FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 23, 2003

HAZEL OLSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-302-D
	:	DENV CD 2001-01
	:	
v.	:	Mine I.D. 48-01355
	:	North Rochelle Mine
TRITON COAL COMPANY,	:	
Respondent	:	

ORDER REQUIRING THE SECRETARY OF LABOR TO PRODUCE DOCUMENTS FOR *IN CAMERA* REVIEW

Complainant, Hazel Olson, contends that she was discriminated against by Triton Coal Company ("Triton") in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) ("Mine Act"). Olson asserts that Triton did not hire her because of her safety activities at another mine. Applicants for employment are protected from discrimination under section 105(c)(1) of the Mine Act.

Olson filed the discrimination complaint at issue in this case with the Department of Labor's Mine Safety and Health Administration ("MSHA") on December 15, 2000. MSHA investigated her complaint. When MSHA declined to file a discrimination complaint before the Commission on her behalf under section 105(c)(2) of the Mine Act, Olson filed her own discrimination complaint under section 105(c)(3) of the Mine Act. In order to prosecute her case, Olson used the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain documents from the file developed by MSHA during its investigation of her discrimination complaint. MSHA provided most but not all of the documents that Olson requested.

Olson filed a motion in this proceeding to compel production of the statements of interview of Scott Pribyl and Carrie Kienzel taken by either MSHA Special Investigator Lana Passarella or MSHA Supervisory Investigator Judy Peters.[1] Olson indicated that she needed these statements to prepare her case for trial. Olson also served a subpoena on Ms. Passarella. The subpoena directed Ms. Passarella to appear at a hearing that was previously scheduled in this case. In response, I issued an order to the Secretary requiring her to produce the subject statements of interview for my *in camera* review. In my order, I provided that if the Secretary

[1] Pribyl and Kienzel were employees of Manpower, Inc., a temporary employment agency, that was involved in hiring workers at Triton's North Rochelle Mine.

opposes Olson's motion to compel production, her response to my order should set forth her reasons and legal argument for her opposition.

The Secretary filed a response in which she objected to my order to compel production on several grounds and sought to have the subpoena quashed. As a consequence, I canceled the hearing in order to resolve this issue because Olson believes that the information she seeks is critical to her case.

I. SUMMARY OF THE ARGUMENT

A. Secretary of Labor

In the Secretary's response to my order to compel production, the Secretary maintains that the Federal Mine Safety and Health Review Commission ("Commission" or "FMSHRC") lacks jurisdiction over MSHA, the Department of Labor, and its employees in this matter. She states that the Commission is an "agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989). The present case is a discrimination proceeding brought by a private party under section 105(c)(3) of the Mine Act that does not involve MSHA or the Secretary. Consequently, the Commission, being a quasi-judicial agency, has no jurisdiction over the Department of Labor, MSHA, or its employees in this case. "To require the Secretary to submit to the jurisdiction of FMSHRC in 105(c)(3) cases is tantamount to directing the manner in which the Secretary chooses to enforce the Mine Act, and thus outside the scope of FMSHRC's statutory responsibilities and outside its Congressional grant of authority." (S. Response 6).

The Secretary next argues that the Commission lacks the authority to compel the production of documents from the Secretary through subpoena. Section 113(e) of the Mine Act authorizes Commission administrative law judges to issue subpoenas. The Secretary believes that the word "person" in that section does not include the Secretary. Consequently, the Commission does not have subpoena powers with respect to employees of the Department of Labor in proceedings in which the department is not a party.

The Secretary contends that the Commission lacks authority to compel the production of documents previously determined by the Department of Labor to be non-disclosable under FOIA. Olson filed a FOIA request in 2002 asking for everything in MSHA's investigation file regarding her discrimination complaint against Triton. The Secretary states that she supplied "over 200 pages of materials collected by MSHA" during its investigation. (S. Response 8). Some documents were withheld or redacted because disclosure of the protected information could (1) "reasonably be expected to divulge the identities of confidential sources;" (2) "reasonably be expected to constitute an unwarranted invasion of privacy;" or (3) reveal predecisional materials

and internal deliberations.[2] *Id.* The Secretary states that on July 26, 2002, she responded to Olson's FOIA request and advised Olson of her appeal rights. Olson failed to appeal the Secretary's FOIA determinations. The Secretary contends that FOIA is the sole vehicle for obtaining information in federal government files where the government is not a party to an action. Olson cannot forego her FOIA appeal rights before the Department of Labor and then attempt to use the Commission to obtain the requested documents. An agency's decision to withhold documents under FOIA "may be appealed only through FOIA channels." (S. Reply 10).

Next, the Secretary argues that the Privacy Act and the Department's system of records prohibit disclosure of the sought-after documents. She believes that the requested records are prohibited from disclosure by the Privacy Act and the disclosure does not fit within any exemptions established by the Department. The Department is not a party to the litigation and has no interest in the litigation sufficient to warrant the production of the records. The Secretary argues that the Commission is not a "court of competent jurisdiction" having the authority to issue a subpoena to the Secretary that would allow disclosure under 5 U.S.C. § 552a(b)(11) of the Privacy Act.[3]

Finally, the Secretary argues that by virtue of the Department's regulations at 29 C.F.R. Part 2, Subpart C, the Commission lacks the authority to compel the production of documents of departmental employees in matters in which the department is not a party. The Department's Deputy Solicitor for Regional Operations has, through directives, the authority to determine the conditions under which subpoenas shall be complied with. He determined that the Department will not comply with Olson's subpoena of MSHA Special Investigator Passarella. Departmental employees are bound by the Deputy Solicitor's instructions. Although the Deputy Solicitor's decision is reviewable, such review may only be had in a U.S. District Court. The Secretary submits that "neither FMSHRC nor its administrative law judges may compel the production of documents, or compel the testimony of departmental employees, in response to an administrative subpoena in a case in which the Department is not a party." (S. Response 19).

B. Hazel Olson

In response, Olson states she is asking that "Ms. Passarella provide testimony concerning specific witness statements that Ms. Passarella took during her investigation of my claim against Triton Coal Company." (Olson letter 1). She states that "[b]ecause there seem to be

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[2] In order to protect the identities of those who were interviewed by the MSHA Special Investigators, the Secretary declined to disclose whether Scott Pribyl or Carrie Kienzel were actually interviewed during MSHA's investigation. For purposes of this order, I assume that such interviews occurred.

[3] In making this argument, the Secretary cites a statement of Eva Kletterman, OMB Privacy Act Advisor, Office of Management and Budget, dated March 18, 2003.

discrepancies between the witness statements now and the statements made subsequent to the initial investigation, this testimony is critical to my case." *Id.* Olson maintains that the cases cited and arguments made by the Secretary do not apply in this instance. First, many of the cases cited by the Secretary concern subpoenas filed against a federal agency by state agencies and courts. Federal courts clearly have the authority to order a nonparty agency to comply with a subpoena "if the government has refused production in any arbitrary, capricious, or otherwise unlawful manner." *Id.* (citation omitted).

Olson maintains that a second difference between the cases cited by the Secretary and her case concerns the fact the she is "seeking witness statements themselves that Ms. Passarella took as part of her official business." (Olson Letter 1-2). Olson maintains that this important testimony cannot be replicated and there is no other way to determine what witnesses actually said during MSHA's initial investigation. These statements are necessary so that the administrative law judge can determine whether these witnesses "have changed what they said regarding my job application since Ms. Passarella interviewed them." *Id.* at 2. Olson believes that Mr. Pribyl and Ms. Kienzel "are retracting the statements that they gave." *Id.* Courts look to see if the documents requested under the subpoena are otherwise available. In this instance, "[t]here is no other way to discover what these witnesses said when Ms. Passarella first conducted her investigation, other than to talk to her and see her documents." *Id.*

Olson argues that the only complicating factor in this case is that a subpoena was issued by the Commission rather than a federal court. She contends that the Commission has compelled the production of witness statements using a balancing test and that application of a balancing test in this instance will show that her interests outweigh the interests of the Secretary in protecting the interview statements. The work product rule and the informant's privilege should yield to her need for the interviews. Olson believes that it is important to keep in mind that the statements were made during the initial stages of MSHA's investigation. Olson asserts that these two individuals have "first-hand knowledge of what the supervisor said after she saw my job application." *Id*. at 4. Because these witnesses made the statements to Ms. Passarella shortly after the incident that prompted the MSHA investigation, Olson states that she has a substantial need for them, especially since Olson believes that their statements about the events have changed over time. Consequently, Olson believes that the "witness statements that Ms. Passarella took when she conducted the MSHA investigation into my discrimination complaint should be produced." *Id.*

II. ANALYSIS OF THE ISSUES

Under section 105(c)(2) of the Mine Act, the Secretary was required to investigate the discrimination complaint filed by Ms. Olson. If the Secretary determined that she was discriminated against, the Secretary must file a complaint with the Commission alleging such discrimination and propose an order granting appropriate relief. In this instance, the Secretary determined that Olson was not discriminated against and so notified Olson by letter dated August 29, 2001. Olson filed her discrimination complaint with the Commission under section 105(c)(3)

of the Mine Act.

Neither the Department of Labor nor employees of the Department of Labor are parties in this case. Under section 113(e) of the Mine Act, however, an administrative law judge has broad authority to compel the testimony of witnesses and the production of documents. 30 U.S.C. § 823(e). This provision states, in part:

> In connection with hearings before the Commission or its administrative law judges under this Act, the Commission and its administrative law judges may compel the attendance and testimony of witnesses and the production of books, papers, or documents, or objects and order testimony to be taken by deposition at any stage of the proceedings before them. Any person may be compelled to appear and depose and produce similar documentary or physical evidence, in the same manner as witnesses may be compelled to appear and produce.

In the first sentence of this provision, Commission judges are granted the authority to compel the testimony of witnesses at a hearing or by deposition. Commission judges are also authorized to compel the production of books, papers, documents, or objects. In the second sentence, Commission judges are authorized to compel "[a]ny person" to testify at a hearing or at a deposition. In addition, "[a]ny person" may be compelled to "produce similar documentary or physical evidence, in the same manner as witnesses. . . ."

The Commission's rule implementing this provision provides that the "Commission and its judges are authorized to issue subpoenas, on their own motion or on the oral or written application of a party, requiring the attendance of witnesses and the production of documents or physical evidence." 29 C.F.R. § 2700.60(a). Nothing in Mine Act or the Commission's rules limits a judge's subpoena power to witnesses who are called to testify by a party or to individuals who are employed by a party. The subpoena power applies to any witness and to any person.

Section 113(e) of the Mine Act goes on to state:

> In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge . . . to appear, to testify, or to produce documentary or physical evidence, any district court of the United States . . . within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon application of the Commission or the administrative law judge . . .have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the commission or administrative law judge.

This provision grants the U.S. District Court the authority to enforce Commission subpoenas.

The Secretary argues that these broadly written provisions do not apply to her. First, she argues that neither the Secretary nor employees of the Department of Labor are persons, as that term is defined in the Mine Act. Section 3 of the Mine Act defines the term "person" to mean "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization. 30 U.S.C. § 802. The Commission has held that the term "person" does not include the Secretary of Labor or MSHA in the context of section 105(c) of the Mine Act. *Wagner v. Pittston Coal Group*, 12 FMSHRC 1178, 1184 (June 1990), *aff'd*, 947 F.2d 943 (table), 1991 WL 224257 (4th Cir. 1991). Two Courts of Appeal have reached the same conclusion. *Wagner v. Secretary of Labor*, 947 F.2d 943 (table), 1991 WL 224257 (4th Cir. 1991); *Meredith v. FMSHRC*, 177 F.3d 1042, 1052-54 (D.C. Cir. 1999). These decisions hold that, given the structure of section 105(c), MSHA employees cannot be "persons" subject to discrimination actions under that provision. These decisions did not hold, however, that the word "person" can never include the Secretary and her employees. Indeed, the court in *Meredith* specifically rejected this approach. 177 F.3d 1053-04 & n.11. That court limited its analysis to situations in which a discrimination complaint is brought against an employee of MSHA and its holding cannot be broadly applied to section 113(e) of the Mine Act. I find that I have jurisdiction to issue a subpoena to the Secretary in this case to require her to produce the requested documents. Enforcement of the subpoena would be through the U.S. District Court.

Under section 113(e) of the Mine Act, a Commission judge is specifically authorized to compel the production of documents. This authority is not tied to witnesses or persons. Nothing in section 113(e) indicates that the Commission's authority does not apply to official documents in the custody of the Department of Labor. The cases and arguments supplied by the Secretary concern situations in which a private party is seeking to obtain information from a Federal agency in a proceeding totally unrelated to the agency's mission. The moving party is seeking to use the government as a free source of information or expertise in a state court proceeding or other unrelated proceeding. For example in *Davis Enterprises v. U.S. E.P.A.*, 877 F.2d 1181 (3rd Cir. 1989), the EPA produced documents requested by a party in a state court proceeding but refused to allow its employees to testify in that proceeding. Among other reasons, the EPA stated that the "cumulative effect of allowing such testimony would constitute a drain on EPA resources . . . and such testimony was not in the EPA's interest." *Id.* at 1186. The court held that the EPA's position was not arbitrary or capricious.

Although the Secretary is not a party in this case, she is inexorably tied to the events leading up to this case. Ms. Olson was required by the Mine Act to file her discrimination complaint with the Secretary. The Secretary, acting through MSHA, investigated the complaint by interviewing potential witnesses and gathering information. When the Secretary determined that section 105(c) was not violated, Olson filed a complaint on her own behalf before the Commission. The documents sought by Olson in this case are a portion of the information gathered by the Secretary during her investigation of Ms. Olson's complaint. The Secretary is not a stranger to this proceeding and she is not disinterested in the outcome of this case.

It is clear that Congress intended the Secretary to rigorously enforce section 105(c) of the Mine Act. (S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 624 (1978)). It is also clear that the Secretary, like all human institutions, is not infallible. Although the Secretary has determined that Triton did not violate the anti-discrimination provisions of section 105(c), the Secretary should want to see justice done and should not deliberately obstruct Ms. Olson's ability to pursue her case on her own behalf. If I find that Triton violated section 105(c), the Secretary will initiate a civil penalty case against the company to collect a civil penalty. Rather than remaining neutral, however, the Secretary has chosen to purposely impede Olson's ability to prosecute her case. As stated above, Ms. Olson believes that the information she has requested is crucial to her case. It is not clear whether Ms. Olson will be able to establish her case without the requested information.

The Secretary's position with respect to the document request is unnecessarily obstructive and callous. The Secretary's attitude seems to be that if MSHA did not find a violation of the Mine Act then such a violation did not occur. She treats this case as though it is totally unrelated to her mission under the Mine Act. Nothing could be further from the truth. The Commission and its judges have found violations of section 105(c) in many instances in which MSHA determined that a violation did not occur. The Secretary appears to have no regard for the needs of this potential discriminatee and is content to impede her ability to establish a violation of section 105(c). Unlike the EPA in *Davis Enterprises*, the Secretary is not only refusing to allow one of its employees to testify in a Commission proceeding, she is refusing to provide the two requested documents.

The Secretary's argument that Olson's only avenue to obtain the two documents is through FOIA is rejected. Commission administrative law judges have independent authority to require the production of documents in cases before them. The Secretary's Privacy Act arguments are rejected as irrelevant in the context of this case. As stated above, the Secretary, while not a party, is intimately involved in this case. The interview statements were given to the Secretary's investigators by Mr. Pribyl and Ms. Kienzel with the knowledge that the information provided could be used in a case against Triton on Ms. Olson's behalf. That the Secretary determined that she will not pursue this case does not change that fact or raise any special privileges. The information is being sought by the very same complainant on whose behalf the Secretary conducted her investigation.

In my initial order, I required the Secretary to provide the requested documents for my *in camera* review so that I could analyze them for two purposes: (1) to determine if the statements contain the information that Ms. Olson believes is present; and (2) if so, to determine whether the information sought should be withheld because it is protected by a privilege. I did not order the Secretary to provide the documents to Ms. Olson. In spite of these protections, the Secretary unreasonably refused to comply with my order. I hold that the Secretary's refusal to provide a

copy of the statements is arbitrary, capricious, and an abuse of her discretion [4]

III. ORDER

For good cause shown as discussed above, the Secretary of Labor is **ORDERED TO PRODUCE** for my *in camera* review on or before **October 16, 2003** any interview transcripts or statements of interview taken of Scott Pribyl and Carrie Kienzel during MSHA's investigation of the discrimination complaint filed by Hazel Olson.

If the Secretary refuses to comply with this order to produce documents, I will certify this order for interlocutory review by the Commission under 29 C.F.R. § 2700.76. Enforcement of this order to compel production can only be obtained in the U.S. District Court. Prior to such enforcement, the Commission should have the opportunity to address the issues raised herein.

Richard W. Manning
Administrative Law Judge

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[4] I am not requiring the Secretary to produce Ms. Passarella for testimony at this time. If the requested documents do not contain the information that Olson contends that they do, then that issue will be moot. If the documents support Olson's position, then Ms. Passarella's testimony may be necessary.