

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 10, 2010

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on	:	
behalf of KEVIN BAIRD,	:	Docket No. SE 2010-74-DM
Complainant	:	SE-MD-09-08
	:	
	:	DISCRIMINATION PROCEEDING
v.	:	
	:	Docket No. SE 2010-304-DM
	:	SE-MD-09-08
	:	
PCS PHOSPHATE COMPANY, INC.,	:	Mine ID 31-00212
Respondent	:	Mine: Lee Creek

## DISSOLUTION OF ORDER OF TEMPORARY ECONOMIC REINSTATEMENT AND DISMISSAL OF PROCEEDINGS

Before: Judge Bulluck

These matters are before me upon an Application for Temporary Reinstatement and a Complaint of Discrimination filed by the Secretary of Labor (“the Secretary”) on behalf of Kevin Baird (“Baird”) against PCS Phosphate Company, Inc. (“PCS”), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).

On October 14, 2009, the Secretary filed an Application for Temporary Reinstatement for an order requiring PCS to temporarily reinstate Kevin Baird to his former position or similar position at the same rate of pay as prior to his alleged termination. On December 18, 2009, an Order Granting Temporary Reinstatement of Baird to his former position of shift foreman, or to a similar position at the Lee Creek Mine, retroactive to November 16, 2009, was issued. Thereafter, on January, 11, 2010, the parties filed a Joint Motion to Amend the Order Granting Temporary Reinstatement, seeking temporary **economic** reinstatement of Baird. I granted the joint motion in an Amended Order on February 2, 2010.

On February 4, 2010, the Secretary filed a Notice of Withdrawal of her Discrimination Complaint filed on behalf of Baird, and requested that Baird’s economic reinstatement remain in effect until the Commission’s entry of a final order on the merits of Baird’s potential action under section 105(c)(3) of the Act. The Secretary essentially asserts that the Act provides for temporary reinstatement under sections 105(c)2 **and 105(c)(3)**, notwithstanding a determination by the Secretary, under section 105(c)(2), that no discrimination has occurred. As support for

her position, the Secretary notes that, currently, there is no Commission precedent on this issue. Specifically, in *Peter Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009), the Commission split evenly on the question, which allowed ALJ David Barbour's dissolution of a temporary reinstatement, in the absence of a 105(c)(2) complaint, to stand.<sup>1</sup> This issue, again, is currently before the Commission. See *Mark Gray v. North Fork Coal Corp.*, 31 FMSHRC 1167 (Sept. 2009) (ALJ).

In response to the Secretary's withdrawal of the Baird Complaint, PCS filed a Motion to Dissolve Order of Economic Reinstatement on February 12, 2010, arguing that dissolution of a temporary reinstatement is required when the Secretary determines that no discrimination has occurred and consequently withdraws her section 105(c)(2) complaint. PCS asserts that this conclusion is consistent with the plain language of section 105(c). Additionally, in its March 5, 2010, reply to the Secretary's opposition to dissolution, PCS argues that a miner's private action under section 105(c)(3) is an additional remedy, rather than a continuation of the Secretary's section 105(c)(2) complaint under which temporary reinstatement is afforded.

Section 105(c)(2) provides, in pertinent part:

If the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner *pending final order on the complaint* (emphasis added).

30 U.S.C. § 815(c)(2).

Section 105(c)(3) provides, in pertinent part:

If the Secretary, upon investigation determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference. . . .

30 U.S.C. § 815(c)(3).

Although the Commission in *Phillips*, 31 FMSHRC 975, was unable to reach a majority decision, I find the reasoning of Commissioners Young and Duffy persuasive. The statutory language of sections 105(c)(2) and 105(c)(3) directly speaks to the issue before me. Section 105(c)(2) explicitly provides for temporary reinstatement under the Secretary's involvement in investigating and filing a complaint with the Commission, whereas language to that effect is notably absent from section 105(c)(3).

The legislative history further demonstrates Congressional intent to restrict temporary

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<sup>1</sup> See *Peter Phillips v. A&S Construction Co.*, 30 FMSHRC 1119 (Nov. 2008) (ALJ).

reinstatement to the Secretary's responsibilities under the anti-discrimination provision of the Act. Under section 105(c)(2), only the Secretary is charged with conducting the initial investigation into the miner's claims, and is required to complete her investigation within a limited time. Congress sought to balance the miner's likely economic hardship against the operator's interest in controlling its workforce. *Phillips*, 31 FMSHRC at 984-85; *Peter Phillips v. A&S Construction Co.*, 30 FMSHRC 1119 (Nov. 2008) (ALJ).<sup>2</sup> Consequently, it implemented the remedy of temporary reinstatement, which would protect the miner until completion of the Secretary's investigation, and would only **temporarily** burden the operator. *Phillips*, 31 FMSHRC at 985-86. Therefore, based on the Secretary's determination that section 105(c)(1) has not been violated, I conclude that temporary reinstatement shall terminate as of the date of her determination.

**WHEREFORE**, the Amended Order Granting Temporary Economic Reinstatement is hereby **DISSOLVED**, effective February 4, 2010, and these proceedings are **DISMISSED**.

Jacqueline R. Bulluck  
Administrative Law Judge

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<sup>2</sup> See S. Conf. Rep. No. 95-461, at 52-53 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 1330-31.