

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 20, 1999

JAMES MILAM,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 99-34-D
v.	:	HOPE CD 98-11
	:	
WHITBY ELECTRIC, INCORPORATED,	:	No. 1 Mine
Respondent	:	Mine ID 46-02166

ORDER PERMITTING COUNSEL TO WITHDRAW, CONVERTING CASE TO ONE UNDER SECTION 105(C)(3), AND CHANGING CAPTION

I. The Motion and the Response

Counsel for the Secretary has moved to withdraw from this case as counsel for the Complainant. Counsel states the Complainant has retained private counsel.¹ Counsel also states the parties have engaged in settlement negotiations but, "The Secretary has been unsuccessful in attaining guidance or settlement authority from the Complainant, and the Complainant and his counsel have not provided the assistance the Secretary's counsel needs to adequately represent the Complainant's case" (Mot. to Withdraw 2). Because the Secretary's "ability to pursue [the] litigation ... has been severely compromised by ... Complainant's failure to provide [counsel with] meaningful assistance", the Secretary's counsel seeks to leave and to "convert" the case from a section 105(c)(2) action to a section 105(c)(3) action (*Id.*).

Counsel for the Respondent does not object to the Secretary's motion, provided the complaint is not "converted" and the present complaint is dismissed with prejudice. The Complainant has not filed a response.

II. The Ruling

The Act prohibits discrimination and provides two avenues for redress. Either the Secretary may represent the miner who believes he or she has been discriminated against (section 105(c)(2)); or, if the Secretary determines no discrimination has occurred, the miner may file his or her own complaint (section 105(c)(3)). When the Secretary initiates the complaint, the

¹Although counsel for the Secretary refers to Complainant's "private counsel", no lawyers other than those representing the Secretary and Whitby Electric, Inc. have entered appearances in this case. If the Complainant has retained private counsel, it would behoove counsel to enter an appearance on Complaint's behalf.

complainant on whose behalf the Secretary has filed is a party to the proceeding (29 C.F.R. § 2700.4(a)).

As this case now stands the Commission has before it an allegedly aggrieved party (James Milam) who asserts he has been illegally discriminated against in violation of section 105(c)(1) of the Act and a defending party (Whitby Electric, Inc.) who denies the allegations. Milam has sought to effectuate his section 105(c) rights by authorizing the Secretary to file a complaint for him pursuant to section 105(c)(2). Now, the Secretary wishes to withdraw her representation, something which the Commission's rules allow provided the parties (Milam and Whitby) are not prejudiced (29 C.F.R. § 2700(4)(d)).

While the Act does not specifically provide for "converting" a discrimination case brought under section 105(c)(2) to one brought under section 105(c)(3), it is clear to me conversion should be allowed. Without it a party's right to the protections of section 105(c)(1) could be defeated by disagreements between the party and his or her counsel, and the protections, not the means by which they are sought to be effectuated, must be paramount.

While counsel for Respondent expresses concern that "conversion" will allow Complainant to recover attorney's fees, recovery of costs and fees by a successful privately represented complainant is exactly what Congress intended. Congress provided for such recovery in order to encourage the effective representation of miners in those cases where the Secretary, for whatever reason, chose not to go forward on the miner's behalf.

Although allowing the case to proceed under section 105(c)(3) creates the potential for prejudice to Whitby should Complaint seek to be awarded fees for work done by counsel for the Secretary, the problem is not of the moment and may be sorted out later if the case ever reaches the point of awarding fees and costs.

ACCORDINGLY, the Secretary's motion is GRANTED. Yusaf Mohamed is PERMITTED TO WITHDRAW as counsel for the Secretary and Milam. The proceeding is CONVERTED to a case brought pursuant to Section 105(c)(3) of the Act, and the case caption IS CHANGED to reflect the Secretary no longer is involved in this matter.

The parties are reminded the matter will proceed to hearing as scheduled on July 1, 1999, in Beckley, West Virginia.

David F. Barbour
Administrative Law Judge
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