FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. HUMPHREYS ENTERPRISES, INC., Respondent.	CIVIL PENALTY PROCEEDING Docket No. VA 2009-99 A.C. No. 44-06045-169698 Mine: No. 5 Strip

ORDER DENYING MOTION TO COMPEL PRODUCTION OF DOCUMENT

This case is before me upon the Secretary's Petition for the Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815 (2006). Respondent, Humphreys Enterprises, Inc. ("Humphreys"), has filed a Motion to Compel Production of Document, seeking production of the Possible Knowing/Willful Violation Review Form ("Review Form") concerning Citation No. 6639082 entered on August 27, 2008, for an alleged violation of 30 C.F.R. § 77.1005(a). The Secretary replied to the motion and argues that the deliberative process privilege protects against disclosure of the Review Form.

The sole issue before me is whether the deliberative process privilege protects this document from disclosure to Humphreys. For the reasons below, I determine that the Review Form is privileged and not subject to disclosure.

I. ARGUMENTS

Humphreys argues it lacks the information contained in the Review Form, which the Secretary relied upon in issuing Citation No. 6639082. (Mot. Compel Prod. Doc. 3.) Humphreys, in addressing the Secretary's assertion that the completed discovery contains the information in the Review Form, observes that the "discovery depositions consist of several hundred pages." (*Id.*) Humphreys emphasizes that, if the information contained in the form is actually located in the discovery, then that information should not remain privileged.[1] (*Id.*) Humphreys further contends that the Secretary's Narrative Findings for a

[1] Humphreys does not admit that the information contained in the form is contained in the discovery. (Mot. Compel Prod. Doc. 3.)

Special Assessment relied on the Review Form. (*Id.*) Therefore, Humphreys argues that it ought to receive a copy of the Review Form so it can "properly defend the violations asserted by MSHA." (*Id.* at 4.) Humphreys emphasizes that "this ought not be a trial by ambush." (*Id.* at 4.)

The Secretary argues that the privilege protects "'predecisional'" and "'deliberative'" information as to preserve the "consultative functions of government by maintaining the confidentiality of advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated." (Reply to Mot. Compel Prod. Doc. 2 (quoting *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).) The Secretary explains that the Review Form "exchange[s] information obtained by the inspector, within the agency and among agency supervisors, to determine if MSHA will assert that a [knowing or willful] violation . . . has been committed." (Reply to Mot. Compel Prod. Doc. 2.) As a result, the Secretary argues that production of the Review Form "would lead to a revelation of privileged material." (*Id.* at 3.)

The Secretary also contends that, through her provision of the issuing inspector's notes and the inspector's deposition taken by Respondent's counsel, Humphreys has access to the factual information underlying her allegations. (Reply to Mot. Compel Prod. Doc. 3.) She disputes Humphreys's characterization of the volume of discovery in this case, explaining that the inspector's deposition transcript is only 116 pages long. (*Id.*) The Secretary further argues that given the factual information in this case has already been produced, disclosure of the form would serve only the purpose of revealing the agency's decision-making process. (*Id.*)

Finally, the Secretary objects to Humphreys's characterization of this matter as a "trial by ambush." (Reply to Mot. Compel Prod. Doc. 4.) She explains that her counsel has had extensive discussions with Humphreys's counsel, clearly outlining the Secretary's positions on the issues and providing substantial discovery. (*Id.*) The Secretary asserts that "the case to be tried is clear." (*Id.*)

II. STATEMENT OF THE LAW

A. The General Rule

The statutory basis of the deliberative process privilege is an exception to the disclosure requirements of the Freedom of Information Act, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). *See In re: Contests of Respirable Dust Sample Alteration Citations* (*Dust Cases*), 14 FMSHRC 987, 990-92 (June 1992) (discussing the historical origins of the deliberative process privilege). In interpreting the exception, the Supreme Court explained that the privilege protects the "'decision making process of government agencies,' and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (citations omitted).

The Commission has relied on the following test to determine whether information is privileged under the deliberative process privilege: "[T]he [privileged] document must be '*pre*-decisional.' The privilege protects only communications between subordinates and supervisors that are actually *antecedent to the adoption of an agency policy*. . . . The communication must be 'deliberative,' that is, it must actually be related to the process by which policies are formulated." *Dust Cases*, 14 FMSHRC at 992 (quoting *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)). The case law counsels careful analysis of whether factual information is subject to disclosure, as "purely factual information that does not expose an agency's decision making process does not come within the ambit of the privilege." *Dust Cases*, 14 FMSHRC at 993 (citing *Exxon v. Doe*, 585 F. Supp. 690, 698 (D.D.C. 1983)).

B. Applicability of the Privilege to Factual Information

Where factual information is involved, the Commission has explained that if that information can be segregated from the otherwise protected deliberative material, then it must be disclosed. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1246 (July 1997). However, even if the information can be segregated, the party opposing disclosure can prevent disclosure by showing "that the material is 'so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of deliberative information that is entitled to protection.'" *Id.* at 1246-47 (quoting *Providence Journal Co. v. U.S. Dep't of the Army*, 981 F.2d 552, 562 (1st Cir. 1992)). Courts have applied the privilege to disclosures of factual information when such disclosure "'would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Consolidation Coal*, 19 FMSHRC at 1247 (quoting *Quarles v. U.S. Dep't of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990)). Specifically, "courts only protect from disclosure . . . factual material in underlying documents when it is clear that there was an evaluation made by an agency regarding which facts it would rely upon and those which it would disregard." *Consolidation Coal*, 19 FMSHRC at 1249 (citing *Playboy Enterprises, Inc. v. United States Dep't of Justice*, 677 F.2d 931, 935-36 (D.C. Cir. 1982); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974)). The Commission has adopted the Fourth Circuit's rule imposing on the government the burden of proving that no segregable information exists that is unprotected by the privilege. *Consolidation Coal*, 19 FMSHRC at 1247 (citing *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1250 (4th Cir. 1994)).

The above-cited *Playboy Enterprises* and *Montrose Chemical* decisions, relied upon by the Commission in *Consolidation Coal*, provide an analytical framework for identifying which facts are entitled to protection under the deliberative process privilege. The D.C. Circuit in *Montrose Chemical* barred the disclosure of a summary of facts prepared to assist the Administrator of the EPA in deciding a complex matter, explaining that deliberative material is privileged as well as the factual material that plays a role in the decision-making process. 491 F.2d at 67-71. In *Playboy Enterprises*, which affirmed an order directing the revelation of facts contained in a task force report to the U.S. Attorney General, the D.C. Circuit observed that

merely including facts in a report does not necessarily make those facts deliberative. *Playboy Enterprises,* 677 F.2d at 935. The court distinguished *Montrose Chemical*, noting that in that case the "[d]isclosure of the [factual] summaries would have permitted inquiry into the mental processes of the Administrator by revealing what materials he considered significant in reaching a proper decision, and how he evaluated those materials. The [task force report in *Playboy Enterprises*, however,] . . . was prepared only to inform the Attorney General of facts which he in turn would make available to members of Congress." *Id.* at 936.

The Commission's analysis in *Consolidation Coal* reflects the distinction above. There, the Commission recognized that answers to questionnaires generated in support of the preparation of an MSHA internal review report were deliberative communications because they contributed to the process of changing agency procedures. *Consolidation Coal*, 19 FMSHRC at 1247. Nonetheless, the Commission observed that the questionnaires' answers provided "strictly factual information," even with regard to an opinion question. *Id.* at 1248. Noting that the "material at issue . . . differs little from the factual background material already made public in the Internal Review Report," the Commission concluded that the "Secretary [did] not establish that an evaluative process took place with respect to the . . . material in question during preparation of the Internal Review Report," and it held that the material was "purely factual," did not expose MSHA's decision making process, and was unprivileged. *Id.* 1249-50.

Nevertheless, the disclosure of privileged deliberative material, such as the publication of a segment of a draft report in a final agency decision, may not void the protection applicable to the remaining privileged information. The Commission has adopted a narrow view of the consequences of disclosing a segment of deliberative material: "'If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process. . . . [S]uch disclosure of the internal workings of the agency is exactly what the law forbids . . . .'" *Dust Cases*, 14 FMSHRC at 994 (quoting *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979)). Consequently, the Commission rejected the administrative law judge's conclusion that documents concerning completed matters automatically fall outside the privilege. *Dust Cases*, 14 FMSHRC at 994.

C. Overcoming the Privilege

Finally, even if the deliberative process privilege applies, the Commission has noted that it is qualified and subject to the balancing test set forth in *Bright Coal Company*, 6 FMSHRC 2520 (Nov. 1984), governing the informant's privilege. *Dust Cases*, 14 FMSHRC at 994. Under this test, if "disclosure is essential to the fair determination of a case, the privilege must yield." *Bright Coal Co.*, 6 FMSHRC at 2523 (citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)). Application of this test requires analysis of the case's particular circumstances, including whether the Secretary is in sole control of the information, the nature of the violation, possible defenses, and the impact of the information. *Dust Cases*, 14 FMSHRC at 988; *Bright Coal Co.*, 6 FMSHRC at 2526. The party seeking disclosure has the burden of proving the facts

necessary to establish that the information sought is essential to a fair determination of the case. *Bright Coal Co.*, 6 FMSHRC at 2526.

III. LEGAL CONCLUSIONS

In this case, the Review Form sought by Humphreys typically documents the inspector's conclusions as to whether a knowing or willful violation occurred based on his evaluation of two review criteria and any other pertinent information. *See* MSHA, U.S. Department of Labor, *Special Investigations Procedures*, 4-7 (2005), *available at* http://www.msha.gov/READROOM/HANDBOOK/PH05-I-4.pdf. Those review criteria ask: "1. Did the condition or practice cited create the presence of a high degree of risk to the health and/or safety of miners?" and "2. Did the operator or agent have actual knowledge, or reason to know, of the facts or conditions constituting the violation?" *Id.* The form typically gathers the inspector's superiors' opinions on the inspector's analysis. *Id.* Altogether, the content generated by these questions typically forms pre-decisional communications between the inspector and his superiors prior to the formulation of a conclusion as to whether a knowing or willful violation has occurred. These sections of the form are protected from disclosure under the deliberative process privilege. *See Dust Cases*, 14 FMSHRC at 993-95 (finding deliberative process privilege applies but affirming administrative law judge's order to produce documents anyway because privilege was overcome in accordance with *Bright Coal Co.*).

The Review Form, however, solicits a significant amount of factual information related to the above two review criteria. *See* MSHA, *Special Investigations Procedures*, *supra*, at 4-7. Questions prompting the collection of such information include "Who was exposed to the hazard?" and "Who had . . . knowledge [of the facts or conditions constituting the violation]?" *Id.* This information, though, directly relates to the task of determining whether a knowing or willful violation has occurred. Because that information guides the Secretary's decision making process, this aspect of the form must be privileged as well. *Cf. Consolidation Coal*, 19 FMSHRC at 1249-50 (determining that factual material was not privileged because it did not play a role in agency's decision making process).

Humphreys's request for production of the Review Form assumes the information contained therein is merely factual. That assumption is incorrect because the Review Form records MSHA's analysis of whether a knowing or willful violation occurred. As a result, the entire form is privileged. Moreover, though facts contained in the form may have been disclosed, they comprise part of the Secretary's deliberative process in issuing the violation. *Dust Cases*, 14 FMSHRC at 994 (quoting *Lead Indus. Ass'n, Inc.*, 610 F.2d at 86). Therefore, the presence of facts in the Review Form does not vitiate the privilege protecting the document.

Humphreys also argues it needs the Review Form to mount a proper defense at the hearing now scheduled for February 24 and 25, 2011. However, Humphreys and the Secretary acknowledged that extensive discovery has already taken place in this case. According to the Secretary, this discovery has produced the factual allegations referenced in the Review Form.

Counsel for the Secretary states she has clearly explained her position to Humphreys. Humphreys has not disputed these assertions. Additionally, the amount of discovery in this matter is not notably voluminous, given that the inspector's deposition is only 116 pages long and the total page number of documents ranges in the hundreds. The factual information that Humphreys seeks is reasonably accessible to it. Rather than foreshadowing a "trial by ambush," these findings show that the parties' counsel have handled this matter ably and professionally. In accordance with *Bright Coal Company*, I conclude that, because disclosure of the Review Form is not essential to the fair determination of this case, Humphreys has not overcome the Secretary's assertion of privilege and the document should not be produced.

IV. ORDER

Based on the foregoing reasoning, Humphreys's Motion to Compel Document is **DENIED**.

Alan G. Paez
Administrative Law Judge

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