

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 2, 2001

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. VA 2001-7
Petitioner : A. C. No. 44-06975-03503
v. :
CLINCHFIELD COAL COMPANY, :
Respondent : Roaring Fork #3 Mine

ORDER DENYING MOTION TO COMPEL DISCOVERY

Respondent Clinchfield Coal Company filed on February 21, 2001, a Motion to Compel Discovery seeking from the Secretary of Labor the full unredacted field notes of Inspector Gary Jessee. The Secretary filed her response to the motion on March 1, 2001, asserting that she has produced for Respondent a redacted version of the field notes of Inspector Gary Jessee and maintains that the redacted portion is subject to the deliberative process privilege.1 The Commission In re: Contest of Respirable Dust Sample Alteration Citations, 14 FMSHRC 987, 990-93 (June 1992) in addressing the deliberative process privilege quoted from Jordan v. United States Department of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978) as follows:

This privilege protects the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations compromising part of the process by which governmental decisions and policies are formulated.' (Citations omitted). The privilege attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy. To be covered by the privilege, the material must be both "pre-decisional" and "deliberative." Id. Purely factual material that does not expose an agency's decision making process is not covered by the privilege, unless it is so inextricably intertwined with deliberative material that its disclosure would not compromise the confidentiality of the deliberative information that is entitled to protection. It is the Secretary's burden to prove that the privileges applies to the material it seeks to protect from disclosure.

1 On March 2, 2001, the Secretary provided Respondent and the judge with a revised redaction disclosing additional information. This ruling is based upon the revised redaction.

In determining whether to recognize the privilege, a court must balance the public interest in protecting the information with the litigant's need for it. *United States v. Nixon*, 418 U.S. 683 (1974); 8 *Wright and Miller*, Federal Practice and Procedure § 2019 at 167-169 (1970). The Court considers such factors as the relevance of the information sought, its availability elsewhere, the nature of the case, and the degree to which disclosure would hinder the government's ability to hold frank discussions about contemplated policy. If the government can demonstrate that its interest in non-disclosure outweighs the litigant's need for the information, a claim of deliberative process privilege will be accepted by a court. *Lundy v Interfirst Corporation*, 105 FRD 499 (D. D.C.).

The undersigned has been provided with both the unredacted and redacted notes and has performed an *in camera* review of the documents. As the Secretary correctly notes in her response to the motion she has redacted only a small portion of the field notes from the inspector who issued the citation at bar and the redacted portion refers to internal conversations between Inspector Jessee and a supervisor at the Mine Safety and Health Administration (MSHA). As the Secretary also correctly observes the redacted portions relate to a decision-making process and do not contain any factual material relevant to the case. Indeed, I find that the redacted portion of the inspector's notes are neither relevant nor relate to matters that would either be admissible evidence or likely to lead to the discovery of admissible evidence. See Commission Rule 56, 29 C.F.R. § 2700.56(b). I further find that the information sought from the redacted portion of the inspector's notes does not appear to be reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1), Fed.R.Civ.P.

Under all the circumstances the deliberative process privilege claimed by the Secretary is hereby sustained.

ORDER

The Respondent's Motion to Compel Discovery of Redacted Portions of Inspector Jessee's notes on April 4 and 5, 2000, is hereby denied.

Gary Melick
Administrative Law Judge
703-756-6261

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