

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

March 31, 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,	:	
Complainant	:	
v.	:	Pontiki No. 2 Mine
	:	Mine ID 15-09571
PONTIKI COAL CORPORATION,	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS ON REMAINING ISSUES

The Order Granting Partial Dismissal issued February 6, 1995, (amended on March 10, 1995), left certain issues to be resolved following limited evidentiary hearings. Hearings were thereafter held on March 9, 1995. For the reasons set forth herein, those issues are now resolved in favor of the complainant.

One of the issues remaining from Respondent's Motion to Dismiss was its claim that the Secretary's complaint in this case was untimely filed. It is undisputed that on April 26, 1994, Charles H. Dixon filed with the Mine Safety and Health Administration (MSHA) a complaint alleging discriminatory acts from around March 11, 1994, through April 15, 1994. This complaint was received by the Secretary on April 26, 1994. Accordingly, the 90 days within which the Secretary must notify the complainant of his determination whether a violation has occurred, expired on July 25, 1994. Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et. seq.*, the "Act."

It is further undisputed that the Secretary did not until September 2, 1994, file its complaint on behalf of Dixon with this Commission. Moreover, it was not until September 15, 1994, that the Secretary actually mailed to Dixon, with copies to Respondent, a copy of the Secretary's written determination that

Dixon had been discriminated against and stating therein that a complaint had already been filed with the Commission on Dixon's behalf. Thus, the complaint in this case which was not filed with this Commission until September 2, 1994, was filed 129 days after Dixon's initial complaint was received by the Secretary. Furthermore, the Secretary's written determination issued in accordance with Section 105(c)(3) of the Act on September 15, 1995, was issued some 142 days after the initial complaint was received by the Secretary.

It is apparently on the basis of these delays that the Respondent seeks dismissal for untimely filing. However, as the Respondent notes, this Commission restated in *Gilbert v. Sandy Fork Mining Company*, 9 FMSHRC 1317 (1987), rev'd on other grounds, 866 F2d 1433 (D.C. Cir 1989), that the 90 day deadline for completion of the Secretary's investigation and commencement of a miner's discrimination complaint is not jurisdictional. The Commission noted that this was the case because a "complainant should not be prejudiced because of the failure of the government to meet its time obligations".

In general, when dealing with late-filings of a few days or even a few months, the Commission has determined that the time limits in Sections 105(c)(2) and (3) are not jurisdictional and that the failure to meet them should not result in dismissal absent a showing of material legal prejudice. See, e.g., *Secretary on behalf of Hale v 4 - A Coal Company*, 8 FMSHRC 905, (June 1986).

The delay in this case of only a few days is indeed quite limited and Respondent has failed to show any legal prejudice caused by the delay. In addition, I find, based on the affidavit of Associate Regional Solicitor, Ralph York, that there was some justification for the delay (Government Hearing Exhibit No. 1). Accordingly, I find no basis for dismissal because of untimely filing.

The next unresolved issue is Respondent's claim that Mr. Dixon's Certificate of Representation, received by Pontiki on April 15, 1994, was defective and not legally binding because it failed to comply with the Secretary's regulations at 30 C.F.R. ' 40.3(a). The cited 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 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 certification at issue in this case was submitted at hearing (Government Hearing Exhibit No. 3) and, contrary to Respondent's allegations, clearly sets forth the "title" or "position" of Mr. Dixon as "international representative". Furthermore, a telephone number is provided on the face of the certificate which purports to be that of Dixon. The regulation does not require the representative to provide a home telephone number as Respondent seems to suggest. Under the circumstances, Respondent's argument herein is clearly without merit.

Finally, Respondent has argued that the Secretary failed to comply with Commission Rule 44(a), 29 C.F.R. ' 2700.44(a), in that the Secretary's amended complaint failed to include "a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in Section 110(i) of the Act". Whether or not the Secretary's amended complaint failed to comply with Commission Rule 44(a) is now moot however since the Secretary has, in fact, filed a second amended complaint meeting the requirements of the Rule. The Respondent's argument on this issue is, accordingly, also rejected.

Gary Melick
Administrative Law Judge
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