FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 22, 1996

SECRETARY OF LABOR,	:	
on behalf of	:	
RONALD A. MARKOVICH	:	
	:	
v.	:	Docket No. LAKE 96-139-DM
	:	
MINNESOTA ORE OPERATIONS,		:
USX CORPORATION	:	

BEFORE: Jordan, Chairman; Holen, Marks, and Riley, Commissioners

DECISION

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (1994) ("Mine Act"), the Secretary of Labor, on behalf of Ronald A. Markovich, timely filed a petition for review of Administrative Law Judge Arthur J. Amchan's July 26, 1996, order denying complainant's application for temporary reinstatement pursuant to Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f). Minnesota Ore Operations, USX Corporation ("USX") timely filed its opposition to the petition. Upon consideration of the petition and USX's opposition to it, we grant the petition for review. For reasons that follow the judge's decision stands as if affirmed.

On September 26, 1995, Ronald A. Markovich was suspended with the intent to be discharged. He had been employed by USX as a millwright since 1969.

On October 12, 1995, Markovich timely filed a complaint of illegal discharge with the Secretary of Labor pursuant to section 105(c)(2) of the Mine Act. 30 U.S.C. § 815 (c)(2). Following an investigation, the Secretary determined that the complaint of illegal discharge filed by Markovich was not frivolous. On June 27, 1996, the Secretary filed an application for temporary reinstatement with the Commission. On July 18, 1996, an evidentiary hearing on the application for temporary reinstatement was held. On July 26, 1996, the judge issued an order denying complainant's application for reinstatement.

The Secretary alleges that Markovich was illegally discharged from his job and that USX's asserted basis for discharge, i.e., Markovich's unprotected activity of removing and/or tampering with "No Smoking" signs in a company elevator was a pretext. The Secretary asserts that the suspension and discharge of Markovich was in retaliation for his protected activity as a miners' representative and that, under the circumstances of this case, the sanction for his unprotected activity was disparate. On the very same day that Markovich was suspended, September 26, 1995, he had served as a miners' representative accompanying a MSHA inspector who issued 22 citations, 12 of which were S&S. USX maintains that the suspension and discharge of Markovich was based solely on his unprotected activity and that the treatment of Markovich vis-a-vis other miners who also engaged in unprotected activity was fair and rationally applied.

Commissioner Holen and Commissioner Riley would affirm the judge's ruling. Chairman Jordan and Commissioner Marks would reverse the judge's ruling. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3rd Cir. 1992) ("*Penelec*"), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

The opinions of the Commissioners follow.

Commissioners Holen and Riley, affirming the decision of the administrative law judge:

The Secretary has filed a petition appealing the judge's denial of temporary reinstatement of a miner who, the Secretary concedes, engaged in a series of insidious acts of vandalism. *See* Dec. at 2, 9; Pet. at 12.

The Mine Act at 30 U.S.C. § 815(c)(2) instructs the Secretary to file an application for temporary reinstatement of a miner when he finds that the underlying discrimination complaint has not been "frivolously brought." [1] The judge cited the correct legal test in reviewing the Secretary's application. He cited the decision of the Eleventh Circuit Court of Appeals, in which that court concluded the standard for review of an application for reinstatement was a "reasonable cause to believe standard." Dec. at 6, *citing Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738, 747-48 & nn. 8-10. The "reasonable cause to believe" standard was also used by the judge and approved by the Commission when the *Jim Walter Resources* case was before it. *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987). To review the Secretary's application under any less rigorous standard would raise due process concerns (*see Jim Walter Resources*, 920 F.2d at 747-48) and would relegate the

[1] The legislative history sheds no light on the standard for the Commission's granting of such a temporary reinstatement order. It only instructs the Secretary to seek temporary reinstatement when a miner's complaint "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., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Commission's role to rubber-stamping the Secretary's application.[2]

The judge also correctly applied the standard of review in this matter. He concluded that the "[c]omplainant's claim of disparate treatment . . . is simply without merit." Dec. at 9. The Secretary acknowledges the complainant participated more frequently than any other miner in removing the no-smoking signs from the mine elevator--an act antithetical to complainant's position as miners' safety representative. Pet. at 12. As the judge found, the complainant's offenses were of "a totally different order" than those of other rank-and-file miners, including one miner whom USX discharged but who was reinstated following an arbitration decision. Dec. at 9. Additionally, USX discharged a foreman for engaging in fewer instances of the same misconduct. *Id.* at 8. On this record, even viewing the facts most favorably to the Secretary's position, we find no reasonable cause to believe that the complainant was the victim of disparate or discriminatory treatment. *Compare Jim Walter Resources, Inc.*, 9 FMSHRC at 1306. *See also Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512-13 (November 1981).

We note, moreover, that the complainant had been employed by USX for 26 years and engaged openly in protected activity for 19 years as a miners' representative. Dec. at 1, 3, 7. There is no indication as to why the complainant's role as miners' representative suddenly became intolerable. *Id.* at 7-8. There was little evidence of animus or hostility caused by the complainant's communication with MSHA that allegedly gave rise to the retaliatory discharge. Finally, USX's initial determination to discipline the complainant, as well as the other employees who removed the no-smoking signs, was made prior to its awareness of the complainant's role in the MSHA inspection that is the basis for the Secretary's complaint. *Id.* at 7 & n.1. Once a determination has been made that discipline for a punishable offense is warranted, it is not the Commission's role to judge the appropriateness of the severity of that discipline, in the absence of disparate treatment. *See also United Mine Workers of America on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC 1357, 1364 (September 1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987).

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Arlene Holen, Commissioner

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James C. Riley, Commissioner

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[2] The Secretary's argument, that the Commission is to review the Secretary's application based on whether it "appears" to have merit, confuses the standard under which the Secretary is to determine whether to file an application with the standard under which the Commission is to review that application. Pet. at 6. *See* n. 1, *supra*. *Neitzke v. Williams*, 490 U.S. 319 (1989), cited by the Secretary, Pet. at 6, is not applicable in establishing an appropriate standard of review of reinstatement applications. That case involved prisoner *in forma papueris* complaints.

Chairman Jordan and Commissioner Marks reversing the decision of the judge.

We conclude that the judge improperly applied the test for determining whether the complaint of discrimination is frivolous. The only issue before the judge was whether Markovich's complaint of illegal discharge was frivolously brought. In ruling on that issue, we find that the judge required the Secretary to effectively establish that an illegal discharge occurred.

We have consistently stated in our decisions on review of temporary reinstatement proceedings that "[t]he 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 of Labor on behalf of Price v. Jim Walter Resources, Inc*., 9 FMSHRC 1305, 1306 (August 1987), *aff'd, Jim Walter Resources, Inc. v.* FMSHRC, 920 F.2d.738 (11th Cir. 1990). *See Secretary of Labor on behalf of Peters v. Thunder Basin Coal Co*., 15 FMSHRC 2425, 2426 (December 1993)*; Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc*., 15 FMSHRC 1816, 1817 (September 1993); *Secretary of Labor on behalf of Bowling v. Perry Transport, Inc*., 15 FMSHRC 196, 197 (February 1993). Moreover, as recited by the judge, the Eleventh Circuit, in *Jim Walter Resources* concluded that "not frivolously brought" is essentially equated with "reasonable cause to believe," "not insubstantial," and "not clearly without merit." Dec. at 6, Citing 920 F.2d at 747 & n.9. In that decision the Court also indicated that "[t]he legislative history of the Act defines the 'not frivolously brought standard' as whether a miner's 'complaint appears to have merit.'" *Id.* at 747.

Although the judge set forth the pertinent legal standard by which this proceeding was to be evaluated, he failed to apply that standard. But for the caption and textual references to "temporary reinstatement," the judge's order is not unlike a decision on the merits of a complaint of discrimination. The judge made all the necessary findings and conclusions to dispose of the matter in its entirety. Indeed, the judge ultimately concluded that "there is no reason on the record before me to conclude that Respondent did not discharge Mr. Markovich for reasons other than those it articulated." Dec. at 9. This effort by the judge would have been entirely appropriate if the complaint of illegal discharge was before the judge. It was not. The judge was merely required to determine if the complaint was frivolous. This should not have been difficult to do. The uncontroverted evidence established that the operator knew that Markovich had engaged in protected activity at the time it took the adverse action of discharging him. These events occurred within a short time of each other. We believe that the Secretary exceeded his burden of demonstrating that the complaint was not frivolous.

In reaching his conclusion that the complaint was frivolous, the judge engaged in an indepth analysis of the evidence that manifestly demonstrates that his consideration of the evidence went well beyond the scope of whether there was "reason to believe," i.e., whether the complaint was frivolously brought. For example, the judge conceded that although "[i]t is possible that Respondent was irritated enough by the September 26 citations that it decided to fire Markovich rather than merely suspend him," the evidence was too speculative to support the theory. *Id*. We find that the judge, in so concluding, held the Secretary to an evidentiary burden that is not required for the purpose of establishing that the complaint is not frivolous. By the judge's own words, he effectively agreed that the Secretary had established that a colorable theory of retaliatory animus existed. That should have been enough to demonstrate that the claim

was not frivolous. The Secretary should not, at this juncture, be expected to present that which is necessary to prove that a violation occurred, or to prove that retaliatory animus existed. The temporary reinstatement hearing is supposed to "determine[e] whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." 920 F.2d at 744. (emphasis added). However, that was, in reality, the standard imposed upon the Secretary by the judge. As such we conclude that the judge committed reversible error.[3]

Accordingly, we conclude that the Secretary has demonstrated that the complaint is not frivolous and that, therefore, an order of immediate temporary reinstatement should issue.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

[3] As stated previously, the only issue before us is whether Markovich's complaint was frivolously bought. We intimate no view as to the ultimate merits of this case.