FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 28, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of ARTHUR R. OLMSTEAD	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 96-130-D
	:	DENV-CD-95-20
Complainant	:	
v.	:	
	:	Savage Mine
KNIFE RIVER COAL MINING CO.,	:	
Respondent	:	

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Laura E. Beverage, Esq., and Rebecca Graves Payne, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), on behalf of Arthur R. Olmstead, against Knife River Coal Mining Company under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c). For the reasons set forth below, I find that Knife River violated section 105(c) when it discharged Mr. Olmstead on June 30, 1995.

A hearing was held on February 27 through March 1, 1996, in Billings, Montana. In addition, the parties filed post-hearing briefs in the case.

BACKGROUND

Mr. Olmstead worked for Knife River from September 11, 1967, until his discharge on June 30, 1995, a total of 27 years. He operated the tipple since 1987. During his employment, Mr. Olmstead was well known for raising operational and safety matters, both with management and state and federal mine inspectors. Until 1995, he had never had any disciplinary problems with the company.

Richard Kalina became superintendent of the Savage Mine on March 1, 1993, having been promoted from Knife River=s Gascoyne, North Dakota, mine where he had been foreman since 1984. On Mr. Kalina=s recommendation, Mr. Olmstead was suspended without pay for five days beginning on March 6, 1995, for an unauthorized absence. The absence occurred when Mr. Olmstead accompanied his son to traffic court, for which he claimed on his time card AJury or Court Duty.@ (Comp. Ex. 7.)

Mr. Olmstead=s employment with Knife River was terminated effective June 30, 1995, for dishonesty. The dishonesty concerned alleged misrepresentations on Mr. Olmstead=s part about his medical status and availability for work following surgery on his right wrist.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his Discrimination Complaint filed with MSHA, Mr. Olmstead alleged that Knife River discriminated against him by terminating him. In the Complaint of Discrimination filed by MSHA with the Commission, the assertion that the company discriminated against Mr. Olmstead by suspending him without pay was added. At the hearing a third claim was made, that the Complainant was required to take coffee and lunch breaks at times different than the rest of the employees. I conclude that only the original allegation has merit.

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,[1] a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2768 (1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F2d. 1211 (2d Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse

---

[1] Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he Ahas filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;@ (2) he Ais the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;@ (3) he Ahas instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding@ or, (4) he has exercised Aon behalf of himself or others . . . any statutory right afforded by this Act.@

action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission=s *Pasula-Robinette* test).

It is undisputed that Mr. Olmstead engaged in protected activity. It is apparent that he was constantly making complaints about matters that he considered to be safety and health issues to whomever would listen. Therefore, the questions in this case are whether the company took adverse actions against him, whether the adverse actions were because of the protected activity, and, if so, whether the company would have taken the adverse actions solely because of unprotected activity in which the Complainant may have engaged.

Solitary Coffee and Lunch Breaks

Turning first to the claim, that Mr. Olmstead was required to take his coffee and lunch breaks alone, I find that this was not an adverse action. On April 14, 1994, Mr. Kalina instructed Mr. Olmstead to finish crushing the coal in the crusher before taking his coffee or lunch breaks. This caused him to take the breaks at different times than the rest of the employees. While Mr. Olmstead testified that this lasted two or three weeks, in a record he kept at the time, on a page headed Ainfo to establish Harrasment [*sic*] Charges against Management concerning lunch time and dinner time,@ only four dates are listed, April 14, 15, 18 and 19. (Comp Ex. 4, at 102.)

On the other hand, the other witnesses, including employees Steve Ler and Brian Carr, testified that it was not unusual for management occasionally to require employees to take lunch or coffee breaks at different times, if the job required it. Furthermore, no one corroborated Mr. Olmstead=s statement that he was required to do this for two or three weeks. In addition, even his contemporaneous notes, made for the specific purpose of documenting adverse actions, only show four days. Consequently, I conclude that this was no more than a reasonable job request, no different than that made of all employees, and not an adverse action.

Suspension without Pay

The suspension without pay is a more difficult question. It is entirely believable that the court may have required a parent to accompany a minor to traffic court. Clearly, however, this was not jury duty, nor did Mr. Olmstead ever claim that he was serving on a jury. That he was uncertain whether accompanying

his son to court entitled him to any type of court leave is supported by his discussions with his fellow employees before going and his putting AJury or Court Duty@ on his time card.

However, despite his apparent confusion, Mr. Olmstead never consulted anyone in a position to give him an answer. The union contract was clear that only jury duty entitled an employee to special leave; he did not bother to read it. Nor did he ever question any of his supervisors about what type of leave he could take, although at least one of is friends, Steve Ler, told him he should check it out. Mr. Olmstead testified that he put the time card on Jody Reed=s desk and told her that he did not know how the jury duty applied and would let her figure it out. Jody Reed, a part-time secretary, was plainly not in a position of authority and, further, stated that Mr. Olmstead did not say anything to her about the time card.

The day after the court appearance, Mr. Kalina asked Mr. Olmstead how the Ajury trial went@ and Mr. Olmstead responded, Ait went fine.@ (Tr. 120.) Nothing further was said about the incident until late February or early March when Mr. Kalina, after finding out that the company had not received any jury fees for Mr. Olmstead=s appearance, questioned Mr. Olmstead about the fees. Mr. Olmstead responded that the company should be receiving a check from the court. It was only by calling the court that the company determined that Mr. Olmstead had not served on a jury and was, therefore, not entitled to jury leave.

It is not necessary to determine whether Mr. Olmstead was being disingenuous or really was bewildered in this situation to conclude that the adverse action was not based on his protected activities. Viewing the situation through the eyes of management, a conclusion that Mr. Olmstead was being deceptive

---

Although the Secretary has advanced that management was aware of his dilemma because his discussions with his friends took place in a room outside of Mr. Kalina=s office, I give this evidence no weight. There was no showing that Mr. Kalina was in his office at the time, or that, even if he was, he would have been able to hear the discussion.

with them was perfectly reasonable. In fact, since Mr. Olmstead never bothered to attempt to clarify matters until he was

suspended, such a conclusion was the only reasonable one to be drawn.

An unauthorized absence is clearly unprotected activity. Even though the company may have been tired of Mr. Olmstead's constant safety complaints and recommendations, I find that the five day suspension was allotted, mainly, if not solely, for the unprotected activity. Accordingly, I conclude that Mr. Olmstead was not discriminated against in this instance.

Discharge

Mr. Olmstead injured his wrist in April 1994. In March 1995, he decided to have the wrist fused. The surgery was performed on March 21, 1995. After the surgery, the doctor advised Mr. Olmstead, on March 24, that he expected him to be off work for three months and scheduled a return visit for April 21. Thereafter, return check-ups were scheduled every 30 days.

Mr. Olmstead's next visit was on May 19. After the examination, the doctor gave Mr. Olmstead a slip which stated: "If avail. lite duty -- no shoveling or lifting over 15 pounds rt. hand." (Comp. Ex. 11.) According to Mr. Olmstead, he went to the mine on May 23 and gave the slip to Mr. Kalina. He testified that Mr. Kalina kept the original of the slip, made a copy for him, and wrote down on his desk calendar when Mr. Olmstead's next appointment was.

Mr. Olmstead further testified that he explained to Mr. Kalina that he was not completely healed, that there was a risk that he would reinjure the wrist, but that he could return to work with the restrictions listed. Mr. Olmstead asserted that Mr. Kalina replied that they would wait until after his next appointment before putting him back to work.

Mr. Kalina's recollection of this visit was somewhat different. He testified:

> Q. Now, did Mr. Olmstead visit you at the mine site on or about May 23, 1995?
>
> A. Yes.

Q. And did Mr. Olmstead at that time provide you with a May 19, 1995, doctor=s slip?

A. Not that I recall.

Q. Did you discuss with Mr. Olmstead whether he could return to light duty at that time, on May 23, 1995?

A. No, I never did.

Q. Did Mr. Olmstead discuss with you his general medical condition?

A. Yes. The conversation went, Art sat down and we talked about his arm, what it looked like. If I remember right he had a new cast on. And he said his doctor said he could not come back to work, no light duty. He said his diabetes was hindering his healing and he needed more time.

He mumbled something about 15 pounds and what I could do with that. And I said, AI can=t,@ something about Awhen your doctor releases you, you can come back to work.@

(Tr. 655-56.)

Mr. Olmstead=s next doctor=s appointment was on June 15. His cast was replaced with a wrist brace. He did not receive a work restriction slip when he left the doctor=s office. He returned to his home on June 16.

While he was helping his sons adjust a hay rake that was pulled behind a tractor, Mr. Kalina and Junior Etzel, the foreman, came out to the hay field in a pick-up truck. Mr. Kalina remarked that it looked like Mr. Olmstead could return to work. Mr. Olmstead replied that he had not been released to return to work. Mr. Kalina asked Mr. Olmstead for a doctor=s slip to update his file.

As a result of this confrontation, both Mr. Olmstead and Mr. Kalina apparently called the doctor=s office to obtain a doctor=s slip. The slip subsequently received by both indicated that the restrictions were: ANo pushing or pulling, cannot carry items up

a ladder. No lifting over 10 pounds. No repetitive or twisting motions.@ (Comp. Ex. 12.)

A meeting with management was held on June 28, 1995. At the meeting, Mr. Olmstead was represented by counsel who was allowed to be present but not to participate, and Mr. Olmstead was not permitted to question any of the witnesses against him. After the meeting, Mr. Olmstead was informed by a June 30 letter that

> there is a clear discrepancy between your statements to management about your work status and the written work releases. You failed to provide a reasonable, credible explanation for the discrepancy. Therefore, we have concluded that your actions represent dishonesty in violation of Rule 1 of Knife River Coal Mining Company Rules of Conduct and warrant immediate dismissal.

(Comp. Ex. 19.)

The letter gave the following reasons for this conclusion:

> It is the recollection of Rich Kalina, the mine superintendent, that you told him on May 23 that you could not return to work yet. He recalls advising you to provide a doctor=s statement for the file. Notes taken by Rich in his daily calendar for May 23 are consistent with his recollection.
>
> You stated at the meeting held at the Savage Mine on June 28 regarding this matter that you knew you were released to light-duty work in May and that you gave the doctor=s statement to Rich around May 23 but he told you that you could not return to light duty.
>
> Knife River=s long-standing practice is to utilize light duty whenever we can accommodate restrictions.

Mr. Olmstead was evidently misadvised by his union that a lawyer could represent him at the meeting in the place of union representation. Apparently, the union contract would have permitted a union representative to participate in the proceedings.

> Your statement that Rich told you in May that you could not return to light duty would be inconsistent with that practice and is not credible in view of Rich=s recollection and notes taken at the time.
>
> . . . .
>
> On June 16, 1995, Rich and Junior went to Savage to get Junior=s pickup and stopped at your place to see how your last doctor=s appointment had gone. You were in the field haying but according to both Rich and Junior, told them you could not return to work for 30 days. Rich told you Knife River would need a doctor=s statement regarding work status.
>
> You stated at the June 28 meeting that what you had said was that it would be 30 days until your next doctor=s appointment not that you couldn=t work for 30 days. This conflicts directly with the recollection of both Rich and Junior and lacks credibility.
>
> Rich followed up by contacting your doctor=s office on June 16 and was advised that you had been re-released to return to work on light duty at the appointment on June 15. When he asked what was meant by Are-released,@ he was advised that you had been released for light duty following your May 19 appointment also.

(*Id.*)

Clearly, the key to this case depends on whether Mr. Olmstead or Mr. Kalina is telling the truth about the May 23 meeting. If Mr. Olmstead=s version of the meeting is untrue, then the company had a non-protected reason for discharging him, even if they also wanted to get rid of him because of his constant safety complaints. However, if his version is true, then it becomes clear that Mr. Kalina manipulated the facts so that dishonesty could be used as a subterfuge for dismissing Mr. Olmstead for being a nuisance with his constant complaining. I find that Mr. Olmstead=s version of the May 23 meeting is true.

To find Mr. Kalina=s story credible, it is necessary to believe that Mr. Olmstead came to the mine office on May 23 and

did not give Mr. Kalina the doctor's slip given him on May 19. Mr. Kalina's version is not supported by the evidence or common sense. He testified that he never saw the original slip and was not aware of it until the doctor's nurse informed him on June 16 that Mr. Olmstead had been re-released for light duty. Indeed, in the letter of termination this was the last discrepancy noted.

However, Mr. Kalina also testified:

Q. Now, Mr. Kalina, the time you called Nurse Durden, had you looked in Art Olmstead's file?

A. Yes, just before I called her.

Q. And did you find a May 19, 1995, slip return -- or a slip with Orthopedic Surgeons on it?

A. Yes, I did.

The termination letter does not mention that management was aware of the May 19 slip as of the date of the letter. It only states that Mr. Kalina "was advised that you had been released for light duty following your May 19 appointment also" even though at the hearing Mr. Kalina claimed to have found the slip on June 16 and had even asked the doctor's nurse to decipher it for him. It is also not mentioned in a June 16 memo from Mr. Kalina to Larry Duppong, the Vice President of Operations who actually discharge Mr. Olmstead, even though the memo relates that Mr. Kalina had talked to the doctor's nurse.

Mr. Kalina was interviewed by Special Investigator Jerry Thompson on August 24, 1995. According to Investigator Thompson, Mr. Kalina originally claimed that he had never seen the May 19 slip and did not know what it said. Then he changed his story and said that he had found a copy of the slip in Mr. Olmstead's file at a later date, that he had no idea how it had gotten there, and that only he and Junior Etzel had access to the file cabinet.

The most impeaching pieces of evidence to Mr. Kalina's story, however, are the various copies of the May 19 slip that were offered at the hearing. None were offered by the company. The first one, sponsored by Mr. Olmstead as the copy he received

back from Mr. Kalina on May 23, is a copy of the slip and has only the doctor=s writing on it. (Comp. Ex. 11.) The next one, identified by Mr. Kalina, purports to be the copy he discovered in Mr. Olmstead=s file on June 16. In addition to the doctor=s writing, the following writing appears in an area where it could have been written on the slip itself: ANurse -- Pat Durden?sp@ at the top, and Awill examine 6-15-95 next appt.@ at the bottom. (Comp. Ex. 36.) Finally, a third copy, also identified by Mr. Kalina, appears identical to the second one, except that at the bottom it says Awill examine 6-15-95 next appt. RK.@

Mr. Kalina identified the additional writing as his. He could not explain why the ARK@ had been added to the third copy, nor why the Awill examine@ writing had been made darker. Mr. Kalina claimed that he made the Awill examine@ note when talking to the nurse on June 16. When questioned as to why he had used the future tense for an examination that had occurred the day before, Mr. Kalina stated: AI think she was just probably -- I=m just surmising this -- I think she was reading from a file and I was just putting all pertinent information down that I thought about.@ (Tr. 742.)

This explanation makes no sense. In the first place, this does not appear to be what would normally be pertinent information. In the second place, nothing else was written down. What does make sense is that Mr. Kalina wrote Awill examine 6-15-95 next appt.@ on the original slip when Mr. Olmstead gave it to him on May 23. This would also explain how Mr. Kalina knew that Mr. Olmstead had been to the doctor on June 15, when he decided to go see him on June 16. It would also explain how Mr. Kalina knew about the 15 pound lifting restriction that he claimed Mr. Olmstead mumbled to him on May 23.

In short, I do not find Mr. Kalina=s version of this event credible. While the notes on his calendar seem to support his version, I do not give those notes any weight. Almost all of the entries pertain to Mr. Olmstead, presumably to document the case against him. However, by his own admission, Mr. Kalina did not make all of the entries on the day that they allegedly occurred, but added some at a later date. Furthermore, some of the added ones were inserted on an incorrect date, according to Mr. Kalina. Therefore, there is no way of knowing which were written

concurrently and which were written later to bolster the case against Mr. Olmstead.

This is particularly crucial in view of the self-serving nature of the entry on May 23 which states: AArt stopped in -- not to come to work yet. No lite duty -- needs healing time. Asked Art to get a Drs. slip for his file@ (Comp. Exs. 23 and 42.) The credibility of this entry is further put in doubt by the subsequent mysterious discovery of the doctor=s slip in Mr. Olmstead=s file.

In addition, I do not find that Mr. Olmstead=s version is contradicted by AKnife River=s long-standing practice [] to utilize light duty whenever we can accommodate restrictions@ In the first place, this Along standing practice@ is not written down any where in the company=s rules and regulations. In the second place, such a practice does not mean that Mr. Kalina could not have concluded that Mr. Olmstead was still too restricted to work any place since he had a cast on his right (dominant) hand.

Having found that Mr. Olmstead=s version of the May 23 meeting is the credible one, his actions in the hay field on June 16 cease to appear deceptive. If Mr. Kalina told him there was no light duty, it would be logical that Mr. Olmstead would relay that to the doctor. This would explain why the doctor did not give Mr. Olmstead a doctor=s slip after his June 15 visit, and why Mr. Olmstead then told Mr. Kalina and Etzel that he had not been released to return to work. Ironically, the June 16 doctor=s slip appears to be more restrictive than the May 19 slip.

Obviously, Mr. Olmstead=s constant safety complaints made him an annoyance to the company. Evidently he quickly got under Mr. Kalina=s skin. Mr. Olmstead related that shortly after Mr. Kalina arrived at the mine, the mine had an inspection during which Mr. Olmstead pointed out several problems to the inspector. He testified that after the inspector had gone, Mr. Kalina came to him and told him that he did not want Mr. Olmstead discussing safety problems with inspectors unless he had already brought the

---

Interestingly, Alite duty@ is spelled the same way it is on the doctor=s slip.

problem to Mr. Kalina. He further testified that Mr. Kalina told him that Ahe always got even with anybody who ever crossed that line with him.@ (Tr. 27.)

This obviously did not deter Mr. Olmstead, who continued raising safety concerns. Mr. Kalina got more exasperated with Mr. Olmstead, noting on March 8, 1994, AArt argues all the time,@ (Comp. Ex. 30), on March 23, 1994, AI=m getting very tired of arguing with Art,@ (Comp. Ex. 31), and in February 1995, having a heated discussion with him over the necessity for replacing guards before operating the crusher, (Tr. 106, 386-90).

The Astraw that broke the camel=s back@ occurred on May 25, 1995. Mr. Olmstead had filed a section 103(g) complaint, 30 U.S.C. ' 813(g), over the non-reporting of his wrist injury. Because of the nature of the complaint, it was obvious that Mr. Olmstead had made it. Inspector Herbert Skeens came to the mine on May 25 to investigate the complaint. He testified that when he gave a copy of the complaint to Mr. Kalina, Mr. Kalina appeared to be Afrustrated, disgusted, aggravated with the fact that the complaint had been made.@ (Tr. 351.) He described Mr. Kalina as pacing rapidly in a circle and related that Mr. Kalina

> made a comment something to the effect this had been a problem for some time, something to that effect. I cannot quote him verbatim. I know he made a comment that he had a problem or had a problem with Mr. Olmstead, or something to that effect, for some time. This had been an ongoing situation. That was the comment that was made, something to that -- along that line.

Mr. Kalina made a similar statement to Brian Carr. (Tr. 458.)

Section 103(g) provides, in pertinent part, that: AWhenever . . . a miner has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists . . ., such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger@

(Tr. 353.)

Mr. Kalina was out of town from June 5 through June 14. On the June 16, Mr. Kalina and Junior Etzel drove out to Mr. Olmstead=s farm to Asee how he was doing.@ Before this date, no one in management had been out to see how Mr. Olmstead was doing. This was not a friendly visit. Shortly thereafter, Mr. Olmstead found himself discharged as a result of this visit. The evidence to support the discharge was provided by Mr. Kalina. As has been seen, it was less than truthful.

While Mr. Olmstead was ostensibly discharged for dishonesty, I find that he was really discharged for continually raising safety concerns at the mine. Accordingly, I conclude that his discharge was based on his engaging in protected activity and that there was no legitimate non-protected activity reason for discharging him.

CIVIL PENALTY ASSESSMENT

The Secretary has proposed a civil penalty of $1,000.00 for the company=s violation of section 105(c). However, it is the judge=s independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. ' 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the six criteria, the parties have stipulated that the proposed penalty will not affect the company=s ability to remain in business. The mine is a small mine and it=s *Assessed Violation History Report* indicates that it received only 29 citations or orders, none involving section 105(c), between January 1, 1978, and August 1, 1995. Plainly, its history of prior violations is very good. On the other hand, the gravity and negligence involved in this violation are very serious. Taking all of this into consideration, I conclude that the proposed penalty of $1,000.00 is appropriate.

ORDER

Having found that Knife River Coal Mining Company=s June 30, 1995, discharge of Arthur R. Olmstead was motivated by his

protected activity and, thus, in violation of section 105(c) of the Act, it is **ORDERED** that:

1. The Respondent **REINSTATE** Mr. Olmstead to his former position with full pay and benefits;

2. The Respondent **PAY** Mr. Olmstead full back pay, with interest, and benefits for the period from July 1, 1995, until December 7, 1995, the effective date of his temporary economic reinstatement.

3. The Respondent **REIMBURSE** Mr. Olmstead for any other reasonable and related economic losses or litigation expenses incurred as a result of his discharge.

4. The Respondent **EXPUNGE** from Mr. Olmstead's personnel file and from company records the discharge and all references to the circumstances involved in it.

5. The Respondent is **ORDERED TO PAY** a civil penalty in the amount of $1,000.00 for its violation of section 105(c).

The parties are **ORDERED** to confer within 21 days of the date of this decision for the purpose arriving at a settlement of the specific actions and monetary amounts that the Respondent will undertake to carry out the remedies set out above. If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within 30 days of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case the parties should so state.

The judge retains jurisdiction in this matter until the specific remedies Mr. Olmstead is entitled to are resolved and finalized. Accordingly, this decision will not become final until an order granting specific relief and awarding monetary damages has been entered. Consequently, payment of the civil

penalty by Respondent is **HELD IN ABEYANCE** until the final order is entered.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Tambra Leonard, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Laura E. Beverage, Esq., Jackson & Kelly, 1660 Lincoln St., Suite 2710, Denver, CO 80264 (Certified Mail)

/lt