

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
WASHINGTON, D.C. 20001

February 23, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2003-332
Petitioner	:	A.C. No. 15-02132-03851
	:	
v.	:	Docket No. KENT 2003-333
	:	A.C. No. 15-02132-03852
WEBSTER COUNTY COAL, LLC,	:	
Respondent	:	Dotiki Mine

## ORDER

Respondent filed a Motion to Compel on February 6, 2004, seeking production by the Secretary of three categories of documents pertaining to the above-captioned cases. The Secretary has asserted that the documents are protected by the deliberative process privilege. Subsequent to the Secretary's refusal to produce the documents, but prior to the filing of this Motion, the Secretary changed her representative.

A teleconference with the parties was held on February 18, 2004. Two of the three categories of disputed documents were resolved. The sole issue remaining is whether Respondent is entitled to the Health and Safety Conference Worksheets respecting the citations in these dockets. The Secretary, through her new representative, argued that the documents are protected by the work product privilege, rather than the deliberative process privilege. I denied her request to advance an alternative legal theory.

The deliberative process privilege protects communications between subordinates and supervisors within the government that are "antecedent to the adoption of an agency policy." *Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) (citation omitted). The deliberative process privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D. C. Cir. 1980). Documents that are protected by the privilege "are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position." *Id.* Nevertheless, "even if the document is pre-decisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Id.*

I find that the Worksheets are relevant to the characterizations of the cited violations. To the extent that the contents are fact-based, i.e., summaries of the parties' respective representations and negotiations in the meetings, they are not protected by the deliberative process privilege and Respondent is entitled to them. Respondent is not entitled, however, to the personal opinions and deliberations of the authors. The Secretary shall redact any portions of the Worksheets that reflect the personal analyses, opinions and recommendations of the MSHA personnel who prepared them.

**WHEREFORE**, Respondent's Motion to Compel is **GRANTED**, and it is **ORDERED** that the Secretary provide Respondent with a copy of the Health and Safety Conference Worksheets, redacted as directed, as soon as is practicable.

Jacqueline R. Bulluck  
Administrative Law Judge  
(202) 434-9987

Distribution: (Certified Mail)

Anne T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Thomas C. Means, Esq., Crowell & Moring, LLP, 1001 Pennsylvania Avenue, NW, Washington, DC 20004-2595

ej