FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 24, 2021

SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR on behalf of DARCY WHITE, Complainant, v. PRAIRIE STATE GENERATING CO., Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2021-0158 MSHA Case No. VINC-CD-2021-03 Mine: Lively Grove Mine Mine ID: 11-03193

ORDER DENYING RESPONDENT'S MOTION TO DISSOLVE TEMPORARY ECONOMIC REINSTATEMENT

Pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") on September 27, 2017, filed an Application for Temporary Reinstatement of miner Darcy White ("Darcy" or "Complainant") to her former position with Respondent Prairie State Generating Co., ("Prairie State" or "Respondent") at the Lively Grove Mine pending final hearing and disposition of the case.

PROCEDURAL HISTORY AND PARTY CONTENTIONS

On June 30, 2021, the Respondent filed a timely request for hearing, as well as a Motion to Dismiss Application for Temporary Reinstatement for Failure to Join Required Party or to Join Required Party. In its motion, Respondent stated that Complainant was employed by Custom Staffing, a staffing agency through which Respondent sourced temporary contract workers, as needed. Accordingly, Respondent argued that Custom Staffing was a required party under Fed.R.Civ.P. 19(b), because Custom Staffing was necessary to effect a remedy.

The Secretary opposed Respondent's motion. The Secretary argued that preliminary investigation revealed no evidence that Custom Staffing engaged in any discriminatory conduct, and that the complete relief sought required only Prairie State as Respondent.

The undersigned deferred ruling on Respondent's motion prior to hearing, which convened via Zoom videoconference on July 20, 2021. After the hearing opened, the parties requested to meet in breakout rooms to engage in settlement discussions. Following several attempts, the parties reached agreement on material terms of settlement. On July 27, 2021, the parties filed a Joint Motion to Approve Economic Reinstatement. On July 29, 2021, this administrative tribunal approved the Joint Motion and ordered that within 30 days the Secretary either complete his

investigation and make a determination on the complaint, or provide a detailed explanation why he could not do so.

On August 25, 2021, the Secretary filed a motion stating that the Secretary would not be able to complete his investigation within 30 days of the undersigned's Order due to new developments in the case. Specifically, the Complainant filed an Addendum on August 18, 2021, naming Custom Staffing as an additional Respondent in her discrimination complaint.

On August 31, 2021, the Respondent filed a Motion to Dissolve Order Granting Joint Motion to Approve Temporary Economic Reinstatement Motion and Agreement. In this motion, Respondent argued by analogy to the Commission's decision in *Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2021), that this tribunal should adopt a test that would balance the Secretary's need to proceed beyond the deadline with the prejudice the operator would face to determine that the Temporary Economic Reinstatement should be dissolved for failure to complete the investigation of this expedited matter within the statutory 90-day period referenced in section 105(c)(3), or the additional 30-day period encouraged by the undersigned.

With respect to the first step of Respondent's proposed test—the Secretary's burden of establishing adequate cause—Respondent argues that the Secretary has failed to establish adequate cause for not completing its investigation into the merits of Complainant's case. Specifically, Respondent argues that Complainant is late in filing any Addendum and that any additional investigation into an additional respondent should not impact the completion of the Secretary's investigation of Prairie State. Furthermore, Respondent argues that the Secretary and Complainant "disclaimed that Custom Staffing was a proper respondent when that issue was pending before the Court." *Resp. Mot.* at ¶25. Respondent also alleges that the Complainant's Addendum amounts to a "willful delay" and is the result of "bad faith." *Resp. Mot.* at ¶26, 27.

With respect to the second step of Respondent's proposed test—the operator's burden of showing actual prejudice arising from the delay—Respondent argues (1) that the continuation of its requirement to pay Complainant is "manifestly prejudicial," and (2) that because the Secretary has provided no end date for the investigation, he has unduly delayed the matter such that it constitutes prejudice against Respondent.

In a brief footnote, Respondent suggested in the alternative that if the undersigned was disinclined to dissolve the Order Granting Temporary Economic Reinstatement, it should toll the Order during the period of investigation.

On September 7, 2021, prior to the Secretary or Complainant submitting their responses to the Respondent's motion, the undersigned convened a conference call, wherein the undersigned noted certain strengths in Respondent's motion and asked why it should not be granted.

On September 13, 2021, the Secretary filed its Opposition to Respondent's Motion for Dissolution, wherein it argued that Respondent "asks for a severe and extraordinary remedy without citing any case law in support of its request." *Sec'y Resp.* at ¶7. The Secretary argued that the only grounds recognized by the Commission to dissolve a Temporary Reinstatement are if the Secretary's involvement in the case ends, and it can be tolled only if there is no longer work at the mine for the Complainant. Neither of these circumstances apply to the instant case, so therefore it may not be tolled or dissolved.

The Secretary further argues that the Respondent's proposed test based on *Long Branch Energy*, 34 FMSHRC 1984, is inappropriate because civil penalty cases are different from Temporary Reinstatement cases in crucial ways. Congress made clear its intention that employers should bear the greater burden of risk in a Temporary Reinstatement proceeding. As a result, the Commission has never applied *Long Branch* to a Temporary Reinstatement case.

The Secretary also argued that even if this tribunal were to adopt Respondent's proposed balancing test, Respondent has not shown either undue delay or actual prejudice. Contrary to the Respondent's assertions, the Secretary states that there was no "bad faith" in the instant case. Complainant was not represented by counsel when she filed her initial complaint, and it is entirely reasonable that she would amend her complaint after retaining and consulting with counsel. Furthermore, the Secretary's earlier position opposing Custom Staffing as a necessary party only stated that it was not necessary to effectuate the desired remedy. However, the issue presented by Complainant's Addendum is that Custom Staffing was part of the discrimination alleged. The Secretary contends that Respondent improperly conflates these two issues in order to arrive at its conclusion of undue delay.

The Secretary further argues that Respondent has not made any showing of actual prejudice. The requirement to pay a miner under Temporary Reinstatement is not prejudice; it "is the nature of temporary reinstatement." *Sec'y Resp.* at ¶13. Citing the Commission's decision in *Secretary ex rel. Hale v. 4-A Coal Co., Inc*., the Secretary argues that the Respondent's reliance on inconvenience or cost is misplaced, because prejudice means a "deprivation of a meaningful opportunity to defend against the claim." 8 FMSHRC 905, 908 (June 1986). The Secretary argues that the inconvenience that Respondent relies on is entirely speculative because it rests on what may occur if the investigation proceeds indefinitely. Furthermore, he argues that the decision to choose temporary economic reinstatement in lieu of actual reinstatement was the Respondent's, and it cannot claim prejudice due to its agreement to forgo the value of Complainant's labor.

On September 13, 2021, the Complainant, through counsel, similarly submitted a Response to Respondent's Motion, which incorporated the arguments made by the Secretary. Additionally, Complainant's counsel cavils that the September 7, 2021 conference call was inappropriate because it was essentially an off-the-record surprise oral argument that may inform the undersigned's decision prior to Complainant or the Secretary having submitted written responses.

The Complainant's counsel strenuously objected to Respondent's accusations of "willful delay" and "bad faith" in filing the "eleventh-hour" Addendum to White's discrimination complaint. He explained that the timing of the filing of the addendum was due to the heavy caseload that Complainant's counsel is currently handling, as well as research on the "cat's paw" theory of liability.

On September 20, 2021, the Respondent filed a Reply to the Complainant's and Secretary's Responses, wherein it argued that the Secretary did not establish or show adequate cause for the delay. Respondent questioned the timing of the Secretary's inclusion of Custom Staffing, and ultimately why adding this party impacts the conclusion of the investigation of Prairie State.

DISPOSITION

While the undersigned is sympathetic to Respondent's frustration with the Secretary's continued inability to conclude its investigation within the timeframe stated in the Act, the Motion to Dissolve or Toll the Temporary Economic Reinstatement must be denied.

Congress viewed the discrimination provision of the Mine Act as having a central place in ensuring the health and safety of miners. In the Senate Report accompanying the 1977 Mine Act, the Committee stated this sentiment clearly:

> If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act. The Committee is cognizant that if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.

S. Rep. No. 95-181 at 34 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-624 (1978). Indeed, it was for this reason that Congress explained that the scope of protected activities should be "broadly" interpreted and that the Section be "construed expansively." *Id.* However, Congress understood that a right with a delayed remedy would be hollow, so it included a provision for temporary reinstatement of the miner. ("The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *Id.* at 35.) Though Congress included short timeframes for the investigation and complaint, it was abundantly clear that no miner should suffer as a result of delay, stating, "[i]t should be emphasized, however, that these time frames are not intended to be jurisdictional. *The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations*." *Id.* at 36 (emphasis added). Based on the Act and congressional intent, neither a judge nor the Commission can lightly dissolve or toll a temporary reinstatement.

While the law gives the Secretary a great deal of flexibility in meeting its deadlines, it does not allow for an investigation to proceed indefinitely. By its very nature, a temporary reinstatement was intended to be temporary, and evidence of undue delay by the Secretary, along with actual prejudice to the Respondent, may be grounds for a court to take extraordinary action. Such an inquiry must closely examine the facts of the case to determine if extraordinary action in warranted. In this case at this time, even accepting Respondent's proposed *Long Branch* test, which balances the Secretary's need to proceed against the prejudice faced by the Respondent, a dissolution or tolling of the Order Granting Temporary Economic Reinstatement is not yet warranted.

The Secretary justified its need for additional time in this case by informing this tribunal that on August 18, 2021, Complainant filed an Addendum to her discrimination complaint naming Custom Staffing as an additional Respondent to her complaint. *Sec'y Response to TR Order* at ¶5. Complainant had not received legal advice when she filed her initial complaint and did not understand the legal distinctions between Prairie State and Custom Staffing. *Sec'y Opposition to Resp. Motion* at ¶3. The Secretary has confirmed that within a week of receiving this Addendum, it began requesting documents and interviews from Custom Staffing and is diligently investigating the allegations. *Id.* at ¶6.

The Secretary should have concluded his investigation into this expedited case in a more timely manner, but the employment relationship in this case is more complicated than in most instances. This has led to disagreements over whether the Complainant's employment was actually terminated because she remained employed for Custom Staffing, even after being removed from the Prairie State assignment. *Resp. Mot. To Dismiss* at ¶3-11. There were disagreements on

whether a remedy could be effectuated by Prairie State alone, because the contract between Prairie State and Custom Staffing appeared to be silent on whether Prairie State could recall someone for a temporary work assignment. *Resp. Reply to Sec'y Opposition*. These are not issues that arise in most discrimination cases. And while Respondent is free to structure its business and employment relationships in whatever manner it chooses, its complaint about delay is less convincing when a complicated employment relationship takes longer to investigate.

With regards to question of prejudice, Respondent argues that it is prejudiced in two ways. The first is that it must continue to pay Complainant during the course of the investigation, and the second is "the potentially infinite delay proposed by the Secretary." *Resp. Motion to Dissolve TR* at ¶21, 28. Both of these reasons fail to demonstrate actual prejudice. In considering whether a delay by the Secretary in making a discrimination determination has resulted in prejudice such that a dismissal may be appropriate, the Commission has held that the Respondent must show that "such delay prejudicially deprives a respondent of a meaningful opportunity to defend the claim." *Sec'y ex rel. Hale v. 4-A Coal Co. Inc*., 8 FMSHRC 905, 908 (June 1986).

The first reason that Respondent invokes to establish prejudice is true in every temporary reinstatement case and cannot constitute actual prejudice. As the Commission recently stated:

> Under the Mine Act, if a mine operator has a duty to reinstate a miner, the operator must continue to fulfill that obligation during the period prior to a reinstatement hearing. Temporary reinstatement is an essential protection for miners, and Congress intended employers to bear the proportionately greater burden of risk in temporary reinstatement proceedings.

Sec'y of Labor obo James McGoughran v. Lehigh Cement Co., LLC, 42 FMSHRC 467, 471 (July 2020). Insofar as Respondent is arguing that it is prejudiced because it is paying Complainant while not receiving any labor in return, this too cannot constitute prejudice because Respondent chose temporary economic reinstatement in lieu of temporary reinstatement.[1]

The second reason that Respondent advances to establish prejudice must also fail as it is too speculative at this time. The Secretary's inability to provide at present a date for the end of its investigation is not proof that it will proceed indefinitely. Indeed, if the Secretary's investigation drags on for too long without good reason, and the Respondent can show actual prejudice at that time, the undersigned will consider a renewal of this Motion with updated facts and arguments However, that moment has not yet arrived.

The Respondent further suggests that the undersigned toll the Temporary Economic Reinstatement pending completion of the investigation. This option is simply not permissible under existing Commission caselaw, although the undersigned is sympathetic to this alternative. In a recent decision, the Commission held that a judge abused her discretion when she tolled a temporary reinstatement due to technical difficulties that led to delays in the hearing. *Lehigh Cement,* 42 FMSHRC 467. In reversing the judge, the Commission succinctly outlined the parameters of when a judge should toll temporary reinstatement:

[1] The Respondent is free to move for temporary economic reinstatement in lieu of economic reinstatement. *See Sec'y of Labor obo Dustin Rodriguez v. C.R. Meyer and Sons Co*., 35 FMSHRC 811, 813-814 (April 2013) ("The economic cost it bears … can be mitigated by making use of [the miner's] services.")

> The Commission has recognized that the occurrence of certain events may toll an operator's temporary reinstatement obligation. The types of "events" which may justify tolling are those which would affect the availability of relevant work at the mine for the miner at issue, such as a layoff due to business contraction. *See Sec'y of Labor on behalf of Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050, 1054-56 (Oct. 2009) (finding the Judge erred in failing to consider "changes that occur at the mine" and explaining that the operator must show that work was unavailable for the discriminatee); *Sec'y of Labor on behalf of Anderson v. A&G Coal Corp.*, 39 FMSHRC 315, 319-20 (Feb. 2017) (finding tolling inappropriate where the miner may not have properly been included in the layoff). The purpose of temporary reinstatement is to provide the miner with an income through a return to work until the complaint is resolved. *North Fork*, 33 FMSHRC at 592. The obligation to temporarily reinstate may logically be tolled when work at the mine is no longer available for the relevant miner.

Id. at 470. The Commission explicitly rejected respondent's arguments that tolling was justified by factors other than availability of work at the mine, and also rejected the Judge's justification for tolling due to economic harm to the operator and unjust enrichment of the miner. *Id.* at n. 4, 5.

WHEREFORE, the Respondent's Motion to Dissolve Order Granting Joint Motion to Approve Temporary Economic Reinstatement Motion and Agreement is **DENIED, WITHOUT PREJUDICE**.

It is **FURTHER ORDERED** that the Secretary shall provide to the undersigned a detailed status update on the investigation and when it is expected to be completed every 21 days until a determination has been made or a new motion filed by Respondent Prairie State.

Thomas P. McCarthy

Thomas McCarthy
Administrative Law Judge

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