

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 14, 2020

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JAMES MCGAUGHRAN,
Complainant,

v.

LEHIGH CEMENT COMPANY, LLC,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. PENN 2020-0015-DM

Mine: Nazareth Plant I
Mine ID: 36-00190

ORDER DENYING MOTION TO ENFORCE ORDER

Before: Judge Rae

This matter comes before the Court upon the Secretary of Labor’s (“Secretary”) Motion to Enforce Order (“Motion”). For the reasons set forth below, the Secretary’s Motion is denied.

I. BACKGROUND

On August 20, 2019, I issued an Order Granting Temporary Economic Reinstatement (“Order”) ordering Lehigh Cement Company, LLC (“Respondent”) to economically reinstate James McGaughran in accordance with all terms set forth in the parties’ Joint Motion to Approve Settlement Regarding Temporary Reinstatement. I issued the Order in the temporary reinstatement proceeding, Docket No. PENN 2019-0144. Subsequently, I was assigned this discrimination proceeding—Docket No. PENN 2020-0015—which concerns the merits of McGaughran’s discrimination complaint. I set a hearing date of June 2-4, 2020 for the discrimination proceeding. Subsequently, I postponed the hearing until October 27-30, 2020 due to COVID-19.

On May 11, 2020, Respondent filed a Motion for Tolling of Economic Temporary Reinstatement. On May 22, 2020, I issued the Order Tolling Temporary Reinstatement under the temporary reinstatement docket, Docket No. PENN 2019-0144. The Secretary filed a Petition for Discretionary Review of my Order Tolling Temporary Reinstatement, which the Commission granted on July 1, 2020. The matter is currently pending before the Commission.

II. DISCUSSION

The Secretary’s Motion alleges that Respondent is not honoring the Order. Specifically, the Secretary alleges that Respondent failed to pay McGaughran the entire amount he is owed

under Respondent’s Annual Incentive Plan (“Incentive Plan”). The Incentive Plan provides Respondent’s eligible employees with “an incentive compensation opportunity for improving operating performance within their areas of responsibility during the ‘plan year.’” Mot. to Enforce Order Ex. 1, at 1. The Secretary seeks an order requiring Respondent to pay McGaughran \$12,000.00, which the Secretary claims represents the remainder of the Incentive Plan payment that Respondent has withheld from McGaughran.¹

Conversely, Respondent claims it is in full compliance with the Order. Respondent argues that payments under the Incentive Plan are a discretionary “bonus,” not a “benefit” that McGaughran is entitled to under the Order. Resp’t’s Opp’n to Mot. to Enforce Order, at 3-5. Although Respondent made a partial Incentive Plan payment to McGaughran, Respondent now maintains that the Order does not require Respondent to make *any* Incentive Plan payment to McGaughran. *Id.* at 6-7. For that reason, Respondent seeks an order requiring McGaughran to return the partial Incentive Plan payment to Respondent.

Ultimately, I cannot resolve the issues raised by the Secretary’s Motion at the present time because the Motion is not properly before me and because I lack jurisdiction over the temporary reinstatement proceeding. The Secretary filed the instant Motion under the incorrect docket. The instant discrimination proceeding solely concerns *the merits* of McGaughran’s discrimination claim, not issues addressing compliance with the Order. Rather, the matter of enforcing compliance with the Order would be properly filed under Docket No. PENN 2019-0144, the temporary reinstatement proceeding.

However, this Court would lack jurisdiction to address the substance of the Secretary’s Motion even if it were filed under the temporary reinstatement docket. Per Commission Rule 45(e), “[a] Judge’s order temporarily reinstating a miner is not a final decision within the meaning of [Section] 2700.69, and[,] *except during appellate review of such order by the Commission or courts*, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.” 29 C.F.R. §2700.45(e)(4) (emphasis added); *see also BR&D Enters., Inc.*, 23 FMSHRC 386, 389 (Apr. 2001). During the Commission’s review of the Order, the Court does not retain jurisdiction over the temporary reinstatement proceeding.² 29 C.F.R. § 2700.45(e)(4).

¹ From 2016 through 2019, Respondent paid McGaughran an incentive payment that ranged from 15% to 17% of his annual salary. McGaughran Decl. ¶ 5. The Incentive Payment Respondent paid McGaughran in April 2020 represented approximately 7% of his annual salary. *Id.* ¶¶ 6, 7.

² Even if I had jurisdiction, I would find that payments under the Incentive Plan are not a “benefit” that McGaughran is entitled to under the Order. Payments under the Incentive Plan are solely at the discretion of Respondent to award. Further, Section VI.D of the Incentive Plan states that “incentive payments . . . shall not be deemed a part of a participant’s regular, recurring compensation for purposes of calculating payments or benefits from any Company benefit plan or severance program.” Mot. to Enforce Order Ex. 1, at 7.

Therefore, I deny the Secretary's Motion to Enforce Order because the Motion is not properly before me and because I lack jurisdiction over the temporary reinstatement proceeding pending review by the Commission.

ORDER

The Secretary's Motion to Enforce Order is **DENIED**.



Priscilla M. Rae
Administrative Law Judge

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