

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

February 6, 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1274-D
ON BEHALF OF CHARLES H.	:	PIKE CD 94-16
DIXON, BERNARD EVANS,	:	
RICHARD GLOVER, EDGAR OLDHAM,	:	
MARK MARCH, AND ELEVEN (11)	:	
UNNAMED EMPLOYEES OF PONTIKI	:	
COAL CORPORATION,	:	
Complainant	:	
v.	:	Pontiki No. 2 Mine
	:	Mine ID 15-09571
PONTIKI COAL CORPORATION,	:	
Respondent	:	

**ORDER GRANTING PARTIAL DISMISSAL**

Before: Judge Melick

This proceeding is before me based upon the Respondent's Motion to Dismiss raising the following issues: (1) the Commission lacks jurisdiction in this case over those persons who have not filed complaints under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 3- U.S.C. § 801 et. seq., the "Act" and in cases whether such complaints have merit (under Sections 105(c)(2) and (3) of the Act); (2) that the complaint of Charles H. Dixon must also be dismissed for lack of jurisdiction because he was not a member of a class of persons protected under Section 105(c) when the alleged discrimination occurred; (3) that the complaint is defective under Commission Rule 44(a), 29 C.F.R. § 2700.44(a); and (4) that the complaint herein is untimely.<sup>1</sup>

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<sup>1</sup>The Secretary's Motion for Summary Decision on the merits filed January 13, 1995, is premature as the Motions to Dismiss may be dispositive on preliminary issues. The Secretary's Motion also appears to be based upon facts still at issue. See Commission Rle 67, 20 C.F.R. § 2700.67.

The undisputed record shows that Charles H. Dixon, alone, filed a complaint of discrimination pursuant to section 105(c)(2) of the Act<sup>2</sup> on April 26, 1994, alleging the following discriminatory actions:

Pontiki Coal Corporation, through and by management personnel, advised miners that they could not choose a representative of miners who was a representative of the United Mine Workers of America. The miners were further advised that if they chose a UMWA representative that Pontiki would be forced to spend thousands of dollars to defend their position and that only employees of Pontiki will be recognized as a representative of miners.

Management for Pontiki, on or about March 11, 1994, further implied that the miners' jobs would be less secure as a result of the company having to spend thousands of dollars to defend their position and that if the company was not forced to spend this money on lawyers that it would mean more money for them.

Management for Pontiki on April 15, 1994, properly received by certified mail, pursuant to 30 C.F.R. [sic] part 40 a certificate of representation of which they have failed to properly recognize.

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<sup>2</sup>Section 105(c)(2) provides, in part, as follows:

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. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, 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. If upon such investigation, the Secretary determines that the provisions of the subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief.

In a letter to Mr. Dixon dated September 15, 1994 the Secretary advised Dixon in relevant part as follows:

Your complaint of discrimination, under section 105(c) of the Federal Mine Safety and Health Act, has been investigated and the results carefully considered.

Based on the results of this investigation, the Mine Safety and Health Administration (MSHA) has determined that, in its opinion, a violation of section 105(c) of the Act has occurred and that you have been discriminated against. MSHA, through the Office of the Solicitor, has prepared and filed a complaint on your behalf, requesting that Federal Mine Safety and Health Review Commission order relief which would remedy the discrimination.

Thereafter, September 6, 1994, presumably under section 105(c)(2) of the Act, the Secretary filed a complaint of discrimination with this Commission alleging in part as follows:

5. The following non-employees of Pontiki Coal Corporation have been appointed as duly authorized representatives of miners for the Pontiki No. 2 mine all within the meaning of section 105(c) of the Act [30 U.S.C. 815(c)]: Charles Dixon, Bernard Evans, Don Riley, Charles Johnson, Richard Glover, Edgar Oldham, and Mark March. Said representatives of miners were appointed by eleven employees of Pontiki Coal Corporation working at the Pontiki No. 2 mine.

6. From March 1994 to present, Pontiki Coal Corporation has discriminated against the non-employee representatives of miners and the eleven Pontiki Coal Corporation employees who appointed said non-employee miners' representatives. The acts of discrimination are in violation of section 105(c) of the Act [30 U.S.C. 815(c)]. The acts of discrimination engaged in by Pontiki Coal Corporation include but are not limited to the following:

(a) refusal to recognize the non-employees as representatives of miners; (b) posting the appointment notice with the names of the non-employees representatives of miners on the mine bulletin board with the admonishment that Pontiki Coal Corporation would not recognize or honor the appointment of non-employees as miners' representatives; and (c) holding meetings with hourly paid employees, to include the eleven employees described above, and threatening said hourly paid employees with job termination by closing the mine if said employees continued their efforts to appoint non-employees as

representatives of miners.<sup>3</sup>

In its motion to dismiss, Pontiki argues, inter alia, that the Secretary cannot bring a complaint on behalf of non-complaining individuals. Indeed, under the plain language of that section, it is only that particular "miner or applicant for employment of representative of miners" who believes that he has been discriminated against who is authorized and has standing to file a complaint with the Secretary alleging such discrimination against him.

The initiating complaint filed with the Secretary in this case was clearly identified as the complaint of Charles H. Dixon. He is the only listed named complainant and only Dixon's signature appears on the complaint. Moreover, the Secretary's findings pursuant to section 105(c)(2) evidenced by its letter to Mr. Dixon dated September 15, 1994 specifically refers to Mr. Dixon's complaint as "your complaint of discrimination" and refers to the findings that "you have been discriminated against". There is, accordingly, no legal basis for the Secretary's expanded complaint filed with this Commission alleging discrimination against the named complainant herein, Charles Dixon, but also as against persons other than Charles Dixon. There being no statutory basis for the inclusion of the 17 additional persons in the complaint, this Commission has no jurisdiction to act on the expanded complaint. The complaint herein must accordingly be dismissed with respect to all purported Complainants except Charles H. Dixon.<sup>4</sup>

Moreover, to the extent that the Secretary's complaint also contains allegations naming additional "complainants" and raises additional issues thereby deviating from the original complaint filed by Dixon with the Secretary on April 26, 1994 those deviating and additional allegations must also be stricken as beyond the scope of this Commission's jurisdiction. Hatfield versus Colquest Energy, Inc., 13 FMSHRC 544 (1991).

With respect to the one remaining complainant, i.e. Charles H. Dixon, Pontiki also argues that he was not a person protected under section 105(c) because he was not an applicant for employment, a miner or even a miner's representative when the

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<sup>3</sup>On October 2, 1994, the Secretary filed an amended complaint adding a specific request for assessment of a civil penalty of \$1,500 for the alleged violation.

<sup>4</sup>The case caption in future pleadings should accordingly be modified to reflect the deletion of these 17 persons as Complainants herein.

alleged discrimination occurred. It is undisputed in this case that complainant Dixon has not, in fact, been either a "miner" or an "applicant for employment" within the meaning of the Aact and that he did not, until April 15, 1994 notify Pontiki of this claim to be a "representative of miners" at the subject mine when Pontiki received by certified mail a "certificate of representation" purportedly under 30 C.F.R. Part 40. It is clear, therefore, that before April 15, 1994, Mr. Dixon was not a miner, applicant for employment, or representative of miners within the scope of section 105(c)(2).

Under the circumstances, I am without jurisdiction to consider any alleged acts of discrimination occurring before April 15, 1994. In examining the specific issues set forth in Mr. Dixon's April 26, 1994 complaint to the Secretary it is clear, therefore, that only that part of Dixon's Complaint may be considered which asserts that "management for Pontiki on April 15, 1994 properly received by certified mail pursuant to 30 C.F.R. [sic] Part 40 a certificate of representation of which they have failed to properly recognize."

Pontiki further argues that Dixon was not a "representative of miners" and is still not a "representative of miners" because of his failure to comply with Part 40 of the Secretary's regulations. In this regard Pontiki notes that 30 C.F.R. section 40.3(a) provides for mandatory requirements for certification, requiring that the certificate provide the title of the official or position, who is to serve as representative and his or her telephone number. The regulation specifically provides as follows:

Section 40.3(a) The following information shall be filed by a representative of miners with the appropriate District Manager, with copies to the operators of the affected mines. This information shall be kept current:

(1) The name, address and telephone number of the representative of miners. If the representative is an organization, the name, address, and telephone number of the organization and the title of the official or position, who is to serve as the representative and his or her telephone number.

The Secretary responds by claiming the allegation is "hypertechnical" but also maintains that the required information has been provided. There appears, therefore, to be a factual dispute on the issued of compliance with the certification requirements and that issue cannot be resolved without evidentiary hearings.

The Respondent further maintains that the Complaint should be

dismissed as untimely. It is undisputed that Dixon's initial Complaint was received by the Secretary on April 26, 1994. The Complaint was not filed with this Commission until September 2, 1994, some 129 days later. The Secretary's written determination that Dixon had been discriminated against, which also states that a complaint had already been filed at the Commission on his behalf, was dated September 15, 1995. This filing delay exceeded the time limits set forth in section 105(c)(3) of the Act. However, as this time limit is not jurisdictional, a hearing will also be needed for the parties to present evidence on the issues of whether such delay was justified and whether the operator has been prejudiced by such delay. Oral argument will also be held at such hearings on the issued of whether the Secretary has complied with Commission Rule 44(a) and, if not, what sanctions should be imposed.

### ORDER

The Complaint herein, insofar as it purports to name as individual Complainants persons other than Charles H. Dixon, is dismissed. The Complaint of Charles H. Dixon is further limited as provided in this Order.

Hearings will be scheduled in the near future on the issues presented in the motions to dismiss which have not been decided herein.

Gary Melick  
Administrative Law Judge

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