

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 12, 2001

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION, on behalf of :
GARY DEAN MUNSON, : Docket No. WEVA 2000-58-D
Complainant : MORG-CD-2000-01
v. :
 : Federal No. 2
EASTERN ASSOCIATED COAL CORP., : Mine ID 46-01456
Respondent :

DECISION
AND
FINAL ORDER

Appearances: Douglas N. White, Esq., Associate Regional Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
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 a complaint of discrimination 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). On June 25, 2001, a Decision on Liability was issued, finding that Respondent discriminated against Munson in violation of the Act, and directing the parties to confer and attempt to reach agreement on the relief to be awarded to Munson and on the amount of an appropriate civil penalty.¹ The parties have conferred and reached agreement on all outstanding relief issues. As noted in the Decision on Liability, by stipulating to the specific relief to be awarded no party has waived, or compromised in any way, any right to seek review of this final decision.

¹ *Sec'y of Labor on behalf of Munson v. Eastern Associated Coal Corp.*, 23 FMSHRC 654 (June 2001).

ORDER

Accordingly, based upon the stipulation of the parties and the Decision on Liability, which is adopted and incorporated by reference herein, it is **ORDERED** that:

Reinstatement

Respondent shall reinstate Complainant in the position that he held at the time of his suspension on December 6, 1999, at the same mine, on the same schedule and under the same working conditions that then existed, subject to the following condition. As a condition of Complainant's reinstatement, he shall be placed under the "Last Chance Agreement," a copy of which is appended to this decision. Respondent shall adjust all benefits, including but not limited to, pension, vacation and health benefits, to reflect exactly what those benefits would be had Complainant not been suspended on December 6, 1999, and shall promptly notify insurance carriers and pension providers, as necessary, to assure that such adjustments are made. Respondent shall provide Complainant with training to acquaint him with the requirements and technical aspects of his job and to enable him to have the same level of certification or job qualification that he held as of December 6, 1999. The training shall be provided at Respondent's expense and while Complainant is receiving his full pay and benefits and shall include formal training, on-the-job training, orientation sessions, or any other training that will satisfy federal, state, or other applicable training requirements necessary for him to properly and safely perform his job.

Back Pay and Interest

Respondent shall pay Complainant \$16,528.20, representing back pay, plus \$2,333.84, in interest on the back pay amount, accrued through September 1, 2001. These are gross pay figures, from which appropriate legal deductions should be made. Additional interest shall accrue from September 1, 2001 to the date of payment, under the formula established in *Sec'y on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (Dec. 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-05 (Nov. 1988). Payment shall be made within 30 days of the issuance of this decision.

Miscellaneous Expenses

Respondent shall pay Complainant \$398.07 to compensate him for expenses he incurred as a result of the discrimination and litigation of this case. Payment shall be made within 30 days of the issuance of this decision.

Posting

Respondent shall post, in a prominent place at the mine, where all miners can read it, a statement that the company will not discipline or take any adverse action toward any miner based upon the miner's exercise of rights under the Act. The statement shall not include any mention of Complainant's case and shall be posted within 30 days of issuance of this decision.

Civil Penalty

The Secretary proposed a civil penalty of \$8,500.00, and Respondent does not challenge the amount of the proposed penalty, though it does contest liability. Respondent is a large operator with a significant number of safety violations and one other finding of discrimination. It does not contend that imposition of a penalty in the amount of \$8,500.00 would impair its ability to remain in business and I find that the proposed penalty is appropriate to the size of Respondent's business. The equivalent of gravity, negligence and good faith considerations were addressed in the Decision on Liability. As noted in the Decision on Liability, I have rejected the Secretary's argument that Respondent's rejection of Complainant's attempt to rescind his economic reinstatement agreement evidences bad faith.

Based upon these considerations, Respondent is **ORDERED** to pay a civil penalty of \$8,500.00 within 30 days.

This constitutes the "Decision of the Judge" on Munson's complaint of discrimination, within the meaning of Commission Procedural Rule 69(a), 29 C.F.R. § 2700.69(a).

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)

Rebecca J. Oblak, Esq., Atkins & Oblak, PLLC, 5000 Hampton Center, Suite 4, Morgantown, WV 26505 (Certified Mail)

/mh

Attachment

LAST CHANCE AGREEMENT
between
GARY D. MUNSON and
EASTERN ASSOCIATED COAL CORPORATION

In order to resolve issues concerning the terms of reinstatement of Gary D. Munson, subsequent to his violation of Article XXII(i)(4) of the National Bituminous Wage Agreement and in order to achieve a remedy in accordance with the decision of Administrative Law Judge Michael Zielinski (Federal Mine Safety and Health Review Commission) in the Mine Act case docketed as WEVA 2000-58-D, and due to the particular circumstances of this situation, the parties agree to the following conditions for the continuation of Mr. Munson's employment with Eastern Associated Coal Corp.

1. Mr. Munson will be allowed to continue his employment under a special attendance control program that is specifically intended to require him to work on a regular and continuing basis. The terms of the program are as follows:
 - a. For the calendar year 2001:
 - (i) Mr. Munson may not be absent from work for any reason other than with Explicit prior permission of the Manger-Preparation, Operations Manger, or their respective successors. It is understood that Mr. Munson may use his remaining contractual days in accordance with the above stipulations.
 - b. Beginning January 1, 2002:
 - (i) Mr. Munson may not be absent from work on any scheduled shift for any reason other than a contractually paid absence or with explicit prior permission of the Manager-Preparation, Operations Manager, or their respective successors. Such permission will not be unreasonably withheld.
 - (ii) Mr. Munson may take no more than two (2) contractually paid days off work during any month without explicit prior permission of the Company. Such permission will not be unreasonably withheld.
2. Should Mr. Munson be found guilty of any violation of the published rules of conduct dated September 27, 2000, he may be discharged at the Company's discretion.
3. Any violation of this Last Chance Agreement will constitute "just cause"

- For Mr. Munson's discharge.
4. Mr. Munson acknowledges that this Agreement is being entered into based upon his promise that he can, and will, work consistently and regularly. He understands that his inability or failure to do so will result in his discharge.
 5. Mr. Munson acknowledges that he has had an opportunity to confer with his Union Representatives and others of his choice regarding the terms and conditions of this Last Chance Agreement, and that he understands and agrees to abide by all the terms and conditions of this agreement.
 6. Mr. Munson further agrees to permit the company (EACC) to exercise approval over any physician or medical facility from whom or from which he proposes to seek medical care which may result in his absence from work. Such approval will not be unreasonably withheld.
 7. Mr. Munson acknowledges that the Company has an Employee Assistance Program that is available to assist with any personal problems that he may have that would affect his ability to work regularly in the future.
 8. This Agreement is not in any way to be considered a part of Article XXII(i) of the National Bituminous Coal Wage Agreement.
 9. This Agreement is entered into by the parties without precedent or prejudice and shall never be referred to in any future matters except those involving Mr. Munson.
 10. This Last Chance Agreement will continue in effect until June 9, 2002, for this particular case only.

Gary D. Munson Ck; 43726

Eastern Associated Coal Corp.

For the Union

Date

xc: Mr. Blair McGill, EACC
Mr. Frank Peduti, EACC
Mr. C. Flanagan, EACC
LU1570 Mine Committee
File