FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

March 4, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of	:	
LEONARD M. BERNARDYN,	:	Docket No. PENN 99-158-D
Complainant	:	PENN 99-129-D
	:	
v.	:	WILK CD 99-01
	:	
READING ANTHRACITE COMPANY,	:	
Respondent	:	Wadesville Pit
	:	Mine ID 36-01977

ORDER

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

On February 1, 2002, I issued a partial decision, in this matter, based on the Commission's remand, 23 FMSHRC 924 (2001), and found, based on the law of the case as set forth by the Commission, that the Secretary had established that Bernardyn was discharged in violation of Section 105(c) of the Act. The partial decision indicated that it would not be final until a further Order is issued regarding the scope of Bernardyn's relief and the amount of civil penalties to be assessed against the Respondent.

1. Relief Due to Bernardyn

The parities submitted a series of stipulations regarding the scope of relief due Bernardyn and, based upon the stipulations, which I adopt, it is **ORDERED** as follows:

a. Bernardyn is due back wages in the gross amount of $14,870.32 in principle, plus

interest less legal deductions.[1]

b. Bernardyn is due reimbursable health benefits in the amount of $571.80 in principle plus interest.

c. Reading Anthracite Company will purge the personnel file of Leonard Bernardyn of any reference to his termination on November 10, 1998.

d. Bernardyn is due a credit in vacation hours earned in the amount of $507.04 plus a $25.00 Christmas bonus in principle plus interest.

2. Assessment of Penalty Against Reading

Inasmuch as it has been found that Reading violated Section 105 of the Act, a penalty must be assessed pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977. Section 110(i) of the Act provides that the following factors are to be considered by the Commission in accessing a civil monetary penalty: The operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The parties stipulated that Reading has an annual coal production of approximately 231,564 production tons per year, that the Wadesville Pit Mine produces approximately 29,151 tons of coal per year, that the imposition of the proposed civil penalties will have no affect on Reading's ability to remain in business, that Reading was accessed approximately 27 violations over 82 inspection days during the 24 months preceding the issuance of the subject 105(c) violation, and that Reading was assessed three previous 105(c) violations.

The remaining factors of gravity, negligence and good faith have not been agreed to be the parties.[2]

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[1]Interest is to be calculated using the Short-Term Federal Underpayment Rate as explained by the Commission in Secretary v. Clinchfield 10 FMSHRC 1493, 1504 (1998).

[2]The 110(i) factors of gravity, negligence, and good faith will be analyzed as they relate to Reading's violation of Section 105 of the Act, i.e., unlawfully discharging Bernardyn. In contrast, Reading's brief analyzes these factors as they relate to physical conditions which provided the basis for Bernardyn's protected activity. Inasmuch as Reading's brief does not discuss negligence, gravity, and good faith as they relate to Reading's violative discharge of Bernardyn, the arguments set forth in the brief need not be discussed.

a. Gravity

In evaluating the gravity of a Section 105 violation, the Commission has held that the proper analysis is whether the discharge had a chilling effect on other miners. (See Jim Walter Resources, Inc., 18 FMSHRC 552, 558-559 (Apr. 1996). In the case at bar, Bernardyn was discharged after he had informed Reading's superintendent that he had been driving cautiously due to slippery road conditions. Hence, it can be concluded that his discharge could reasonably tend to discourage other miners from driving slowly in slippery conditions. Also, Bernardyn's discharge occurred after he had contacted his safety representative on a C.B. radio. It thus can be found that the discharge of Bernardyn, would reasonably discourage other miners from contacting their safety representative on a C.B. radio. Thus it concluded that the gravity of the violation was high.

b. Negligence

The decision that Reading failed to establish its affirmative defense, and did discharge Bernardyn in violation of Section 105(c) of the Act, was based upon findings made by the Commission, 23 FMSHRC, supra, which led to a conclusion, based on the law of the case, that Bernardyn was disparately treated by Reading. In this connection, the following were found to be the law of the case: that there was no evidence in the record of prior difficulties Reading may have had with Bernardyn swearing; that Reading violated its policy in terminating Bernardyn; that there was no substantial evidence to support a finding that Bernardyn's broadcast of his cursing over the C.B. radio materially distinguished his cursing episode from previous cursing incidents; and that there was not substantial evidence to support a decision that Bernardyn was not subject to disparate treatment based on a finding that other individuals made a profane remark only once, whereas Bernardyn had used profanity unstop for approximately eight to ten minutes. Hence, in light of these findings, it is concluded that Bernardyn was subject to disparate treatment by Reading, which defeats Reading's affirmative defense. Thus, it must be concluded that the level of Reading's negligence with regard to the violation herein was high.

c. Good Faith

The violative act herein, i.e., discharging Bernardyn on November 10, 1998, in violation of Section 105 of the Act, was initiated and executed by Reading. Reading did not make any attempt to abate this violation by reinstating Bernardyn until March 19, 1999, when it was ordered to do so in a decision issued on that date ordering Reading to reinstate Bernardyn subsequent to a hearing initiated by the Secretary's Application for Temporary Reinstatement (21 FMSHRC 339 (Mar. 1999)). Subsequently, on July 26, 1999, Reading terminated Bernardyn upon the issuance of an order dissolving the initial order of temporary reinstatement (21 FMSHRC 819 (July 1999)). Reading did not reinstate Bernardyn until September 1, 1999, when the Commission vacated the initial dissolution of the temporary reinstatement order (22 FMSHRC 298 (Mar. 2000)). Within this context, I find that Reading was lacking in some good faith attempt to abate the violative discharge of Bernardyn.

d. Penalty Amount

Considering all the above factors, and giving considerable weight to the high level of gravity and negligence, I conclude that a penalty of $5,000 is appropriate.

e. Order

It is **Ordered** that, within 30 days of this Decision, Reading shall pay a civil penalty of $5,000.

It is **Further Ordered** that this Order become incorporated in the Partial Decision issued on February 1, 2002, and that the Partial Decision is now Final.

Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

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