FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR - 6 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of J. DON ARNOLD, Complainant	DISCRIMINATION PROCEEDING Docket No. CENT 2013-541-D Case No. DENV-CD 2013-11
v.	
BHP NAVAJO COAL COMPANY, AND ITS SUCCESSORS, Respondent	Mine: Navajo Mine Mine ID: 29-00097

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Lewis

STATEMENT OF THE CASE

This case is before me upon a complaint of discrimination filed by J. Don Arnold ("Arnold" or "Complainant") against BHP Navajo Coal Company, and its successors ("BHP" or "Respondent") pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c).

On November 7, 2013, Respondent entered its Motion for Summary Decision. In such, Respondent states that there are no genuine issues of material fact, and the real question as a matter of law is the narrow issue of whether holding an employee out of service while the alleged conduct is investigated with no delay in pay or benefits is an "adverse action" as contemplated by the statute. By motions dated November 26 and November 29, 2013, the Secretary requested that the original complaint be amended to include the fact that Arnold's performance review was modified from "meets requirements" to "needs improvement," and he was issued a written warning concerning the alleged conduct. The Secretary responded to Respondent's Motion on December 16, 2013. He argues that Respondent's Motion should be denied because the actions taken by Respondent do constitute adverse action, and Respondent's motion should accordingly be denied.

LAW

According to 29 C.F.R. 2700.67(b),

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

The Commission "has long recognized that [ ] 'summary decision is an extraordinary procedure,' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007)(quoting *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994)). In reviewing the record on summary judgment, the court must evaluate the evidence in "the light most favorable to...the party opposing the motion." *Hanson Aggregates* at 9 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). Any inferences "drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motions." *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *Unites States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

ISSUE

The issue is whether Respondent's suspension of Complainant with no loss in pay or benefits during the completion of an investigation into Complainant's alleged failure to follow safety procedures, Respondent's issuance of a written warning regarding such, and/or Respondent's modification of Complainant's performance review from "meets requirement" to "needs improvement" singly or in combination constitute "material adverse action" raising a cognizable claim under § 105(c) of the Act.

CONCLUSIONS OF LAW

Under Section 105(c) of the Act,

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative

> of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

A complainant alleging discrimination under the Act establishes a *prima facie* case of prohibited discrimination by presenting evidence to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd* on other grounds *sub nom.*; *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (Apr. 1981). In 2006, the Supreme Court stated that the adverse action must be "material adverse action." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006). The employee "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from [engaging in protected activity]." *Id.*

The legislative history for 30 C.F.R. § 815(c) is clear in its intentions:

> 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 35-36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978). The undersigned also acknowledges that the chilling effect on employees cannot be presumed; rather, it must be made on a case-by-case basis taking into consideration both objective and subjective evidence. *Secretary of Labor on behalf of Poddey v. Tanglewood*, 18 FMSHRC 1315, 1320-1321 (Aug 1996). Based on the law and circumstances, the undersigned finds that while any of the actions taken by Respondent in isolation may not have constituted material adverse action, the totality of these actions do.

Respondent argues that the Complainant suffered no material adverse action because 1) he suffered no termination of employment or economic loss, 2) the change in his evaluation did not affect his overall rating, and 3) the written warning given to him was minor. *See* Respondent's Motion for Summary Decision, p. 1; Respondent's Supplemental Motion for Summary Judgement, p. 1-2; Respondent's Reply in Support of Motion for Summary Decision, p. 3. First, while it is true that Complainant was neither terminated nor did he suffer any lapse in pay or benefits, Respondent fails to mention that Arnold was first suspended indefinitely *without* pay pending an investigation. *See* Secretary's Response to Motion for Summary Decision. It was not until later that Complainant learned that there would be no delay in his pay. Arnold

stated that although he was eventually paid, he was worried during the investigation that he would be unable to support his family. *See* Declaration of J. Don Arnold, ¶ 18.

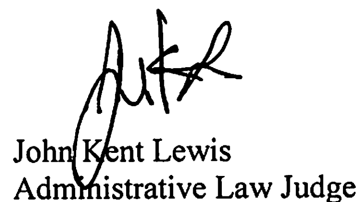
Second, Respondent argues that the change in Arnold's evaluation did not affect his overall rating and, regardless, the evaluations are not kept in an employee file; but, interestingly, Respondent was able to provide multiple performance evaluations in support of its case. *See* Respondent's Supplemental Motion for Summary Decision. This includes an evaluation done seven months prior to the one at issue here. *Id.* If Respondent is not keeping these forms for any personnel purposes, it begs the question of why Respondent would be able to produce it.

Finally, Respondent contends that the warning issued to Arnold was minor. However, the Secretary points out that the written warning is considered a "strike" against Arnold in Respondent's progressive discipline system. Secy's Resp., p. 10. This was confirmed by Arnold, who states that he feels like he has a target on his back. Dec. of Arnold, ¶ 11. Further, this "minor warning" will remain in Arnold's personnel file throughout the remainder of his employment. Secy's Resp., p. 10. Respondent conveniently fails to mention this.

Respondent also argues that this case should be dismissed in light of judicial economy since, it argues, Arnold has suffered no material adverse action. However, as Congress so eloquently stated, miners are the best means for effectively maintaining safety in the mines. Actions which serve to chill their participation must be closely evaluated. In his Declaration, Arnold states that other employees have told him that they will now think twice before making safety complaints. ¶ 17. Given all of the foregoing, the undersigned finds that Respondent's action, *in toto*, may very well deter a reasonable employee from engaging in protected activity.

ORDER

It is hereby **ORDERED** that Respondent's Motion for Summary Decision is **DENIED**. The parties are further **ORDERED** to **PROVIDE** a few mutually agreeable dates for hearing to the office of the undersigned within 20 days of the date of this Order.



John Kent Lewis
Administrative Law Judge

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