FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 24, 2014

SECRETARY OF LABOR on behalf of ROBERTO VEGA, Complainant, v. CANTERA EL TUQUE, INC., Respondent,	TEMPORARY REINSTATEMENT PROCEEDING Docket No. SE 2014-300-DM SE-MD 14-19 Mine: Cantera El Tuque Mine ID: 54-00483

DECISION AND ORDER

Appearances: Summer C. Smith, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Secretary of Labor.

Javier González-Montañez, Esq., Gonzalez, Machado, Roig & Sanchez Ramos, LLC, San Juan, Puerto Rico, for Respondent

Before: Judge Moran

DECISION AND ORDER REINSTATING ROBERTO VEGA[1]

A temporary reinstatement hearing was held in this matter on June 13, 2014, in San Juan, Puerto Rico. For the reasons which follow, the Court finds that the application was not frivolously brought and consequently it is ordered that Roberto Vega be reinstated to his former position, with all attendant benefits, effective immediately.

Temporary Reinstatement under the Mine Act

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]," recognizing 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. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

[1] This decision also disposes of the Respondent's Motion for Summary Decision. *See infra* at 4.

Section 105(c)(2) of the Mine Act provides in relevant part that "Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . . . [I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint."

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990) ("*JWR*"). *Sec. obo Piper, Complainant, v. Kenamerican Resources, Inc.* (June 2013) (Judge Andrews), 2013 WL 3865343 at *2.

The Commission itself "has repeatedly recognized that the 'scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought.' [*JWR* supra] It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999) ("*Chicopee Coal*"). In reviewing a judge's temporary reinstatement order, the Commission has applied the substantial evidence standard. *See, id.* at 719; *Sec'y on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). *Id.* at n. 2." *Sec. obo Rodriguez v. C.R. Meyer and Sons Co.* 2013 WL 2146640 at *5 (May 2013).

"Temporary Reinstatement is a preliminary proceeding, and narrow in scope. The plain language of the Act states that 'if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.' 30 U.S.C. § 815(c)(2). The judge must determine whether the complaint of the miner 'is supported substantial evidence and is consistent with applicable law.' *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). Neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Chicopee Coal* at 719. A temporary reinstatement hearing is held for the purpose of determining 'whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement.' *JWR*, 920 F.2d at 744. "Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered." *Sec'y of Labor, on behalf of Curtis Stahl v. A&K Earth Movers Inc.*, 22 FMSHRC 233, 237 (ALJ) (Feb. 2000)." *Sec. obo Piper, Complainant, v. Kenamerican Resources, Inc.* (June 2013) (Judge Andrews), 2013 WL 3865343 at *2.

Findings of Fact and Conclusions of Law

At the hearing, the Complainant, Roberto Vega, testified. Mr. Vega stated, credibly, in the Court's estimation, that he was employed by the Respondent, Cantera El Tuque, from December 1, 2012 until April 17, 2014, as a supervisor. In that capacity, he reported to Mr. Enrique Golderos, the owner of the Respondent Mine. Tr. 9-10. Mr. Vega stated that he spoke with MSHA Inspector Villahermosa during February 2014 and that the conversation included Mr. Vega's remarks to the inspector about certain unsafe conditions at the mine. Tr. 18. Citations were issued by the Inspector during that time and presented to Mr. Vega. Mr. Vega then informed Mr. Golderos about the citations that were issued. Mr. Vega affirmed during his testimony that he identified safety hazards at the mine. These included fugitive dust, equipment with defects, such as a non-functioning emergency brake and back-up alarm on a loader, among other issues. Mr. Vega stated that he identified these safety issues to the inspector and as a consequence, citations were issued to the mine. Tr. 19-21.

Subsequently, the same Inspector returned to the mine during March 2014 to follow-up on the citations he had previously issued. Tr. 25. The loader which had been cited during the February inspection was still unrepaired and the Inspector issued an Order, barring future use of it until the violative condition was abated. *Id.* During the March follow-up inspection, Mr. Vega spoke with the Inspector about other safety concerns he had about the mine. The Court finds that these safety concerns were communicated to the MSHA Inspector and that those concerns were not negligible.

Upon questioning by the Court, Mr. Vega testified that he had discussions with Mr. Golderos about these, and other identified safety concerns, on several occasions. Tr. 26. These conversations occurred after the citations had been issued and Mr. Vega stated that Mr. Golderos never took any action regarding those concerns. Tr. 27. Beyond this, Mr. Vega asserted that, in conversation with Mr. Golderos, he was advised that he needed to "learn" how to speak with MSHA inspectors. In the context presented, Mr. Vega stated, he construed this to mean that he was to lie to the inspectors.

During cross-examination and repeatedly during the proceeding, Counsel for the Respondent attempted to interject testimony regarding its claim that Mr. Vega was actually fired due to economic reasons at the mine. See, for e.g. Tr. at 37.

The Court found that the government established, through the testimony of Mr. Vega, its prima facie case that the claim was not frivolously brought. This was based upon the Court's conclusion from that testimony, finding that the witness was credible, that he made safety complaints, both to the MSHA Inspector and to the owner, and that, in close proximity in time, he was fired from his job with the mine. The Court added that it was not aware of *any* Commission level decision in support of considering the Respondent's claim that Mr. Vega was discharged for economic reasons. Tr. 45-47. In fact, case law points to the opposite conclusion. As noted by the Secretary in its Motion in Limine, the decisions regarding *Secretary of Labor on behalf of Joseph M. Ondreako v. Kennecott Utah Copper Corp.*, 2003 WL 23416466 (Oct. 9, 2003), *aff'd* 25 FMSHRC 585, make this conclusion clear.

As the Court noted, "So what I have here is Mr. Vega's testimony, which I deem to be credible upon observing him, that he is an employee of this mine, or was; that he made safety complaints to an MSHA inspector, which I found to have been credible testimony; and then that adverse action followed within a reasonable period of time following those complaints." Tr. 56.

In the face of the Respondent's contention that its defense "has to do with, that on prior occasions, both the witness as well other employees, brought safety issues before the respondent and the consequence was never employee termination. And at the end of the day this court will have the opportunity to see, in this proceeding that's being held, that there were other motivations that have nothing to do with safety, which were the ones that moved this employee to request this remedy," the Court tried to explain that such weighing of competing versions for the employee's termination is outside the scope of a temporary reinstatement proceeding. Tr. 60-61.

The Respondent, in defense, called one witness, Ms. Magda Marie Rivera. Ms. Rivera, declared to be an employee of the Respondent, stated that the mine had approximately 25 employees in early 2013 but today has only 14 employees. Tr. 70. Again, the Respondent attempted to show, this time through the testimony of Ms. Rivera, the "real reasons, the true reasons, why [Mr. Vega] was fired," and again the Court advised that consideration of such testimony would necessarily involve a weighing of competing stories, and that this would be outside of the proper scope of the temporary reinstatement proceeding. Tr. 73-74.

At the conclusion of the testimony, the Respondent asked that the Court take "judicial notice" that, under Puerto Rico's labor law, during layoffs an employer must terminate the employee with the least seniority. The Court advised that it did not believe that such considerations were material to the proceeding but that the parties could submit cases in support of their respective positions on that point, if such case law existed. The Respondent has not identified such case law to support its contention.

On June 16, 2014, the Secretary, via email, noted the Court's "request at the close of hearing on June 13, 2014, to identify any case law supporting the proposition that state law could affect a temporary reinstatement proceeding." The Secretary advised that it "found no case law supporting such a proposition. Furthermore, Section 506 of the MSH Act states that the MSH Act preempts state law where it conflicts with the '[MSH] Act or with any order issued or any mandatory health or safety standard. 30 USC 955.'" Based upon that response, the Secretary asserted that "the Puerto Rico statutes that Respondent's counsel alluded to during the hearing are not relevant to this temporary reinstatement proceeding."

Respondent's Motion for Summary Decision

The Secretary noted that the Respondent filed a summary judgment motion at the time it responded to the Secretary's Motion in Limine. The Respondent's "Request for Summary Judgement" [sic], asserts that "[t]he decision to separate Mr. Vega from his work duties responded to an adverse financial condition of Respondent, a fact that has not been disputed by Applicant." Motion at 1. The Motion goes on to assert that Mr. Vega was one of a number of employees that were laid off as a result of the Respondent Mine's "adverse financial condition,"

and that he was so informed by the mine's President, Mr. Golderos, that the mine's economic condition was the basis for the termination. *Id.* at 2.[2]

As that motion was filed just two days before the temporary reinstatement proceeding, the Secretary had not filed a response at the time of the hearing. The Secretary elected to respond to the Respondent's motion orally, at the close of the hearing. It contended that the Respondent's motion was premature as it goes to the merits of the underlying discrimination proceeding and therefore is outside of the "frivolously brought" issue to be decided at this juncture. Further, the Secretary contended that, even assuming for the sake of argument that the motivation for Mr. Vega's termination could be raised, there are factual disputes involved, and therefore that summary judgment is not appropriate. Tr. 83-84. The Court agrees with the Secretary's arguments.

As referenced earlier in this decision, the scope of a temporary reinstatement proceeding is very limited. Considering that the basis advanced in the Request for summary judgment goes beyond the scope of this proceeding, as it would entail a weighing of different narratives as to the basis for the Complainant's termination, summary decision is not appropriate. Accordingly, the Request is DENIED.

Conclusion

The Court has noted that the testimony on the subject of protected activity, and whether adverse action was motivated in any part by such activity, came solely from the Complainant, Mr. Vega. Against this was the Respondent's attempt to show that the miner's discharge was due to economic conditions at the mine. However, the fundamental problem with that approach is that the temporary reinstatement application is not the proceeding for the resolution of such competing narratives. Rather, the Court must focus upon whether there is credible substantial evidence presented to show that protected activity occurred, that adverse action resulted, and that there was evidence of a nexus between those events. Here, as noted, the Court finds that: the record at the application proceeding provided substantial evidence of the Complainant's engaging in protected activity, voicing his concerns over several safety matters; that management was made aware of these concerns; and that an adverse action, in the form of termination, occurred within a time frame thereafter which was sufficiently close in time to establish, on this record, and within the context of temporary reinstatement, that the application was not frivolously brought.

While the Court has found that Mr. Vega's complaint of discrimination was not frivolously brought, it is fully recognized that the Commission has noted that the period of reinstatement may be tolled in some circumstances. A layoff for economic reasons *may* provide such a basis for tolling, but that is a very fact-specific inquiry. *See, e.g.*, *Sec. obo Gatlin v. Kenamerican Resources*, 31 FMSHRC 1050, 2009 WL 3412973 (Oct. 2009), *Sec. obo Ratliff v. Cobra Natural Resources*, 35 FMSHRC 394, 2013 WL 865606 (Feb. 2013). The Respondent may initiate this process by filing a motion to toll the economic reinstatement, which motion

[2] Respondent submitted a "Memorandum of Law in Support of Summary Judgement" [sic] on June 19, 2014. Because the Court denies the Respondent's Motion, there is no need to await a Response from the Secretary.

must fully set forth the basis for that relief. Of course, the motion must provide documentation in support of the claim for tolling. The Secretary will need to timely respond to the motion and then seek discovery in order to make its own evaluation of the bona fides of the Respondent's claim for relief. As the Court explained in a conference call with the parties on June 24, 2014, various scenarios may ensue upon the completion of the discovery and the evaluation of that information by the Secretary. It is possible, for example, that the Secretary may concede that tolling is appropriate or that it is not justified. On the other hand, it may be that the Respondent may step back from its motion and withdraw its claim that tolling should be applied. It is also possible that a hearing may be required to resolve factual disputes about the Respondent's employment situation and the appropriateness of Mr. Vega's inclusion in that layoff, given the finding that his claim was not frivolously brought.

Regardless of the outcome of any potential motion to toll the period of economic reinstatement, the Secretary continues to have the obligation, following the issuance of this Decision and Order, to complete its investigation of the underlying discrimination complaint as soon as possible. Section 105(c)(3) of the Mine Act requires the Secretary to notify the complainant of whether it intends to file a discrimination complaint on the complainant's behalf within 90 days of receiving the miner's initial complaint. If the parties settle the underlying discrimination case, counsel for the Secretary is directed to promptly notify the Court. Similarly, prompt notification to the Court is required if the Secretary determines that the Respondent did not violate section 105(c) of the Mine Act.

ORDER

On the basis of the foregoing, the Court finds that the Secretary presented sufficient evidence at the hearing in Puerto Rico to establish that this discrimination complaint was not frivolously brought. Accordingly, it is **ORDERED** that the Respondent immediately reinstate the Complainant, Roberto Vega, as of the date of this ORDER, to his former position, or its equivalence, at the same rate of pay and benefits that he was receiving at the time of his termination. The Secretary is directed to provide a status report of its discrimination investigation within 30 days of this decision. The Court retains jurisdiction over this temporary reinstatement proceeding.

William B. Moran

William B. Moran
Administrative Law Judge

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