FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

May 8, 2015

SECRETARY OF LABOR U.S. DEPARTMENT OF LABOR on behalf of FREDRICK ABRAMS, Complainant, v. CALIFORNIA ROCK CRUSHER CORP., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2015-551-DM MSHA Case No. WE-MD-15-06 Mine: CEMEX-Paiute Pit Mine Mine ID: 26-00789

ORDER TERMINATING TEMPORARY REINSTATEMENT

Before: Judge Moran

Respondent California Rock Crusher Corporation ("California Rock") has filed a motion seeking an order terminating Complainant miner Fredrick Abrams' temporary economic reinstatement. For the reasons which follow, the Court terminates Fredrick Abrams' temporary economic reinstatement, retroactively effective to the end of the business day on Friday, May 1, 2015.

Respondent's Motion relates that California Rock provided and operated two articulating hauling trucks to move material at an open pit sand and gravel mine owned by CEMEX. It continues, stating that "[o]n Friday, April 24, 2015, CEMEX notified California Rock Crusher Corp. that effective the next Friday, May 1, 2015, at the end of the business day CEMEX was terminating Cal Crush's services because CEMEX was then in a position to operate its own trucks with its own drivers."

In support of its motion, California Rock's Motion provides the following salient information[1]: that its business is located in Ripon, California; that it hired drivers from the Reno-Sparks, Nevada, area to work at CEMEX's sand and gravel mine; that except for one employee, none of those drivers who were permanently laid off had ever worked for the Company in California in the past; that, except for that one driver, none of the other drivers, including

[1] The information, capsulized here without distortion by the Court, is essentially taken from the Motion, as amended by the subsequent email statement by Respondent's Counsel dated May 6, 2015. Respondent contends that the amended statement, disclosing that one driver had worked for the Company in California and has a Class A license, supports its position, on the basis that as it did not offer another position to that driver who had worked for it in California and who has a Class A license, it certainly wouldn't have offered Abrams another position.

Abrams, has a Class A license; that the only other drivers who work for California Rock are located in California and those drivers all have Class A licenses to operate over-the-road trucks; that Respondent did not transfer any employees from California to Nevada; that it does not have any driver positions that are open; that the drivers who were on the CEMEX job on May 1, 2015, were permanently laid-off with no reasonable expectations of recall; that the Respondent will soon be transporting the two articulating hauling trucks to its headquarters in Ripon, California; that it does not have any work in Nevada, nor does it have any work scheduled in Nevada; that the two articulating hauling trucks at the CEMEX site are the only two that the Company owns; and that there currently isn't any work for those trucks and if the Company does not obtain work for those trucks they will be sold.

On the basis of its Motion, the supporting declaration, and exhibits to that declaration, California Rock Crusher Corp. requests that its motion to terminate the order approving settlement be granted on the basis that it has discharged its obligations under the settlement.

In its May 6, 2015, Response to the Motion, the Secretary advised that it "does not take a position on Respondents motion other than to note that Respondent must show by a preponderance of the evidence that work is not available for the complainant." It adds that "if the Court finds that Respondent has met this burden the proper relief would be to toll the economic reinstatement pending the resolution of the underlying discrimination complaint rather than terminate the economic reinstatement entirely . . . [on the grounds that, per an email attachment to the Respondent's motion from Anthony Beato of California Rock Crush,] Respondent is looking for work to employ the Articulating Hauling Trucks that complainant drove." The Secretary contends that "[i]f such new projects are obtained then complainant would be entitled to reinstatement as a truck driver on those projects."

Discussion

As the Commission stated in *Gatlin v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1054 (Oct. 2009), "a temporary reinstatement order [does not] require[] a miner to be employed under any circumstance, regardless of changes that occur at the mine after issuance of the temporary reinstatement order." Instead, it noted "that 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." *Id.* (citing *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)).

It noted with approval the reasoning of a Commission Judge expressing that "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).

"Commission precedent recognizes that a change in circumstances may be relevant to tolling economic reinstatement in a temporary reinstatement proceeding." *Gatlin*, 31 FMSHRC at 1054 (citing *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)). The Commission then held that "the Judge erred in concluding that a miner must remain temporarily reinstated notwithstanding changing circumstances at the mine." *Id.*

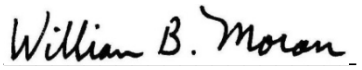
The Commission has also recognized in remedial contexts that an operator has the burden of establishing "facts which would negative the existence of [back pay] liability to a given employee or which would mitigate that liability." *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 779 (May 1989) (citations 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. *Id.*

So too, in *Sec'y of Labor on behalf of Ratliff v. Cobra Natural Resources*, 35 FMSHRC 394, 396 (Feb. 2013), the Commission observed that it has "permitted a limited inquiry to determine whether the obligation to reinstate a miner may be tolled." It also "recognized that 'the occurrence of certain events, such as a layoff for economic reasons, may toll an operator's reinstatement obligation.'" *Id.* (quoting *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1000 (May 2012)). Thus, it agreed that a judge may consider whether a layoff tolls reinstatement obligations. Accordingly a judge should "consider evidence offered by an operator seeking to affirmatively show that reinstatement should be tolled because of a layoff due to business contractions or similar conditions. . . . An operator generally must affirmatively prove that a layoff justifies tolling temporary reinstatement by a preponderance of the evidence." *Id.* at 397 (citations omitted). In the circumstances of a layoff, "the operator must demonstrate that 'the layoff properly included' the miner who filed the complaint of discrimination." *Id.* (quoting *Gatlin*, 31 FMSHRC at 1055). If there are facts to support it, the Secretary in turn may "assert that the miner's inclusion in the layoff was, or might have been, related to protected activity engaged in by the miner."[2] *Id.*

Upon consideration, the Respondent's Motion is GRANTED. The Secretary has taken no position on the Respondent's Motion, nor has it contested the facts presented in that Motion. Commission precedent clearly recognizes that the word "temporary" in temporary reinstatement encompasses situations which make continued employment or, as here, economic employment, subject to termination upon the occurrence of certain events, such as a layoff. Certainly, temporary reinstatement is not a ticket to continued nationwide employment. The undisputed facts here warrant not mere tolling but cessation of the temporary economic employment. California Rock is no longer doing business for CEMEX in the Reno-Sparks Nevada area and, given that state of affairs, its temporary employment obligations ended when that occurred at the end of the business day on Friday, May 1, 2015.

[2] Not applicable here is any claim that the objectivity of the layoff as applied to the miner should be evaluated as a potentially wrongful adverse action itself.

SO ORDERED.



William B. Moran
Administrative Law Judge

Distribution:

Fredrick Abrams, P.O. Box 1013, Verdi, NV 89439

Boris Orlov, Esq., Senior Trial Attorney, U.S. Department of Labor, Office of the Solicitor, 350 S. Figueroa Street, Suite 370, Los Angeles, CA 90071

John H. Feldmann, III, California Rock Crusher Corporation, P.O. Box 775, 339 Doak Boulevard, Ripon, CA 95366