**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041
June 25, 2001

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| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 2001-146-DM |
| ON BEHALF OF | : | SC MD 00-25 |
| LEE GARRETT, | : | |
| Complainant | : | Arkansas Operations Mill |
| | : | |
| UNITED STEEL WORKERS OF AMERICA, | : | |
| LOCAL 4880 | : | |
| Intervenor | : | |
| | : | Mine ID 03-00257 |
| v. | : | |
| | : | |
| ALCOA WORLD ALUMINA, LLC, and | : | |
| its successors, | : | |
| Respondent | : | |

**ORDER GRANTING MOTION TO QUASH DEPOSITION**

This case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Secretary, by counsel, has moved to quash the Respondent's Notice of Deposition of "person or persons at MSHA's office of assessments who made the decision regarding the amount of penalty for this case." For the reasons set forth below, the motion is granted.

The Secretary offers three bases for quashing the notice: (1) High level government officials have a qualified immunity from being deposed; (2) The Commission and its judges assess penalties *de novo*; and (3) The information sought by the deposition is covered by the deliberative process privilege. I find that the first reason does not provide a basis for quashing the notice, but the second and third do.

It has long been held that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) [citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)]. In *Simplex*, the court included the Solicitor of Labor, the Secretary of Labor's Chief of Staff, the Occupational Safety and Health Administration (OSHA) Regional Administrator and the OSHA Area Director as officials included within this prohibition. *Id.*

As the Respondent points out, however, there is no way to determine whether the "person or persons" in the assessment office who determined the amount of penalty in this case come within this prohibition, because the Secretary has not identified who made the decision. Accordingly, this basis for quashing the notice is rejected.

The second reason advanced by the Secretary is sound. Since its beginning, the Commission has held that "in a proceeding before the Commission the amount of the penalty to be assessed is a *de novo* determination based on the six statutory criteria specified in section 110(i) of the Act (30 U.S.C. § 820(i)) and the information relevant thereto *developed in the course of the adjudicative proceeding*." *Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (citations omitted) (emphasis added). Thus, the reasons for the determination of the assessment office are totally irrelevant. Indeed, the Commission has held that even if the judge determines that the Secretary failed to comply with her regulations in proposing a penalty, he does not remand the case to have another penalty proposed, but rather assesses an appropriate penalty based on the record. *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 679 (April 1987).

The Respondent argues that the recent Commission decisions in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000), and *Cantera Green*, 22 FMSHRC 616 (May 2000), requiring that judges explain their reasons for assessing a penalty different from that proposed by the Secretary somehow makes the reasons of the Secretary for proposing a penalty a part of the proceeding. This position, however, misreads the cases. Both cases, as well as *Hubb Corp.*, 22 FMSHRC 606 (May 2000), merely reiterated the admonition in *Sellersburg*, 5 FMSHRC at 293, that: "When based on *further information developed in the adjudicative proceeding*, it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." (Emphasis added.) Clearly, the explanation is how the new information leads to a different penalty, not how the judge's reasoning differs from the Secretary's.

Since the assessment of a penalty after a hearing is based solely on the information presented during the hearing on the penalty criteria set out in section 110(i), the reasons the Secretary may have relied on in proposing the penalty are not relevant. Consequently, taking the deposition of the "person or persons" in the assessment office cannot lead to relevant evidence and the Notice of Deposition will be quashed.

Finally, I also find that the "deliberative process privilege" applies in this case. The deliberative process privilege is designed to protect "the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) [quoting *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978)].

In its Opposition, the Respondent asserts that: "Alcoa does not seek to require that the Secretary make findings of fact concerning the six criteria nor does Alcoa seek to delve into the Secretary's decision-making process. Rather Alcoa looks to have the Secretary provide it with the reasons behind her conclusions." (Opposition at 6-7.) What the Respondent apparently fails to recognize, is that the reasons for the conclusions are the precise types of functions that are covered by the privilege. Therefore, I conclude that the deliberative process privilege is another reason for quashing the notice.[1]

**ORDER**

Accordingly, the motion to quash the notice of deposition of the "person or persons at MSHA's office of assessments who made the decision regarding the amount of the penalty for this case" is **GRANTED**. It is **ORDERED** that the notice of deposition is **QUASHED**.

T. Todd Hodgdon
Administrative Law Judge
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[1] If this were the only reason put forward by the Secretary, it might have been appropriate to permit the deposition and require the Secretary to object to any questions violating the privilege. However, in this case, the Respondent has stated that the only thing that it is seeking from the witness is information covered by the privilege and I have further determined that the information it seeks is not only privileged, but irrelevant.