

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 15, 2000

GARY D. MORGAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. LAKE 98-17-D
	:	VINC CD 97-02
ARCH OF ILLINOIS,	:	
Respondent	:	Conant Mine
	:	Mine ID 11-02886

DECISION ON REMAND

Before: Judge Weisberger

This case is before me based upon a decision issued by the Commission, *Gary D. Morgan v. Arch of Illinois*, 21 FMSHRC 1381 (December 23, 1999), vacating the decision that was issued by me on June 10, 1998, (20 FMSHRC 571) and remanding the case for “further consideration”.

In this discrimination case, Gary D. Morgan alleged that Arch of Illinois (Arch) took adverse action against him in not recalling him for a position after he had failed a hands on test regarding the operation of a bolter. It was Morgan’s contention that the adverse action taken against him by Arch was motivated, in any part based on his protected activities. In the original decision, *20 FMSHRC supra*, it was found that Morgan did engage in protected activities, and that Arch did take action that was adverse to him. However, in the decision, it was concluded that John Cotter, a shift foreman, who administered the hands on test, and made the decision to fail him, which resulted in his not being rehired, was the only agent of Arch to have taken adverse action against Morgan, and that it was not established that he had any animus towards Morgan relating to his protected activities. In the decision, it was found that Ben Williams, Morgan's immediate supervisor, did have some animus toward Morgan in part due to Morgan’s complaints of dust violations. However, it was further found that Williams was not involved in any decisions relating to an evaluation of hands on testing, or whether to recall him. The basis for this finding was the lack of evidence in the record that Williams had communicated his animus to either Cotter or Bob Blaylock, who made these decisions. Specifically, Williams' testimony that he did not tell Cotter to fail Morgan, did not talk to Cotter prior to the time Morgan took the hands on test, and did not tell anyone to fail Morgan on the hands on testing, was accepted because it was not contradicted or impeached.

In addition, it was found that although the version of events testified to by Morgan and Gerald Shelby another miner who worked with Morgan, establishes animus on the part of Harry Riddle, the mine Manager, who had knowledge of Morgan's safety complaints, it was concluded that there was no evidence that this animus formed the basis, in any part, for the adverse action taken against Morgan. This conclusion was based upon Riddle's testimony that he was not involved in the testing procedures, did not ask or tell Cotter or anyone else to fail Morgan, and that he did not tell Cotter that Morgan had filed dust complaints with MSHA. Riddle's testimony was accepted because I observed his demeanor and found his testimony credible in these regards. A further basis for the acceptance of Cotter's testimony was that it was noted that there was no direct evidence contradicting or impeaching his testimony.

In its remand the Commission directed to "more fully consider the record evidence that [I] did not address." (21 FMSHRC 1393) Specifically, the Commission remanded for consideration of "additional evidence" which is summarized as follows: that Morgan had complained about dust to Williams and that Riddle was aware of these complaints, that Arch's supervisors were angry at Morgan for dust complaints, that Riddle told Shelby, according to Shelby but denied by Riddle, that Morgan would never work at Arch's Minerals mine again, that I had discredited both Williams' and Riddle's testimony that Riddle was not aware of Morgan's complaints about dust violations, that in crediting Williams testimony that he did not tell Cotter to fail Morgan I did not look at the entire body of evidence regarding his hostility towards Morgan referring to miners having kidded Williams about the possibility that Morgan be rehired onto Williams' section, that the superintendent at the Conant Mine, Whykoff testified that when he was presented with a list of panel applicants for employment at the Conant Mine he usually tried to talk to their ex-supervisors, and that he had admitted that he attended a meeting at which Williams stated that he did not want Morgan on his crew and that he did not recall making any response or follow-up to Williams criticism, and finally that the small size of the mine supports an inference that the operator knew of protected activity. The Commission also indicated that I could have relied on Morgan's testimony of evidence of disparate treatment i.e. that he was not given time to warm up on the bolter, that he was denied the assistance of a helper, and did that he did not bend a steel, as evidence of disparate or inconsistent treatment of Morgan versus other similarly laid off miners who were tested.

Upon reconsideration the entire record, and weighing the testimony of Williams, Riddle and Cotter against the above summarized factors and also taking into account inconsistencies in the record noted by the Commission (21 FMSHRC 1393) as to whether Cotter timed miners when they were tested on the roof bolter, and Cotter's inability to explain why he gave Morgan non-satisfactory ratings on aspects of the roof bolter test, and "the conflicting" testimony of Cotter regarding warm up time or a helper, I conclude that whereas the above summarized evidence could possibly support some inferences adverse to Arch, I find it of insufficient weight to outweigh the above referenced testimony of Riddles and Cotter whose demeanor I carefully observed and found to be credible. I further find that the evidence and "inconsistencies" are not

of such weight as to constitute an impeachment or contradiction of the direct testimony of Williams, Cotter and Riddle whom I found credible based upon observations of their demeanor.

For all the above reasons, on reconsideration, I reiterate my earlier conclusion as set forth in the initial decision 20 FMSHRC at 581, that it has not been established that Cotter, the only agent of Arch to have taken adverse action against Morgan, had any animus toward Morgan relating to protected activities, or even knew of Morgan's protected activities on or before of October 1996 when the adverse actions were taken. I thus reiterate my initial conclusion that it has not been established that the adverse actions taken by Arch, acting through Cotter, were in part motivated by Morgan's protected activities. Thus, I reiterate my earlier conclusion that it has not been established that Morgan was discriminated against in violation of Section 105(c) of the Act.

ORDER

It is **ORDERED** that Morgan's complaint be **DISMISSED**, and that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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