FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 10, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, on behalf of	:	
GARY DEAN MUNSON,	:	Docket No. WEVA 2000-40-D
Complainant	:	MORG-CD-2000-01
v.	:	
	:	Federal No. 2
EASTERN ASSOCIATED COAL CORP.,	:	Mine ID 46-01456
Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Douglas N. White, Esq., Associate Regional Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant;
Rebecca Oblak Zuleski, Esq., Furbee, Amos, Webb & Critchfield, P.L.L.C., Morgantown, West Virginia, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Gary Munson pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, Eastern Associated Coal Corporation (EACC) to reinstate Munson as an employee pending completion of a formal investigation and final decision on the merits of a discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA). A hearing on the application was held in Morgantown, West Virginia on March 7, 2000. For the reasons set forth below, I grant the application and order Mr. Munson's temporary reinstatement.

Summary of the Evidence

Mr. Munson had been employed by EACC for 28 years. For the past three years he held the position of control room operator and at the time of his discharge he was working the afternoon shift. By all accounts, Munson was a good worker and there were no complaints about his work performance. Throughout his tenure with EACC, Munson was active in bringing complaints to management about safety and general labor concerns. There is no dispute that he frequently raised safety concerns at, or in conjunction with, weekly safety meetings held by his immediate supervisors, foremen Stanley Eddy and Donald Livengood.[1] Munson testified that when his safety concerns were not addressed in a timely fashion, he would call the Secretary's Mine Safety and Health Administration (MSHA) on a confidential complaint line, the "code-a-phone". He testified that he frequently told management that he had phoned complaints to MSHA and would continue to do so when his complaints were not addressed. Munson and a fellow miner, Roger Hornick, also testified that Munson raised safety concerns with Frank Peduti, EACC's manager of preparation and electrical engineering. Mr. Peduti occasionally called meetings to discuss certain issues. Munson and Hornick testified that Peduti indicated that he did not like "code-a-phone" complaints and preferred that such matters be handled in house. Peduti denied animosity toward safety complaints because it was management's obligation to address such concerns and EACC wanted to do so beyond the letter of the law. EACC's management witnesses denied knowledge of Munson's "code-a-phone" complaints and noted that he had never raised safety concerns through the formal grievance process. Munson testified that, until recently, he had been unaware that he could file a grievance on a safety complaint.

Munson was aware that he could file grievances related to labor issues and EACC records showed that, for calendar years 1998 and 1999, he had filed 22 grievances over various labor matters, substantially more than any other miner at the preparation plant. Munson testified that his foremen had expressed concerns about his grievances and safety complaints, stating that they could result in the plant being shut down. Munson also testified that he was authorized to accompany MSHA and state mine inspectors when a member of the safety committee was not available and that he had done so on approximately 12-15 occasions in the past 10 years. Because the inspections started on the day shift, his involvement generally lasted only an hour or two, during which he pointed out safety problems that may have lead to citations being issued. EACC introduced records showing that Munson was recorded as accompanying an inspector only one time since December 1, 1994.

---

[1] As control room operator, Munson was required to start work 15 minutes earlier than other shift workers and was frequently unable to attend the safety meetings held at the beginning of the shift. The foreman would generally speak individually with Munson after the meeting, giving him a synopsis of the meeting and an opportunity to provide input.

The developments that lead to Munson's discharge commenced on Thursday, November 18, 1999, when he told his foreman, Stanley Eddy, that he was going to purchase a "four wheeler" the following day and that he might be late for work. He was told to come in if he was going to be 30-60 minutes late. A miner could report tardy by up to 60 minutes without significant repercussions. Munson encountered delays in purchasing and registering the vehicle and did not report to work on November 19, 1999. He was not scheduled to work that Saturday or Sunday and had applied for vacation days[2] for Monday through Wednesday, November 22-24, 1999. The mine was to be closed for the Thanksgiving holiday period on November 25 and 26, 1999. In accordance with required procedure, his application had been submitted prior to January 1999 and decisions were made at that time based upon the number and seniority of persons applying for vacation on a particular day. His request for vacation was approved for November 22 and 24, but was denied for the 23rd, and he was given a form noting the decisions made on his vacation requests. Munson, like many of the employees at EACC, was an avid deer hunter and had taken off that first week of the firearm deer season, referred to as "gun week", for several years. He inadvertently had referred to his 1998 vacation leave schedule, mistakenly thought that he had also been granted a vacation day on November 23, 1999, and did not come in to work. On the 18th, Stanley Eddy had inquired who was going to be working the following short Thanksgiving week, and Munson indicated that he had scheduled days off. The fact that his vacation request for the 23rd had been denied was not raised at that time. On or around November 24, his foreman called him and asked that he sign up to work the holiday on Friday, November 26, 1999. Despite the opportunity for triple pay, he declined, but did agree to work the following day, Saturday, and otherwise worked his normal schedule the following week. Neither Stanley Eddy, nor any other management employee said anything about his absences until the following Friday. At the beginning of his shift on December 6, 1999, he was called to a meeting and served with a letter advising him that he was being terminated for missing two consecutive work days without a viable excuse.

The formal policies for addressing absenteeism at EACC are found in the National Bituminous Coal Wage Agreement of 1993. Article XXII, Section (i) "Attendance Control" provides in pertinent part:

> (4) Absences of Two Consecutive Days
> When any Employee absents himself from his work for a period of two (2) consecutive days without the consent of the Employer, other than because of proven sickness, he may be discharged. * * *

---

[2] With his seniority level, he was entitled to specified numbers of "graduated" and "floating" days off. In addition, he was entitled to 5 "personal days" off, which he did not need management's permission to take. It appears that as of November 19, 1999, Munson had at least one personal day remaining.

Robert Areford, EACC's manager for employee relations at the time, testified in response to a question about the significance of the word "may", that termination was "not automatic." The term "two (2) consecutive days" has apparently been interpreted to mean two consecutive scheduled work days. Such that, in Munson's case, even though there were intervening weekend days and one scheduled vacation day, the 19th and 23rd were considered consecutive days.[3]

Subsection (2) describes a procedure to address employees who accumulate single days of unexcused absences. An employee who accumulates six single days of unexcused absences in a 180-day period or three single days of unexcused absences within a 30-day period is designated an "irregular worker" and is subject to "progressive steps of discipline". If an "irregular worker" has an unexcused absence within 180 days of his last unexcused absence he may be given a written warning, if another unexcused absence occurs within 180 days of the warning, he may be suspended for 2 working days and if another unexcused absence occurs within 180 days of the suspension, he may be suspended with intent to discharge.

In addition to these formal policies, EACC also applied an informal, discretionary procedure referred to as "last chance agreements". Under this procedure, an employee who was subject to discharge would be given a "last chance" to retain his job, by entering into an agreement to maintain required attendance and possibly take other actions to address the cause of his absenteeism. Failure to comply with the agreement would result in discharge. EACC's officials testified that "last chance agreements" were employed when there were "extenuating circumstances" surrounding the absences. Examples of extenuating circumstances offered by Respondent were situations where an employee had misunderstood what vacation day requests had been disapproved because he was "probably illiterate"; an employee misunderstood the consequences of consecutive absences because he was "considered developmentally slow"; an employee had a substance abuse problem related to the death of his wife and needed only a short period of employment to qualify for retirement; and, an employee misunderstood the pre-scheduling policy, had vacation days available to take and needed only one more year to qualify for retirement." EACC officials testified that they had grown increasingly dissatisfied with such agreements because they often failed to correct the attendance problem. Those officials presently with the authority to enter into last chance agreements, have not done so, but stated that such an agreement would be available in a particular case, depending upon the circumstances.

---

[3] Stanley Eddy, Munson's foreman, testified that he was unaware of that interpretation and initially did not consider the absences to have been on consecutive work days, a view that also may have been held by Munson's other foreman, Donald Livengood. When Munson attempted to raise that issue at a subsequent meeting, it was dispensed with summarily by both management and union representatives. The issue of whether the considerably more harsh rule applicable to consecutive days rather than the single day rule applied in such circumstances had apparently been arbitrated in the past. Whether that decision was subject to further review is unknown. There was no explanation of why unexcused absences that occurred several days apart were more serious or disruptive because there were vacation, as opposed to work, days intervening.

EACC records indicated that approximately 38 last chance agreements had been entered into between December 14, 1980 through February 4, 1999. A summary of the agreements indicated that the underlying reason for the disciplinary action was generally absenteeism. On seven occasions the absenteeism was related to a substance abuse problem. Sixteen of the agreements involved unexcused absences on two consecutive days and the discipline imposed in conjunction with the last chance agreement ranged from a 1-day suspension to an 18-day suspension. In some instances, it appears that employees were allowed to substitute vacation or personal days in lieu of actual suspension.

After Munson was given the notice letter, a second meeting was held to address his challenge to the termination. The meeting is referred to as a "24-48 hour meeting" and representatives of the union and management discussed the reason for the proposed action and Munson's explanation for his absences. As noted previously, the question of whether the two consecutive day provision applied was raised but summarily dismissed. Munson testified that he offered to substitute vacation days for his unexcused absences and requested and expected to receive a last chance agreement. His requests were rejected and he was discharged. Munson testified that Robert Areford stated that there were no more last chance agreements and that they were going to make an example of him. Areford denied making any statement about making an example of Munson. The union representatives stated that the decision would be arbitrated, the standard practice. However, when EACC attempted to schedule the arbitration proceeding the next day, it was advised that the union had withdrawn the arbitration request. Frank Peduti testified that the virtual lack of defense of Munson by the union representatives struck him as "odd" and that he found the union's withdrawal of the arbitration request "a shocker."

Following the conclusion of the 24-48 hour meeting, several attempts were made to try and "work something out" for Munson, in order to avoid the proposed discharge. The union's District President contacted Mr. Hibbs 3-5 times. Complainant introduced a statement by the District President wherein he related that Hibbs had told him that "Munson's case was not about absenteeism [] there was no way they would settle the case [-] Munson was well-known to call the code-a-phone [and that] Munson was not well liked by himself and others." Stanley Eddy talked to Mr. Peduti in an effort to obtain a second chance for Munson. He was informed, however, that last chance agreements were no longer available. Mr. Hibbs testified that he never made a decision regarding a last chance agreement for Munson because it was never proposed. He also stated that if it was up to him, there would be no more last chance agreements because they didn't work. Throughout the discharge process, specifically the meetings of December 6 and 9, 1999, neither Munson, who testified that he was somewhat in shock, nor anyone on Munson's behalf, raised a claim of discrimination or otherwise complained that his discharge was motivated by his making of safety complaints. Roger Hornick testified that Stanley Eddy and Donald Livengood told him that it was Munson's grievances and safety complaints that got him "in trouble" and that he was "done" even before he was completely discharged.

Following his discharge, Munson prevailed in an administrative claim for unemployment compensation benefits. The administrative law judge who decided the claim held that EACC had failed to prove that Munson had been discharged for an act of misconduct.

Munson filed a complaint of discrimination with MSHA on January 4, 2000, alleging that he was discharged and was subject to disparate treatment when he was not given a last chance agreement because he had made numerous safety complaints to his immediate supervisors and had informed management that he had made code-a-phone complaints to MSHA when his safety complaints were not satisfactorily addressed.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and 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." The Commission has established a procedure for making this determination. Commission Rule 45(d), 29 C.F.R. § 2700.45(d), states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987) *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Secretary on behalf of Bussanich v. Centralia Mining Company*, 22 FMSHRC ___ (February 22, 2000) at p. 5.

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, 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 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 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).

There is some dispute as to the extent of the protected activity engaged in by Complainant. However, there is little question that he engaged in such activity and that his activity was known to managers at EACC. A complaint made to an operator or it's agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act. There is also no dispute that he was subjected to adverse action, in that he was discharged on December 6, 1999. Complainant has also offered evidence that EACC's managers were hostile to his complaints and that that hostility lead to rejection of his offers of compromise and discharge. The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Secretary on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.*

While Munson claims that he made complaints within the "several months" prior to his discharge, and introduced limited evidence that EACC managers were aware of and motivated by knowledge of his code-a-phone complaints, he does not present a classic case of an operator's immediate adverse reaction to a specific safety complaint. He relies on evidence of statements made indicating unlawful motivation by EACC's managers and disparate treatment. In essence, he contends that EACC was intent on discharging him at the first opportunity -- that opportunity arose when he mistakenly took the 23rd of November off after having missed work on the 19th — and that in the absence of unlawful motivation, he would have been allowed to substitute vacation or personal days for his absences, and/or that he would have been given a last chance agreement rather than being discharged.

There is clearly enough evidence to demonstrate that his claim of discrimination is not frivolous. He was uniformly acknowledged to be a good worker who had no performance or significant attendance problems. Last chance agreements had been entered into with at least 16 other employees who had unexcused absences for 2 or more consecutively scheduled work days. Other employees likely with more serious absenteeism records[4] had also been offered last chance agreements. EACC's explanation of the status of "last chance agreements" is somewhat inconsistent, as is its explanation of whether or not a last chance agreement was considered for Munson. When Stanley Eddy attempted to intervene and obtain a "second chance" for Munson, he was told by Mr. Peduti that last chance agreements were no longer available. Mr. Hibbs testified that, they were available on a case-by-case basis, though if it was up to him, they would not be. Mr. Areford, likewise testified that he would "never say never" to the availability of last chance agreements. Mr. Hibbs, who would have had the initial authority to approve a last chance agreement for Munson, testified that he never made such a decision because he was never asked to. He acknowledged, however, that the union's District President had contacted him several times in an attempt to secure some relief for Munson. Munson, of course, testified that he specifically requested a last chance agreement at the meetings held in conjunction with his discharge. As Richard Eddy's statement notes, it appeared that Munson met all of the criteria for such an agreement, because he had a good work record, little absenteeism and had made a mistake, i.e. he compared favorably to those employees who had been afforded last chance agreements in the past.

On the other hand, EACC has presented credible evidence that it's view toward last chance agreements was changing for legitimate business related reasons and that Mr. Hibbs, who took over as operations manager in August of 1999, had a decidedly more negative view towards such agreements than his predecessor. Whether EACC's failure to offer Munson a last chance agreement was motivated, in part by animosity toward his protected activity and, if so, whether EACC would have taken the same action in the absence of unlawful motivation pose more difficult questions than whether Munson's complaint is frivolous. These questions cannot, and should not, be answered at this stage of the proceedings. The investigation of Munson's complaint has not yet been concluded and no formal complaint of discrimination has been filed on his behalf. The purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Complainant establishes that his complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.* 920 F.2d at 744. Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered. *Id.* 920 F.2d at 748 n.11.

---

[4] The wage agreement provisions described above provide that to reach the discharge point for non-consecutive days of unexcused absences, the employee would have had to have been designated as a "irregular worker" and then missed three additional work days without a viable excuse.

I find that Munson's complaint is not entirely without merit and conclude that his discrimination complaint has not been frivolously brought.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. Eastern Associated Coal Corporation is **ORDERED TO REINSTATE** Mr. Munson to the position that he held immediately prior to December 6, 1999, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.[5]

Michael E. Zielinski
Administrative Law Judge

Distribution:

Douglas N. White, Esq., Associate Regional Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, Virginia 22203 (Certified Mail and facsimile transmittal)

Rebecca Oblak Zuleski, Esq., Furbee, Amos, Webb & Critchfield, P.L.L.C., 5000 Hampton Center, Suite 4, Morgantown, WV 26505 (Certified Mail and facsimile transmittal)

/mh

[5] There was evidence submitted at the hearing that EACC had restructured it's workforce since the time Munson was discharged. If EACC contends that Munson would no longer have held his former position had he remained employed, it should attempt to reach agreement with Munson on the position to which he will be reinstated. If the parties are unable to reach agreement EACC may file an appropriate motion seeking relief from this Order.