took issue with Complainant’s actions, including Section Foreman Dale Gibson telling Complainant that he would permit him to only “operate a shovel” on the section. After Complainant asked for a ride to the surface to speak with the safety department or mine superintendent about these matters, on the way out of the mine Evening Shift Foreman Dickie Lester informed him that his leaving the mine would be considered tantamount to quitting his job there.
- (3) Upon Complainant’s arrival at work the following day, Safety Manager Scott Toler informed him that Respondent considered his traveling to the surface the prior day as a termination of his employment.

The Respondent having not opposed the Application, I agree with the Secretary that it establishes the Complaint to have been “not frivolously brought” in this instance. *See Jim Walters Res., Inc. v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990) (relying upon Mine Act legislative history and the Supreme Court’s treatment of a similar whistleblower protection provision to conclude that the “not frivolously brought” standard is the equivalent of a “reasonable cause to believe” standard and is met when a miner’s “complaint appears to have merit”).

In addition, I have reviewed the terms of the Agreement and find that they do not appear to reduce Complainant’s rights under section 105(c)(2). The Agreement shall remain on file in this proceeding. I reach no conclusion beyond that regarding the merits of the Complaint.

WHEREFORE, the Application is **GRANTED**, and it is **ORDERED** that reinstatement shall remain in effect until such time that the Secretary provides notification that he will not be bringing a discrimination case in chief on behalf of the Complainant,² or such a case is brought and there is a final determination on it by decision, approval of settlement, or other order of this

² Section 105(c)(3) of the Act directs the Secretary to notify a complainant whether a section 105(c) violation occurred within 90 days of the filing of a complaint, which in this instance would have been no later than Monday, January 30, 2023. 30 U.S.C. § 815(c)(3). The Secretary’s representative is hereby **ORDERED** to provide an update regarding the status of the Secretary’s investigation of the Complaint no later than seven days from the date of this Order.

court or the Commission. I retain jurisdiction over this temporary reinstatement proceeding for such purposes as are necessary, as provided by 29 C.F.R. § 2700.45(e)(4).

A handwritten signature in blue ink, appearing to read "John T. Sullivan", with a long horizontal flourish extending to the right.

John T. Sullivan
Administrative Law Judge

Distribution:

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