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July 18, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ORIGINAL SIXTEEN TO ONE MINE, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2017-119 A.C. No. 04-01299-423919 Docket No. WEST 2017-173-M A.C. No. 04-01299-425970 Sixteen To One Mine

ORDER GRANTING THE SECRETARY OF LABOR'S MOTION TO DENY RESPONDENT'S REQUEST FOR ISSUANCE OF SUBPOENAS

Before the Court is the Secretary of Labor's Motion to deny the Respondent, Original Sixteen to One Mine's request for the issuance of subpoenas ("Motion"). The Respondent has requested subpoenas for the appearance of three MSHA employees at the upcoming hearing in Truckee, California, commencing on August 9, 2017.

The hearing, for the two dockets listed in the caption, involves 11 citations and 2 orders. Two MSHA-authorized inspectors issued the citations; in September 2016 Inspector Julie Hooker issued the two 104(a) citations involved in WEST 2017-0119 and, in November 2016, Inspector Bryan Chaix issued the nine 104(a) citations and two 104(b) orders involved in WEST 2017-173. The Motion identifies the three individuals for whom subpoenas are sought: Wyatt Andrews, who is the Mine Safety and Health Administration's ("MSHA's") Western District Manager, John Pereza, who is an Assistant District Manager in MSHA's Western District, and Steven Hagedorn, who is an inspector in MSHA's Vacaville, CA field office. For the reasons which follow, **the Secretary's Motion is GRANTED.**

Respondent's Request for Subpoenas

In its July 4, 2017 email, Respondent informed of the grounds in support of the subpoenas it seeks for the three above-named individuals. Respondent asserts that

> AR [Authorized Representative] Hooker and AR Chaix are required (must) demonstrate through their words and actions that they are knowledgeable and professional regarding the specific site they inspect. They must rely on their training and experience 'to reach fact-based, impartial decisions in safety and health matters involving miners.' (Chapter TWO A -Procedures Handbook) They are required to utilize their time efficiently and effectively. Neither AR Hooker nor AR Chaix carried out these activities.

Respondent's July 4, 2017 email to the Court and the Secretary of Labor's Counsel, Attorney Pearson.

In the same email, the Respondent elaborated on the reasons supporting the subpoenas as follows,

> Wyatt Andrews and John Perez are key witnesses in the defense of alleged violations of citations issued by AR Hooker and AR Chaix. Both have knowledge regarding the qualifications of AR Hooker and AR Chaix. Wyatt Andrews and John Perez have intimate background, training and experiences with MSHA and its operation in the Western District. No others are qualified to address the questions Respondents will raise in this administration hearing except the Administrator. [Respondent also notes that] [t]he district and assistant district managers share responsibility with the Administer for Metal and Nonmetal Mine Safety and Health (Administrator) 'for enforcing and implementing provisions of the Mine Act' (Chapter ONE D - Procedures Handbook) [and that] Wyatt Andrews and John Perez hold the two district responsibilities. [Respondent then adds that] [i]f the SOL objects to issue Subpoenas [*sic*] for these federal employees, Respondent requests a subpoena for the Administrator.

Id.

As for the third individual for which a subpoena is sought, AR Steve Hagedorn,[1] Respondent states that inspector Hagedorn

> was the designated inspector of then trainee, Right of Entry (ROE) Hooker on her first underground inspection, which was at Sixteen to One mine. This placed him directly responsible over ROE Hooker. MSHA has an 'Instruction Guide Series, instructor training Course. Its intent is to 'teach how to teach.' An instructor/teacher should be well versed in the subjects they intend to teach by past training and experiences. 'If not, further study and/or experience will be required.' Respondent will prove that Hooker did not receive required instructions during the mandatory training period. Respondent will also prove that AR Chaix failed to conduct his activities during the inspection, as required with another ROE federal employee during his training. This establishes a pattern of behavior that only Messrs. Andrews, Perez or the Administrator [ ]can address.[2]

Id. (emphasis in original)

The Secretary's Motion to deny the Respondent's request for issuance of the subpoenas.

The Secretary contends that neither Wyatt Andrews nor John Pereza possess relevant information as neither was "directly involved in the issuance of the citations at issue in this case." Motion at 3. The Secretary states that neither individual was "present at the Mine at the time of either inspection and have no personal knowledge of the conditions described in the citations and orders at issue." *Id.* The Court notes that the Respondent does not claim otherwise.

Given that, the Secretary argues that "their testimony would not assist the finder of fact in determining the truth and is not relevant." As neither can offer any "relevant evidence they should not be compelled to testify." *Id.*

The Secretary also notes, correctly, that Respondent's request for the subpoenas is to allow it *to question Andrews and Pereza* about the qualifications of inspectors Chaix and Hooker. However, the Secretary responds that, as he intends to call both inspectors as witnesses in the upcoming hearing, Mr. Miller will be able to question both Chaix and Hooker directly about their qualifications.[3]

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[1] Respondent identifies the inspector as "Steve Haggerdorn." However, it appears that the correct spelling of the inspector's name is "Steven Hagedorn."

[2] It is noted that, on June 29, 2017, Respondent initially advised the Court via email that subpoenas for John Perez "and/or Wyatt Andrews testimony is critical for judging these citations issued by AR Brian Chaix. There is no acceptable reason for one or both not to appear in your courtroom." June 29, 2017 email from Michael Miller to the Court and the Secretary of Labor's Counsel, Attorney Pearson.

[3] A side issue has apparently arisen, as the Secretary also informs of Mr. Miller's expressed intention "to question Mr. Andrews and Mr. Pereza about internal personnel matters relating to Mr. Chaix, and about Mr. Chaix's demeanor and interactions . . . [and that Mr. Miller has]

With those principles in mind, the Secretary argues that "Mr. Chaix's character is not an essential element of whether Respondent violated the cited standards. Whether Mr. Chaix was unpleasant is completely irrelevant to that question. . . . such questioning would be irrelevant to assisting the trier of fact in determining whether the citations should be upheld." *Id.*

Turning to the requested subpoena for Inspector Steven Hagedorn, the Secretary argues that Hagedorn does not possess relevant information, noting Hagedorn "was not present for the September 2016 inspection of the Mine and has no personal knowledge of the citations issued by Ms. Hooker at that inspection. In fact, Mr. Miller admits as much and states that his intent in calling Mr. Hagedorn to testify is to question him on his training of Ms. Hooker." *Id.* at 5.

While the Secretary acknowledges that Ms. Hooker accompanied Mr. Hagedorn as a trainee on his inspection of the Mine in November, 2015, the matters in dispute in the present docket have nothing to do with that November 2015 inspection and therefore have no relevance to this matter.

The Secretary points out that "Mr. Miller may question Ms. Hooker about her background and training at the hearing on this matter. Any testimony by Mr. Hagedorn would be unduly repetitious, needlessly cumulative, and would serve to waste time during the upcoming hearing," and the Hagedorn subpoena should be denied. *Id.*

Last, the Secretary contends that the Administrator for metal/nonmetal should not be compelled to testify because he is a high ranking government official.[4] *Id.* A second, but

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opined that Mr. Chaix has unstated 'mental issues' that he wishes to explore." *Id.* at 3. As the Secretary observes, delving into such issues are intended to attack the inspector's character. Challenging that purpose, the Secretary notes that "Federal Rule of Evidence 404 prohibits the introduction of evidence of a person's character or previous actions to prove that a person acted in accordance with that character trait on a particular occasion." *Id.* at 3-4. Further, the Secretary points out that "'[c]haracter evidence does not constitute an 'essential element of a claim or charge unless it alters the rights and liabilities of the parties under the substantive law.'" *Id.* at 4, citing *Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 232 (3d Cir. 2004) (citing *Schafer v. Time, Inc*., 142 F.3d 1361, 1371 (11th Cir.1998). The Court agrees with the Secretary's observations. Particular questions which may be posed along these lines will be addressed as they arise during the course of the hearing.

[4] As the Secretary correctly observes, "Courts have routinely held that 'top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.' *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing *United States v. Morgan*, 313 U.S. 409 (1941)). The rule disallowing compulsory testimony of government officials applies not only to cabinet members and heads of executive agencies; it applies as well to lower level but relatively important decision makers within an agency. *Simplex* 766 F.2d at 586-7 (barring depositions of the Solicitor of Labor, the Secretary of Labor's Chief of Staff, an OSHA Regional Administrator, and an OSHA Area Director). The reasons for this rule are particularly apparent in the instant case. 'Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible government officials as sources of

important, reason to preclude the Administrator's testimony is that he is "without personal knowledge of the facts of this case and [therefore] should be protected from compulsory testimony." Motion at 5, citing *Pocahontas Coal Co.*, 36 FMSHRC 2326, 2327 (ALJ Miller, August 7, 2014).

Discussion

This is not a hard, nor close, matter to resolve. While, as the Respondent states, MSHA inspectors must "demonstrate through their words and actions that they are knowledgeable and professional regarding the specific site they inspect [and that] [t]hey must rely on their training and experience 'to reach fact-based, impartial decisions in safety and health matters involving miners,'" the Respondent will have a full opportunity to challenge both the inspectors' knowledge about the alleged violations and the adequacy of their underlying training and experience. Respondent's July 4, 2017 email.

In this regard, in order to assist in cross-examining those inspectors, the Respondent may elect to bring individuals to the hearing who have specialized knowledge about the subjects addressed in the various safety standards cited by the inspectors, in order to attempt to show deficiencies in the inspectors' grasp of those standards and/or alleged educational shortcomings in their knowledge of the subjects upon which those standards are based.

As an illustrative example, in the instance where the Respondent was cited for an alleged violation of 30 C.F.R. § 57.18025, and that standard's requirement, in part, that one is not to work alone "in any area where hazardous conditions exist that would endanger his safety," the Respondent may delve into the basis for the inspector's conclusions that the standard was violated. 30 C.F.R. § 57.18025. This could include questioning about the inspector's underground hard rock mining experience. As a second illustration, the same approach could be used for the citation asserting that the mine's check-in and check-out system did not provide an accurate record of the persons in the mine, per 30 C.F.R. §57.11058.

These examples are only intended to show how, potentially, one could cross-examine an inspector and neither party should construe them as suggesting that the alleged violations are suspect, nor do they infer that the Secretary may not prevail in those or the other contested citations. The facts adduced at the hearing and the legal determinations about the standards involved will determine the outcomes of the challenged citations.

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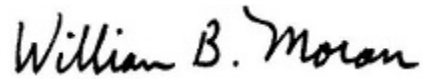
routine pre-trial discovery would result in a severe disruption of the government's primary function.' *Cmy. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983), citing *Capitol Vending Co. v. Baker*, 36 F.R.D. 45 (D.D.C. 1964)." Motion at 4-5. The Court agrees with the Secretary's observations; the Respondent's alternative request to subpoena the Administrator is DENIED.

For now, the more important point is that there is neither a need nor a justification for Respondent's requested subpoenas of MSHA's Andrews or Perez, much less for the appearance of the Metal and Nonmetal Administrator at the upcoming hearing. Thus, the Court does not agree at all with the Respondent's claim that "[n]o others are qualified to address the questions Respondents will raise in this administration hearing . . ." Respondent's July 4, 2017 email. The same observation applies with equal force to the subpoena sought for MSHA's Hagedorn.

SO ORDERED.



William B. Moran
Administrative Law Judge

Distribution

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