

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 2, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of LAWRENCE L. PENDLEY	:	Docket No. KENT 2007-265-D
	:	
v.	:	
	:	
HIGHLAND MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER ON TEMPORARY REINSTATEMENT

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act” or “Act”). Under section 105(c)(2) of the Mine Act, “if the Secretary [of Labor] finds that [a discrimination] 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.” 30 U.S.C. § 815(c)(2). On May 30, 2007, Administrative Law Judge David Barbour issued an order temporarily reinstating Lawrence L. Pendley to employment with Highland Mining Company, LLC (“Highland”). 29 FMSHRC 424, 428 (May 2007) (ALJ). Pendley had been suspended by Highland on March 21, 2007, and terminated five days later. *Id.* at 427.

A complaint of discrimination regarding Pendley’s discharge was brought by the Secretary pursuant to section 105(c)(2) and was heard by the judge in a separate proceeding. The judge subsequently ruled that Highland did not discriminate against Pendley when it terminated his employment with the company. *Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 29 FMSHRC 459, 494-96 (May 2008) (ALJ) (Docket KENT 2007-383-D). Pendley’s right to reinstatement continued, as the Commission reviewed the judge’s discrimination decision.¹

¹ While review was pending, the judge, at the request of the parties, modified the order of reinstatement to reflect that Pendley was to be economically reinstated going forward.

A Commission majority later upheld the judge's decision. 31 FMSHRC 61, 75-80 (Jan. 2009). The order of temporary reinstatement was subsequently dissolved.

The Secretary of Labor did not appeal the Commission's decision, but Pendley, through private counsel, did. In *Pendley v. FMSHRC*, 601 F.3d 417, 429 (6th Cir. 2010), the court granted Pendley's petition for review in part, and denied it in part. Consequently, the Commission's order affirming the judge's decision was reversed and the matter remanded to the Commission for further proceedings consistent with the opinion issued by the court. *Id.*

The mandate of the court issued on May 28, 2010. On June 3, 2010, the Secretary filed a motion to revive temporary reinstatement with Judge Barbour in this docket. On June 15, Highland filed a response to that motion, and on June 18 the Secretary filed a reply.

The court of appeals decision has returned the discrimination docket to the Commission for further proceedings. Because the motion to revive before the judge in the temporary reinstatement docket is contingent upon the status of the discrimination docket that has been remanded to the Commission, the Commission will rule upon the motion to revive. *Cf. Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999). On this date, the Commission is also issuing a briefing order in the discrimination docket.

The Secretary argues that Pendley again has a right to reinstatement because his previous right to reinstatement was only extinguished by the finality of the Commission's decision in the discrimination docket, and with the remand to the Commission in that docket there no longer is a "final" order in that docket. We agree.

In *Bernardyn*, the Commission held that "the language of the Mine Act *requires* that a temporary reinstatement order remain in effect while the Commission reviews the judge's decision" on the complaint of discrimination. 21 FMSHRC at 949 (emphasis added). Because the discrimination docket has been remanded so that the Commission can conduct further review of the judge's decision that Pendley's discharge was not discriminatory, we hold that Pendley must be reinstated during the further course of the discrimination proceedings before the Commission with respect to that discharge.

Highland objects to a Commission order reviving Pendley's reinstatement on a number of grounds. The first is that the court remanded the discrimination case to the Commission for a limited purpose, and thus the Commission is without authority to go beyond that and order that Pendley be again temporarily reinstated. H. Resp. at 3-4.

We do not interpret the court's opinion to so constrain the Commission on remand. First of all, the issue of Pendley's right to temporary reinstatement was not before the court because, while that right had coincided with the Commission's resolution of the discrimination proceeding

Unpublished Order (Aug. 14, 2008).

that was the subject of court review, Pendley's temporary reinstatement was the subject of an entirely separate proceeding. Pendley's temporary reinstatement ended with the issuance of the Commission's decision upholding the judge in the discrimination docket. In that decision the Commission did not even mention that Pendley's temporary reinstatement would thus end, so it is hardly surprising that the court would not address the issue of temporary reinstatement in its decision remanding the discrimination case.

Secondly, while the court remanded the discrimination proceeding to the Commission for specific purposes, it also reversed the Commission's decision upholding the judge. 601 F.3d at 429. Prior to the issuance of the Commission's discrimination decision, Pendley had a right to temporary reinstatement. Because the discrimination proceeding is back before the Commission, that right is revived.

Finally, Highland would have us deny the Secretary's motion because only Pendley, and not the Secretary, continued to pursue Pendley's discrimination complaint in the court of appeals. According to Highland, the Secretary thus lacks standing to seek to revive Pendley's right to temporary reinstatement. H. Resp. at 5. We do not view the Secretary's litigation decision in the court of appeals as having a bearing on the miner's right to temporary reinstatement in this instance. It is undisputed that the pendency of the complaint brought by the Secretary was the basis for Pendley's original right to temporary reinstatement, and it is that complaint that is back before the Commission. Under the terms of the Mine Act, we fail to see the relevancy of the Secretary's decision not to pursue that complaint beyond the "final order on the complaint" that the Commission issued.²

² The question of the Secretary's standing to seek review of a judge's order dissolving temporary reinstatement, upon the Secretary's notice that she will not further pursue before the Commission a discrimination complaint under section 105(c)(2), is presently at issue in another Commission case. *See Sec'y on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D, Unpublished Order, at 2 (Jan. 8, 2010). In this case, however, the Secretary has given every indication that she intends to continue to participate in the section 105(c)(2) proceeding that is back before the Commission. Consequently, our action here has no bearing on the issues raised in *North Fork*.

Accordingly, we order that Pendley be reinstated immediately, with back pay retroactive to May 28, 2010, the date of the court's mandate,³ and until such time as the Commission issues a final order upon remand in the discrimination proceeding. Jurisdiction over his reinstatement will otherwise rest with the judge. *See Sec'y on behalf of York v. BR&D Enter., Inc.*, 23 FMSHRC 386, 389 (Apr. 2001).

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

³ In the event that the operator claims an offset should apply against Pendley's retroactive compensation between May 28, 2010 and the date of this order, the operator may raise this matter before the judge.

Commissioners Duffy and Young, dissenting in part:

While we agree with our colleagues that, with the discrimination proceeding back before the Commission, the miner's right to reinstatement in this case is revived, the issue is one of first impression. Accordingly, we believe the order of reinstatement here should have prospective effect only, and would thus order reinstatement to take effect as of the date of the order.¹

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

¹ Significantly, the Secretary, in moving to revive reinstatement, did not request any sort of retroactive relief for Mr. Pendley.

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