

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 12, 2015

SANDRA G. MCDONALD,
Complainant,

v.

TMK ENTERPRISE SECURITY,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEVA 2014-387-D
HOPE-CD 2013-10

Frasure Creek Mining, LLC
Mine ID 46-07014 5G1

ORDER DENYING MOTION TO AMEND COMPLAINT
AND
DISMISSAL ORDER

This case is before me based on a discrimination complaint filed on January 7, 2014, 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). The complaint, filed by Sandra G. McDonald under section 105(c)(3), concerns her employment as a security guard by a security services contractor at a mine site operated by Frasure Creek Mining, LLC, (Frasure Creek) during the period, on or about, May 2011 through September 3, 2013. McDonald seeks to recover appropriate relief, including employment reinstatement and back pay under Section 105(c) of the Mine Act, from TMK Enterprise Security Services, Inc. (TMK), a business entity that had been incorporated in West Virginia.¹

However, the evidence of record reflects that TMK's corporate status was terminated by the state of West Virginia on June 12, 2009. Consequently, McDonald was never employed by TMK prior to its termination as a corporate entity. Rather, McDonald was employed by George King and Mark Toler, the former principles of TMK, who continued to operate their security services business as a non-corporate entity. During a January 22, 2015, telephone conference with McDonald's counsel, although denying that they had discriminated against McDonald, King and Toler represented that they cannot re-employ McDonald due to the cessation of their business in fall 2014, and that they are financially incapable of providing the monetary relief sought by McDonald.

¹ Section 105(c)(1) provides, in pertinent part:

No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because such miner ... instituted any proceeding under or related to this Act

30 U.S.C. § 815(c)(1).

In view of the above, on February 2, 2015, McDonald's counsel filed a Motion for Temporary Stay requesting that the hearing, previously scheduled for February 10, 2015, be continued and that this matter be temporarily stayed to allow counsel to determine the proper respondents who were responsible for McDonald's employment. Upon identification of the proper respondents, McDonald's counsel represented that a motion to lift the stay would be filed with an accompanying motion to amend the pleadings. Consistent with counsel's request, on February 3, 2015, I issued a stay order to provide counsel with an opportunity to amend the pleading by adding King and Toler as the proper respondents.

Thereafter, on February 18, 2015, McDonald's counsel filed a motion to lift the stay and to amend the named respondent responsible for her alleged discrimination. However, rather than amending the complaint to include King and Toler, McDonald's counsel seeks to add Frasure Creek as an entirely new respondent, under a new theory of the case. Specifically, McDonald's counsel now alleges:

Frasure Creek was intimately involved in and had direct knowledge of all of the hazard complaints at issue in this discrimination case, and had a direct role in effectuating an illegal and discriminatory course of conduct, by communicating and consummating an adverse employment action against the Complainant in retaliation for protected activity.

Mot. to Lift Temp. Stay and to Amend Compl., at 2 (Feb. 18, 2015).

Section 105(c)(2) of the Mine Act provides that upon receipt of a complaint of discrimination, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission. . . ." 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Mine Act provides that, if the Secretary determines that no discriminatory violation has occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Thus, an investigation by the Secretary under section 105(c)(2), and his finding that no discrimination has occurred, are prerequisites for a miner's filing of a complaint on her own behalf under section 105(c)(3).

In seeking an amendment of McDonald's complaint to include Frasure Creek, McDonald alleges previously-unraised facts specifically relevant to Frasure Creek that were not investigated by the Secretary under section 105(c)(2) of the Mine Act. In *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), a miner sought an amendment to his section 105(c)(3) discrimination complaint that differed substantially from the complaint the miner initially filed with MSHA under section 105(c)(2), an amendment that constituted a theory of the case that

MSHA had never previously investigated. The Commission held:

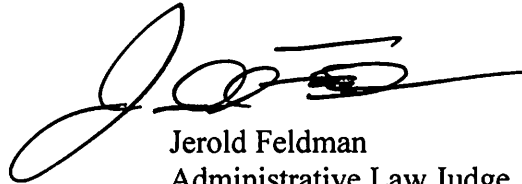
If the Secretary's . . . investigation . . . did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

13 FMSHRC at 546; *see also Pontiki Coal Corp.*, 19 FMSHRC 1009, 1018 (Jun. 1997).

Consistent with *Hatfield*, as the Secretary has not had the opportunity to investigate McDonald's complaint against Frasure Creek, McDonald's motion to redirect her discrimination complaint against the mine operator, rather than her security services former employer, shall be denied. In view of the fact that TMK was not McDonald's employer, and McDonald's counsel has elected not to amend the complaint to include King and Toler as respondents, the captioned discrimination matter against TMK shall be dismissed.

ORDER

Accordingly, in the absence of a relevant investigation under section 105(c)(2), **IT IS ORDERED** that McDonald's motion to amend her complaint naming Frasure Creek Mining, LLC, as the respondent party **IS DENIED**.² **IT IS FURTHER ORDERED** that the captioned discrimination case against TMK Enterprise Security Services, Inc., **IS DISMISSED**. This dismissal is without prejudice to any discrimination complaint McDonald may file under section 105(c)(3) against George King and/or Mark Toler, as individuals.



Jerold Feldman
Administrative Law Judge

² In the event the Secretary investigates and declines to bring a complaint against Frasure Creek Mining on behalf of McDonald under section 105(c)(2), nothing herein shall preclude McDonald from filing a complaint on her own behalf against Frasure Creek Mining under section 105(c)(3) of the Mine Act. Moreover, nothing herein should be construed as addressing the jurisdictional issue of a non-employer's liability under section 105(c).

Distribution: (Regular and Certified Mail)

Samuel B. Petsonk, Esq., Mountain State Justice, Inc., 1031 Quarrier Street, Suite 200,
Charleston, WV 25301

Frasure Creek Mining, LLC, 137 East Main Street, Oak Hill, WV 25901

Mark Toler, Appalachian Enterprise Security Services, LLC, P.O. Box 88, Delbarton, WV 25670

George King, 1704 Jackson Avenue, St. Albans, WV 25177

/acp