FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 2010

JUSTIN NAGEL, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	Docket No. WEST 2010-18-DM
	:	Docket No. WEST 2010-464-DM
NEWMONT USA LIMITED, Respondent	:	WE MD 09-11
	:	Mine ID: 26-02512 Leeville Mine

ORDER CONSOLIDATING CASES AND DENYING COMPLAINANT'S MOTION FOR TEMPORARY REINSTATEMENT

This matter is before me upon an Application for Temporary Reinstatement filed by Justin Nagel (Complainant) on June 8, 2010 pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c). Section 105(c)(1) of the Act prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related, protected activity. A discrimination complaint under section 105(c)(2) of the Act shall be filed by the Secretary of Labor if, after an investigation conducted pursuant to section 105(c)(2), the Secretary determines that a violation of section 105(c)(1) has occurred. A discrimination complaint under section 105(c)(3) of the Act may be filed by the complaining miner if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act have not been violated. In essence, Mr. Nagel seeks an order under 105(c)(3) requiring Newmont Mining Company ("Respondent") to temporarily reinstate him to his former position as Underground Operations Technician 3 at its Leeville Mine, or to a substantially equivalent position at the same rate of pay, even though Nagel settled his right to temporary reinstatement under section 105(c)(2). For the reasons set forth below, I find that Mr. Nagel is not entitled to such relief and his Motion for Temporary Reinstatement is denied. Respondent's motion to strike and motion for attorney fees are also denied.

Procedural Background

On October 5, 2009, the Secretary filed an Application for Temporary Reinstatement on behalf of Justin Nagel pursuant to section 105(c)(2). That Temporary Reinstatement Proceeding was Docket No. WEST 2010-18-DM. The Application sought an order requiring Respondent to reinstate Nagel pending disposition of the complaint of discrimination that Nagel filed with the Secretary's Mine Safety and Health Administration (MSHA) on September 9, 2009. Respondent

requested a hearing on the Application, and a hearing was scheduled for October 22, 2009 in Elko, Nevada before Senior Administrative Law Judge Michael E. Zielinski.

Prior to the hearing, the parties negotiated a settlement of the issues raised by the Application and executed a Settlement Agreement and Joint Motion for Temporary Reinstatement. That Settlement Agreement economically reinstated Nagel, effective November 1, 2009, until the merits of his discrimination complaint have been resolved. The Agreement further provided, however, that in the event that the Secretary makes a finding of no discrimination, the economic reinstatement will terminate on that date. The Settlement Agreement was signed by Complainant, who acknowledged that "I have read this agreement in full and consent to its terms."

On November 4, 2009, Judge Zielinski issued an Order of Temporary Reinstatement, consistent with the parties' Settlement Agreement. Specifically, that Order of Temporary Reinstatement provided:

> This Order shall remain in effect until the merit's of Nagel's discrimination complaint have been resolved, as specified in the Settlement Agreement. In the event that the Secretary makes a finding of no discrimination on the complaint, Nagel's period of economic reinstatement shall terminate, effective upon the date of the Secretary's determination. If the Secretary finds that the discrimination complaint has merit and causes a Complaint of Discrimination to be filed with the Commission, Nagel's period of economic reinstatement shall expire after any decision or similar order from the Commission becomes final.[1]

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[1]A Judge's Order temporarily reinstating a miner is not a final decision within the meaning of Commission Procedural Rule 69, 29 C.F.R. § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding. See Commission Procedural Rule 45(e)(4), 29 C.F.R. § 2700.45(e)(4). Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a Petition for Review of Temporary Reinstatement Order within 5 business days of the Judge's written order. See Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f).

By contrast under Commission Procedural Rule 69(a), 29 C.F.R. § 2700.69(a), "[a]n order by a Judge approving a settlement proposal is a decision of the Judge." I note that this rule is not limited to settlement of civil penalty proceedings. Furthermore, under section 113(d)(1) of the Act, "[t]he decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2)," which provides, inter alia, that petitions for discretionary review must be filed within 30 days of the issuance of the judge's decision. See section 113(d)(2)(i).

It is arguable that Judge Zielenski's Order of Temporary Reinstatement, which is not final, was also an Order approving a settlement proposal, which became a final decision of the

On December 1, 2009, the Secretary issued a Notice of Finding of No Discrimination Respondent never moved for dissolution of the Order of Temporary Reinstatement. Consequently, the Judge never dissolved the Order.[2] Instead, Newmont just terminated Nagel's economic reinstatement, per the terms of the parties' Settlement Agreement.[3]

On January 5, 2010, Complainant filed an action on his own behalf before the Commission under Section 105(c)(3) of the Act charging discrimination under Section 105(c)(1). That discrimination proceeding is Docket No. WEST 2010-464-DM. Nagel alleges that Respondent discriminated against him in violation of Section 105(c)(1) when the company terminated his employment on August 20, 2009 for safety complaints that he made.

On March 26, 2010, the Commission received Respondent's Motion to Dismiss, which denied any violation of the Act and asserted that Nagel's complaint failed to state a claim upon which relief may be granted. On April 30, 2010, the Commission received the Complainant's Response to Respondent's Motion to Dismiss. On May 28, 2010, Chief Administrative Law Judge Robert J. Lesnick issued an Order Denying Respondent's Motion to Dismiss. On June 2, 2010, Chief Lesnick issued an Order of Assignment, which assigned the discrimination proceeding in Docket No. WEST 2010-464-DM to the undersigned. My pre-hearing Order in that discrimination proceeding will issue today under separate cover.

Commission 40 days after its issuance. Given my finding of a voluntary, clear and unmistakable waiver by Nagel of his right to temporary reinstatement, I need not resolve this issue.

[2]In August 2006, the Commission revised Rule 45(g), 29 C.F.R. § 2700.45(g), to delete the requirement that the judge dissolve the order of temporary reinstatement after the Secretary has made a determination of no discrimination. See 71 Fed. Reg. 44190, 44198-99 (Aug. 4, 2006). The preamble explained that the deletion "leaves open for litigation the issue of whether an order for temporary reinstatement remains in effect pending a miner's discrimination complaint under section 105(c)(3). See 31 FMSHRC at 896, n. 8. Commission Procedural Rule 46(g), 29 C.F.R. § 2700.45(g) now reads as follows:

> (g) Dissolution of order. If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and § 2700.40(b) of these rules.

[3]Cf. *Gatlin, Robert v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1052 n. 2 (Oct. 2009) (respondent should have moved judge to modify temporary reinstatement order based on subsequent layoff alleged to have tolled economic reinstatement, rather than unilaterally determine that workforce reduction justified termination of reinstatement).

On June 10, 2010, Nagel filed the instant Motion for Temporary Reinstatement with the undersigned and captioned his motion as a Temporary Reinstatement Proceeding, Docket No. WEST 2010-18-DM . Essentially, Complainant moves for a temporary reinstatement order while his case proceeds under section 105(c)(3), despite the prior Settlement Agreement that he executed resolving the reinstatement issue under 105(c)(2). To prevent any confusion, Docket No. WEST 2010-18-DM and Docket No. WEST 2010-464-DM are hereby **Ordered** to be consolidated and I have considered Complainant's instant motion as part the discrimination proceeding pending before me in Docket No. WEST 2010-464-DM.

On June 18, 2010, Respondent filed an Opposition to and Motion to Strike Complainant's Motion for Temporary Reinstatement. Respondent argues that under the express terms of the Settlement Agreement and Judge Zielinski's November 4, 2009 Order, the Complainant's temporary reinstatement automatically terminated upon a finding of no discrimination by the Secretary on December 1, 2009. Respondent argues that it complied with the Settlement Agreement by economically reinstating the Complainant during the agreed period, and that Complainant must also comply with the terms of the Settlement Agreement, which stipulate that the reinstatement period terminated upon the Secretary's finding of no discrimination. Thus, Respondent argues that Complainant cannot now move to reargue an issue that has been determined by stipulation and binding contract and has been formally adjudicated by prior Order. Respondent's motion also seeks recovery of attorney fees for the cost of replying to what it characterizes as Complainant's "frivolous motion."

On June 28, 2010, Complainant Nagel filed his Response. Complainant argues that no part of the Settlement Agreement states that he cannot request reinstatement again, that he is eligible for temporary reinstatement under section 105(c)(3), and that Respondent is not entitled to any "financial adjustment" i.e., attorney fees, because he has not violated the Settlement Agreement.

Legal Analysis

Rulings on the Parties' Motions

Complainant's Motion for Temporary Reinstatement is denied for the reasons explained below. Accordingly, Respondent's motion to strike is denied as moot.

Respondent's motion for attorney fees is also denied. Essentially, Nagel argues that the Settlement Agreement is only valid with regard to Nagel's claims under section 105(c)(2), and that he remains free to request temporary reinstatement again under section 105(c)(3). For the reasons set forth herein, I find that position to lack merit, but I do not find it frivolous. Given the views of the Secretary of Labor, Chairman Jordan and Commissioner Cohen in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975, (Dec. 2009), more fully explained below, an argument could be advanced that the plain meaning of section 105(c)(2) requires a temporary reinstatement order to remain in effect until there has been a final Commission order on the merits of the miner's underlying discrimination complaint brought under section 105(c)(3), even though all parties have entered a

settlement of the temporary reinstatement issue under section 105(c)(2). In addition, I note that the Complainant is acting *pro se.* Moreover, Respondent presents no authority to support attorney fee recovery. Therefore, Respondent's motion for an award of attorney fees is denied.

Although I find Complainant's Motion for Temporary Reinstatement to be non-frivolous given an arguable extension of the views of Chairman Jordan and Commissioner Cohen in *Phillips v. A&S Construction Co.*, I deny his Motion as lacking in merit. Rather, as further explained herein, I find that Nagel clearly and unmistakably waived his right to temporary reinstatement once the Secretary made a determination of no discrimination under the express terms of the parties Settlement Agreement resolving the temporary reinstatement issue under section 105(c)(2).

The Commission's split views in *Phillips v. A&S Construction Co.*

In examining the merits of Nagel's motion, an overview of the language of section 105(c)(2) and 105(c)(3) and of the facts and analysis in *Phillips v. A&S Construction Co.* may prove helpful. I then analyze Commission precedent concerning voluntary dispute resolution and settlement of discrimination claims.

At the outset, it is important to note that Section 105(c)(2) expressly provides for temporary reinstatement. It provides that any miner may file a discrimination complaint with the Secretary, and 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. Section 105(c)(3) contains no provision or language concerning temporary reinstatement.

In *Phillips v. A&S Construction Co.,* 31 FMSHRC 975, (Dec. 2009), the Commission addressed the issue of whether an order of temporary reinstatement remains in effect after the Secretary of Labor has made a determination that facts revealed from an investigation by MSHA regarding a miner's discrimination complaint do not constitute a violation of section 105© of the Act. The judge concluded that such an order does not remain in effect after MSHA's determination that no discrimination occurred and the judge dissolved his earlier order of temporary reinstatement and dismissed the temporary reinstatement proceeding. 30 FMSHRC 1119, 1123 (Nov. 2008) (ALJ Barbour).

Thereafter, Mr. Phillips filed a petition for discretionary review challenging the judge's order with the Commission, and Phillips concomitantly filed an action on his own behalf under section 105(c)(3). The Commission granted the petition for discretionary review and stayed the judge's order dissolving the temporary economic reinstatement, pending the Commission's decision. The Commission then split 2-2 regarding whether the judge correctly determined that a temporary reinstatement order no longer remains in effect after the Secretary has made a determination of no discrimination. The effect of the split decision allowed the judge's order dissolving the temporary reinstatement proceeding to stand, as if affirmed. 31 FMSHRC at 979, citing *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), aff'd on other grounds, 969 F.2d 1501 (3d Cir. 1992). Accordingly, the Commission lifted the stay, dissolved the order of

temporary reinstatement and dismissed the temporary reinstatement proceeding. 31 FMSHRC at 979, n.1.[4]

On the merits, Commissioners Duffy and Young affirmed the judge's dissolution of the order of temporary reinstatement and his dismissal of the temporary reinstatement proceeding. In their view, based on the plain language of sections 105(c)(2) and (c)(3) and the legislative history and statutory structure, a temporary reinstatement order remains in effect pending final order on the miner's complaint as advanced by the Secretary under section 105(c)(2), but does not extend to the pendency of an action under section 105(c)(3). 31 FMSHRC 981.

On the other hand, Chairman Jordan and Commissioner Cohen reversed the judge's order, but each by way of different analysis. In Chairman Jordan's view, the statute clearly states that a temporary reinstatement order remains in effect pending a final Commission order on the same underlying complaint filed with MSHA and prosecuted by either the Secretary under 105(c)(2), or by the complainant under 105(c)(3). 31 FMSHRC at 997. That is, the statute requires a final order from the Commission on the complaint, not a determination from the Secretary, in order to dissolve a grant of temporary reinstatement. Id. at 992. In her view, there is no "final order on the complaint" until the Commission issues an order affirming, modifying, or vacating the Secretary's proposed order in accordance with section 105(c)(2), or dismisses or sustains the complainant's charges in accordance with section 105(c)(3), and in either case, the final order must be based on the Commission's findings of fact and determination of whether discriminatory conduct in violation of section 105(c)(1) has occurred. Id. at 991.

In Commissioner Cohen's view, given his colleagues' and the Secretary's different and contrary interpretations of the statute's text, structure, legislative history and purpose, all set forth as having "plain meaning" and all having some plausibility, the statute must be ambiguous in terms of the *Chevron I* analysis. Id. at 1002.[5] Therefore, applying a *Chevron II* analysis, Member Cohen

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[4]Recently, two events occurred which may resolve the Commission deadlock on the propriety of a judge's dissolution of a temporary reinstatement order after the Secretary's determination of no discrimination under Sec. 105(c)(2), where no final order of the Commission has issued on the miner's action under Sec. 105(c)(3). First, the Commission granted review on this issue in the matter of *Sec'y of Labor on behalf of Gray v. North Fork Coal Corporation*, Docket No. KENT 2009-1429-D. In that proceeding, the Secretary argues that under the plain language of section 105(c)(2), a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under section 105(c)(2) or by the miner under section 105(c)(3). Alternatively, the Secretary has argued that even if the meaning of section 105(c)(2) is not plain, the Secretary's interpretation of section 105(c)(2) is reasonable and entitled to deference under *Chevron II.* Sec'y Br. at 19-20. Second, Commissioner Nakamura joined the Commission and will likely break the tie vote.

[5]See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-844 (1984) (if a statute is clear and unambiguous, effect must be given to its plain language under a *Chevron I*

would accord deference to the Secretary's reasonable and permissible interpretation of the statute, as amicus curiae, to require that a temporary reinstatement order remain in effect until there is a final Commission order on the miner's underlying discrimination complaint, whether it is litigated by the Secretary pursuant to section 105(c)(2) or by the miner under section 105(c)(3). 31 FMSHRC at 1002, citing *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).[6]

Nagel's Temporary Reinstatement Rights Pending Litigation of his Discrimination Complaint Under Section 105(c)(3) Were Voluntarily Settled and Clearly and Unmistakably Waived

Nagel's temporary reinstatement case is clearly distinguishable from the dissolution of the temporary reinstatement order in *Phillips v. A&S Construction Co.* because it involves a voluntary settlement of the temporary reinstatement application by all parties. In such circumstances, I find that the principles of voluntary dispute resolution must prevail over granting Nagel a second bite at the apple by allowing his motion for temporary reinstatement under section 105(c)(3). Otherwise the Secretary and Commission, already struggling to reduce a vast and growing backlog, would be endlessly negotiating for settlement of multiple applications or motions for temporary reinstatement, and re-adjudicating issues of temporary reinstatement that they thought were settled under section 105(c)(2), time and again under section 105(c)(3). Such a result would gut the principles of voluntary dispute resolution and the confidence that the parties must have in the finality of their settlement agreements.

Knowing and voluntary settlement is an essential aspect of dispute resolution under the Act. In this regard, the Commission recently vacated a settlement in the context of a Section 105(c)(2)

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analysis, but if the statute is ambiguous or silent on a point in question, a second inquiry is necessary to determine whether the agency's interpretation of the statute is a reasonable one and entitled to deference under a *Chevron II* analysis); see also *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996).

[6]Member Cohen emphasized the Secretary's interest in ensuring that section105(c) is interpreted in an expansive manner to vigorously protect miners, who make safety complaints, since "enforcement of the [Mine] Act is the sole responsibility of the Secretary." *See Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006). 31 FMSHRC at 1003. Thus, he found that the Secretary has a real interest in ensuring that her view of the Mine Act's temporary reinstatement provision prevails, even where she has determined that there has been no violation of section 105(c)(1) in a particular case. 31 FMSHRC at 1004. Accordingly, he rejected the views of Commissioners Duffy and Cohen that the Secretary is owed no deference because she is no longer "charged with administering" the temporary reinstatement provision of the Act once the Secretary has made a determination of no discrimination. 31 FMSHRC at 1002-1003. Rather, he concluded that temporary reinstatement is based on a finding by the Secretary that the discrimination complaint was not "frivolously brought," and the fact that the Secretary may later find that discrimination did not occur, does not alter or diminish her finding that the complaint was not "frivolously brought." 31 FMSHRC at 1103.

discrimination complaint because the miner, who filed the complaint with MSHA, was not a party to the agreement. See *Pendley, Lawrence v. Highland Mining Co., LLC,* 29 FMSHRC 164, 164, (Apr. 2007). The Commission emphasized the importance of the miner's participation in agreeing to the settlement terms.[7] Specifically, the Commission emphasized the following:

> The Commission has made clear that "[s]ettlement of contested issues is an integral part of dispute resolution under the Mine Act." *Tarmann v. Int'l Salt Co.*, 12 FMSHRC 1, 2 (Jan. 1990) (quoting *Pontiki Coal Corp.*, 8 FMSHRC 668, 674 (May 1986)). In this respect, the Commission has observed that "the record must reflect and the Commission must be assured that a motion for settlement [approval], in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its provisions." *Tarmann*, 12 FMSHRC at 2 (quoting *Peabody Coal Co.*, 8 FMSHRC 1265, 1266 (Sept. 1986)). *See also Wake Stone*, 27 FMSHRC at 290 (decision approving settlement vacated where it was "unclear whether the parties achieved a true meeting of the minds").

The Commission concluded that because Pendley had objected to and had not come to an agreed disposition of the matter, the judge's decision approving the settlement and dismissing the proceeding should be vacated.

In this case, miner Nagel, who has filed a complaint with the Commission under section 105(c)(3), is a party under Commission Procedural Rule 4(a). Unlike Pendley, however, Nagel has voluntarily relinquished his right to temporary reinstatement under the terms of the Settlement Agreement that he executed. That is, once the Secretary made a finding of no discrimination on December 1, 2009, Nagel's economic reinstatement terminated on that date pursuant to the clear and unmistakable terms of the Settlement Agreement that he signed.

In this regard, the Settlement Agreement, specifically provides that "[i]f the Secretary makes a finding of no discrimination at any time after Mr. Nagel's temporary reinstatement, the temporary reinstatement will terminate on the date on which a negative decision is made...." As a consequence, Nagel's period of economic reinstatement terminated by agreement of the parties, including Nagel, on December 1, 2009, the date of the Secretary's determination of no discrimination.[8] Thus, the

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[7] In that case, the miner, Pendley, did not agree to the initial settlement agreement. *Id.* The Commission found that there must be a "meeting of the minds" between the representatives of the parties for the settlement agreement to stand. *Id.* at 165. Since Pendley did not agree to, or sign, the settlement agreement, there was no genuine agreement between all the parties as to the provisions of the settlement agreement. *Id*.

[8] I note that neither the Secretary nor Nagel reserved the right to argue that in the event that the Secretary determined that Section 105(c)(1) had not been violated, the temporary reinstatement shall remain in effect "pending final order on the complaint." See 30 U.S.C. § 815(c)(2). The Secretary has reserved this argument in settlement of other temporary reinstatement cases. See e.g., *Clapp, Cindy v. Cordero Mining, LLC,* Docket No. WEST 2010-1314-D (June 2007).

record reflects a clear meeting of the minds on the issue of temporary reinstatement, as required by Commission precedent. In these circumstances, I conclude that Nagel clearly and unmistakably waived his right to temporary reinstatement once the Secretary made a determination of no discrimination under the express terms of the parties Settlement Agreement resolving the temporary reinstatement issue under section 105(c)(2).[9]

Perhaps more importantly, Commission case law also establishes that a temporary reinstatement order may be vacated by voluntary settlement where the alleged discriminatee is party to the agreement. See *Koerner, John v. Arch Mineral Coal Co.* 1 MSHC 2078 (judge's decision vacating temporary reinstatement order after settlement of discrimination proceeding affirmed upon receipt of assurance that settlement and vacation of reinstatement order were agreed to by miner). In *Koerner*, a discrimination proceeding under Section 105(c)(2), the Secretary moved to vacate a temporary reinstatement order on the ground that the parties had negotiated a settlement of the discrimination proceeding. The judge granted the motion, but the Commission remanded because the record did not indicate whether the alleged discriminatee agreed with the motion to vacate. The Commission's primary concern in directing review was to assure that the alleged discriminatee voluntarily agreed to vacation of the reinstatement order. The Commission emphasized that "[i]t is the *miner's* rights that are being settled, and we must, therefore, insure that the settlement and vacation of the reinstatement order were agreed to by the miner, not just the Secretary and the operator." *Id.* The Secretary's submissions on remand indicated that discriminatee Koerner was a party to the settlement and authorized the Secretary to move for vacation of the temporary reinstatement order. In these circumstances, since the record established that alleged discriminatee Koerner was a voluntary party to the agreement, the Commission's concerns were satisfied and the judge's vacation of the temporary reinstatement order was affirmed.

The same logic applies to the instant matter even though it involves settlement of the temporary reinstatement issue under Section 105(c)(2), not the entire discrimination proceeding under 105(c)(3). Complainant Nagel, like alleged discriminatee Koerner, was a knowing and

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[9]Cf. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)(union could waive its officers' statutory right under § 8(a)(3) of the National Labor Relations Act to be free of anti-union discrimination, but such waiver must be clear and unmistakable); *Wright v. Universal Maritime Service Corp*., 525 U.S. 70, 80-81 (1988) (collective-bargaining agreement's *general* arbitration clause did not clearly and unmistakably waive an employee's right to a judicial forum for his claim under the ADA, distinguishing *Gilmer v. Interstate/Johnson Lane Corp*.., 500 U.S. 20 (1991) because *Gilmer* involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees and hence the "clear and unmistakable" standard was not applicable); *Interstate Brands v Bakery Drivers*, 167 F.3d 764 (2d Cir. 1999) (*Wright's* "clear and unmistakable" standard is based upon a concern about allowing a union to waive an individual employee's statutory rights—i.e., a concern about the waiver of one's rights by someone else; however, where one waives one's own rights, the "clear and unmistakable" standard is not required).

voluntary party to the Settlement Agreement and the terms under which his economic reinstatement order would be terminated, as evidenced by his signature on the Settlement Agreement. In these circumstances, I find the terms of the Settlement Agreement controlling. Accordingly, I conclude that the temporary reinstatement order was properly terminated on December 1, 2009 - the date the Secretary issued a finding of no discrimination - pursuant to the express terms of the parties' Settlement Agreement.

Accordingly, **IT IS ORDERED** that Docket No. WEST 2010-18-DM and Docket No. WEST 2010-464-DM are consolidated. **IT IS FURTHER ORDERED** that the Complainant's motion for temporary reinstatement has been voluntarily waived and is therefore **DENIED**. Consequently, **IT IS FURTHER ORDERED** that the temporary reinstatement proceeding **IS DISMISSED**. Respondent's Motion to strike Complainant's Motion is moot and Respondent's motion for attorney fees is **DENIED**.

Thomas P. McCarthy
Administrative Law Judge

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