**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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AUG 2 2 2014

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| MARSHALL J. JUSTICE, Complainant, | : | DISCRIMINATION PROCEEDING: |
| v. | : | Docket No. WEVA 2014-559<br>MSHA Case No. PINE-CD 2014-01 |
| GATEWAY EAGLE COAL CO., Respondent. | : | Mine: Farley Eagle Mine<br>Mine ID: 46-01537 |

**CORRECTED ORDER REQUIRING THE SECRETARY TO PRODUCE DOCUMENTS FOR *In Camera* REVIEW AND CORRECTED ORDER DEFERRING RULING ON COMPLAINANT'S MOTION TO ENFORCE SUBPOENA**

In this proceeding, the Complainant, Marshall Justice ("Justice"), contends that he was discriminated against by Gateway Eagle Coal Co. ("Gateway") in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §815(c) ("Mine Act" or "Act"). Justice claims that he engaged in numerous instances of protected activity and that Gateway's officials responded in hostile ways, ones that would dissuade a reasonable worker from exercising his or her rights under the Mine Act, including changing his shift to less desirable hours.[1]

Justice filed his initial discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), and MSHA investigated. When MSHA declined to proceed before the Commission on Justice's behalf (30 U.S.C. §815(c)(2)), Justice filed his own complaint with the Commission under section 105(c)(3). 30 U.S.C. §815(c)(3). Gateway

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[1] The outlines of Justice's case are discernable, but the exact nature of Justice's asserted protected activities and the adverse actions he allegedly suffered are not clear to the undersigned. In a separate order issued today, Justice is directed to submit a chronological list of his asserted protected activities and of the adverse actions he suffered as a result of the activities.

answered. It denied discrimination occurred, and the matter was assigned to the undersigned.[2] The parties initiated extensive discovery, and as part of his discovery efforts, Justice subpoenaed Carolyn James, the Assistant Director of MSHA's Technical Compliance and Investigation Office. The subpoena directed Ms. James to appear to testify at the September 3 hearing and prior to that to be deposed at a place and time, "[t]o be determined for the convenience of the parties and deponent." Subpoena, *Marshall Justice v. Gateway Eagle Coal Co.*, WEVA 2014-559 (July 11, 2014). Ms. James also was directed to bring with her the complete MSHA file of the Secretary's investigation of Justice's initial complaint.

On July 21, the subpoena was served on Ms. James by Justice's counsel via the U.S. Postal Service. *Id.* The Secretary responded to the subpoena by denying the requests. He explained his position by stating that he was not a party to the case and that the Secretary's policy prevented Ms. James from testifying or being deposed and prevented the investigation file from being turned over without the approval of the Deputy Solicitor of Labor. *See* Sec's Op. To Complainant's Mot. To Enforce Subpoena, Exh. B. (Letter of Katherine E. Bissell, Deputy Solicitor for Regional Operations, U.S. Department of Labor, Esq. (August 12, 2014)). The Secretary noted that Justice earlier had obtained a redacted copy of the investigation file via a Freedom of Information Act ("FOIA") request.[3] *Id.* 1. In declining to produce the file, the Secretary raised numerous objections, including the Privacy Act, 5 U.S.C. § 552(a), the deliberative process privilege, the attorney work-product privilege, and the informant privilege. *Id.* 3-4. The Secretary concluded: "[I]n light of the above circumstances, and in accordance with DOL's authority to regulate the provision of records and testimony under 29 C.F.R. § 2.21 *et seq.* . . . DOL does not authorize the release of an unredacted copy of the MSHA investigation file." *Id.* 4.

After receiving the Secretary's response, Counsel for Justice filed a motion to enforce the subpoena. Counsel for the Secretary opposes the motion, again stating that the Secretary is unable to comply due to the decision of the Deputy Solicitor that Ms. James not be deposed or testify and that the investigative file not be produced. Counsel notes that pursuant to his FOIA request, counsel for Justice already has in his possession a copy, albeit redacted, of the file. Counsel states that the Secretary's reason for non-compliance is that:

> Under DOL regulations at 29 C.F.R. §2.20 - 2.25, the production of MSHA personnel and documents in response to third-party subpoenas is prohibited unless approved by the Deputy Solicitor of Labor. On August 12, 2014, [the] Deputy Solicitor for

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[2] Once assigned, case was scheduled to be heard on July 29, 2014, but at the request of the parties, the case was continued to September 3, 2014.

[3] A facsimile of the redacted copy is in the official case file. By the undersigned's count, it consists of 113 pages, 50 of which are significantly or totally redacted.

> Regional Operations . . . responded to the Complainant's subpoena, denying such approval. (Exhibit B.)
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> WHEREFORE, for the reasons stated above and as set forth in Exhibit B, the Secretary lacks authority to produce the requested . . . witness and documents and requests this Court to deny Complainant's Motion to Enforce Subpoena and to not issue a directive to enforce the subpoena in federal district court.

Sec. Of Labor's Opposition to Complainant's Mot. To Enforce Subpoena 2.

In an attempt to informally resolve the dispute and find a way forward, on August 15, the undersigned convened a conference telephone call with counsels.[4] In the call, counsel for Justice stated that he no longer requests that Ms. James be deposed or testify, but his request that the investigation file be produced remained extant. Counsel for the Secretary responded that without authorization of the Deputy Assistant Secretary of Labor, the file can not be produced. Counsel noted, as he had in his response to the motion to enforce the subpoena, that the Deputy Solicitor forbade its transmittal. Counsel also noted that in her letter denying authority to produce the investigation file, the Deputy Solicitor invoked several privileges that in her view prohibited revelation of the file's contents.

The undersigned then suggested to counsels that if the proceeding had been one under section 105(c)(2) of the Act and the Secretary therefore had been a party, the matter most likely would have been resolved by submitting the disputed document for *in camera* review by the judge to weigh the information it contained against the relevance of the information and the Secretary's assertions of privilege. The undersigned asked counsels if they would agree to such a procedure to resolve the present dispute. Counsel for Justice stated he would. Counsel for the Secretary stated he would not, that given the determination of the Deputy Solicitor, he had no authority to do so. Moreover, he stated his belief that much of the information was privileged.

Having failed to informally resolve the matter, the undersigned advised counsels that he would consider the merits of Justice's motion to enforce the subpoena. The undersigned further stated that he would not continue the September 3 hearing because the matter was continued once before and because however he ruled, the discovery dispute might well take on a protracted life of its own. Rather, than close the record at the conclusion of the hearing, the undersigned stated he would likely leave it open until the dispute was finally decided. At that point, the undersigned, with the assistance of the parties, would determine what further action, if any, was

[4] Although not involved in the discovery dispute, counsel for Gateway was a party to the conversation.

needed.

## RULING

The undersigned concludes that a ruling on Justice's motion to enforce the subpoena is premature, and it is deferred. Instead, and within one week of the date of this order, the undersigned will direct the Secretary to produce the investigative file as it pertains to the Memoranda of Interview of two MSHA inspectors, Steve Hall and Robert Puckett for the undersigned's *in camera* inspection. In conjunction with production of these parts of the file, the undersigned will request the Secretary to identify with specificity each privileged portion of the materials, state the privilege and explain why the privilege is applicable. The undersigned will determine whether the privilege is applicable and hence whether the identified part is "redactable" and will order the Secretary to send a redacted or partially redacted copy to counsel for Justice, or to send counsel a non-redacted copy if no privileges apply. The undersigned is sympathetic to the interests and concerns of both Justice and the Secretary and believes that this balanced approach to production as it pertains to what the undersigned perceives to be the present limited scope of the subpoena, is best suited to protect their interests and meet their concerns.[5]

It is important to realize that this is not a situation in which the complainant is asking the Secretary to produce "everything but the kitchen sink." The undersigned deems Justice to have considerably narrowed the scope of what he is seeking. As noted, when discussing the matter with counsels and the undersigned, counsel for Justice stated that he has dropped his request that Ms. James be deposed and testify. In addition, counsel pointed out that his primary interest in the investigative file is to obtain the Memoranda of Interview of Hall and Puckett.[6] This

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[5] The undersigned again observes that this is an approach that has worked well in section 105(c)(2) cases.

[6] In a July 21, 2014 e-mail to Ms James, which counsel states accompanied the subpoena, counsel explained:

> I am especially interested in obtaining copies of the Memoranda of Interview . . . that were taken of MSHA Inspectors Steve Hall and Robert Puckett. These two inspectors were the only individuals, other than mine management, to observe certain acts of discrimination that are central to Mr. Justice's claims under Sec. 105(c)(3) of the Mine Act. As you may surmise, the factual information contained in the MOIs . . . taken shortly following the date of the discrimination . . . is unique and [of] central importance to Mr. Justice's case.

effectual limitation of the subpoena request suggests to the undersigned that had the Secretary been at all receptive, the dispute might well have been resolved to the satisfaction of Justice with little inconvenience to the Secretary. However, the Secretary was not receptive. Rather than explore whether an accommodation could be reached, counsel cited his lack of authority to produce the documents, effectively closing off discussions.[7]

The first question before the undersigned is whether the investigative file, as it pertains to the MOIs of Hall and Puckett is discoverable? Surely, the answer is, "yes." Under the Commission's rules, discoverable material is "any relevant . . . matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. §2700.56(b). The MOIs of Hall and Puckett, who allegedly were present when Justice engaged in protected activity and when Gateway management officials allegedly responded to that activity, are relevant to Justice's allegations of discrimination and/or are likely to lead to the discovery of material that is admissible evidence.

Commission Rule 56(b) excludes privileged matter from discovery. 29 C.,F.R. § 2700.56(b). Therefore, the second question is whether the requested material is protected from disclosure by one or more privileges? The undersigned cannot answer the question because rather than submit the materials for *in camera* review and then identify the privileges to which specific parts of the materials allegedly apply, the Secretary has chosen to respond with what is, in effect, a "my way or the highway" approach. Counsel for the Secretary maintains that he has no authority to produce the requested materials because the Deputy Solicitor has determined they may not be released. Without consciously trying to put too grand a gloss on it, it must be stated that the logical conclusion to draw from the Secretary's position is no more and no less than that the government is the arbiter of its own actions. This is, to say the least, a concept that is antithetical to the very spirit of American jurisprudence. It also must be stated that it is untenable for a Commission judge to accept the position. To do so may leave a section 105(c)(3) complaint without effective recourse to information and evidence necessary to ensure a fair trial, and the primary duty of a Commission judge is to provide fairness to the fullest extent possible. Moreover, it is not only the Complainant who has a concern; so does the public. *In camera*

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> There is no meaningful substitute for these MOIs, because even if Inspectors Hall and Puckett were to testify at the hearing in this matter, their recollections could scarcely be expected to be as fresh as they were shortly following this event that occurred nearly a year ago.

E-mail, Samuel B. Petsonk, Esq. to Carolyn James (July 21, 2014).

[7] This is not to say anything prevents counsels from resuming discussions to informally settle the dispute. Indeed, the undersigned encourages them to do so.

review furthers the public's interest in preventing the unwarranted retention of information by the government.[8]

The undersigned finds instructive and persuasive the observations of Commission Judge Richard Manning when confronted with a similar situation. Noting that the Secretary is "inexorably tied to the events leading up to . . . [the section 105(c)(3)] case" and that the documents sought were a "portion of the information gathered by the Secretary during [his] investigation of . . . [the] complaint," Judge Manning observed, "The secretary is not a stranger to [the section 105(c)(3)] proceeding and [he] is not disinterested in the outcome of [the] case." *Hazel Olson v. Triton Coal Company*, 25 FMSHRC 649, 654 (Oct. 2003). Judge Manning went on, "It is clear that Congress intended the Secretary to rigorously enforce section 105(c) of the Mine Act. . . . It is also clear that the Secretary, like all human institutions is not infallible. Although the Secretary has determined that [the operator] did not violate the anti-discrimination provisions of section 105(c), the Secretary should want to see justice done and should not deliberately obstruct [the complainant's] ability to pursue [his] case on [his] own behalf. " *Id.*

Like the complainant in the case before Judge Manning, Justice "believes that the information [he] has requested is crucial to [his] case." 25 FMSHRC at 654. Like Judge Manning, the undersigned concludes that "it is not clear whether [the complainant] will be able to establish [his] case without the requested information." *Id.*[9] And like Judge Manning, the undersigned concludes *in camera* review is necessary and proper.

## ORDER

Within 5 calendar days of the date of this order, the Secretary is **ORDERED TO PRODUCE** for the undersigned's *in camera* review copies of the complete MOIs of Inspectors Hall and Puckett and all related documents. The Secretary shall also submit a statement as to which privileges, if any, apply to the documents and shall specifically identify the parts of the documents to which the asserted privileges apply. A ruling on Justice's Motion To Enforce Subpoena is deferred until after the Secretary responds to this order.

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[8] As Commission Judge William Moran recently observed, "[T]he trend that began in the late twentieth century [is] that more, not less, public information from government is the preferred practice." *Bristol Coal Corp.*, 36 FMSHRC ___ (Aug. 15, 2014), slip op.1.

[9] The undersigned also notes that in addition to rejecting the Secretary's arguments against *in camera* inspection, Judge Manning persuasively rejected the adequacy of a FOIA request as a substitute for production under the Mine Act. *Hazel Olson v. Triton Coal Co.*, 25 FMSHRC 649, 655 (Oct. 2003).

The parties are advised that the hearing in this matter will go forward as previously scheduled on September 3, 2014 in Madison, West Virginia.

David F. Barbour
Administrative Law Judge

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