

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021

January 10, 2011

JUSTIN NAGEL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2010-464-DM
v.	:	WE MD 09-11
	:	
NEWMONT USA LIMITED,	:	
Respondent	:	Mine ID: 26-02512
	:	Leeville Mine

DECISION AND ORDER GRANTING RESPONDENT’S MOTION TO DISMISS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS AND LACK OF CANDOR WITH THE TRIBUNAL

Before: Judge McCarthy

This matter is before me upon a discrimination complaint filed by Justin Nagel (“Complainant”) pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended. Section 105(c)(1) of the Act prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related, protected activity. A discrimination complaint under section 105(c)(3) of the Act may be filed by the complaining miner if the Secretary, after investigation conducted pursuant to section 105(c)(2) of the Act, has determined that the provisions of section 105(c)(1) of the Act have not been violated. Complainant Justin Nagel appears *pro se* in this matter, as the Secretary of Labor decided not to pursue Nagel’s discrimination allegations under section 105(c)(2).

I. Procedural Background

On October 27, 2010, I issued a Dismissal Order entitled, “Order Certifying Interlocutory Discovery Ruling to the Commission; Order Granting Respondent’s Motion to Dismiss for Failure to Comply with Discovery Orders and Repeated Lack of Candor with Tribunal; Order Staying Dismissal Pending Commission Ruling on Certified Interlocutory Discovery Order.” On November 23, 2010, the Commission issued Direction for Review and Order, which considered the legal implications of my attempt to stay the October 27 Dismissal Order, and whether to the address the issues set forth in Complainant Nagel’s petitions for review of discovery issues. Pursuant to Commission Rule 71, 29 C.F.R. § 2700.71, the Commission limited their review of my Dismissal Order to the issue of whether I had the authority to stay the effect of my decision. The Commission unanimously concluded that an Administrative Law Judge did not authority to stay the effect of his or her decision. See *Capitol Aggregates, Inc.*, 2 FMSHRC 1040, 1041 (May 1980); *see also Sec. of Labor on behalf of Pasula v. Consolidation Coal Co.*, 1 FMSHRC 25 (Apr. 1979) (neither the Mine Act nor the Commissions Interim Rules of Procedure provide for a stay of the effective date of a judge’s decision once the decision is issued). Accordingly, the Commission

vacated my Dismissal Order and remanded the case for issuance of a final decision.

The Commission recognized that Complainant's petitions for discretionary review of my discovery orders regarding the hiring of private security for his deposition and partially granting Respondent Newmont's motion to compel production of audio tape recordings were in essence petitions for interlocutory review under Rule 76. The Commission concluded that review of such issues was not appropriate at this time since the Commission usually does not grant interlocutory review of discovery orders. *See e.g., Asarco, Inc.*, 14 FMSHRC 1323, 1328 (Aug. 1992) ("unless there is a 'manifest abuse of discretion' on the part of a judge, discovery orders are not ordinarily subject to interlocutory appellate review.") (citations omitted). Therefore, the Commission denied both petitions. Similarly, the Commission, at footnote 3, denied Complainant Nagel's November 19, 2010 petition for discretionary review of a related discovery order.

Finally, the Commission directed that once I issued a final decision on remand, a petition for discretionary review of that decision may be filed within 30 days after issuance of the decision or order, pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and the Commission's Procedural Rule 70(a), 29 C.F.R. § 2700.70(a). The Commission noted that if Mr. Nagel files a petition for discretionary review within 30 days of my revised decision, he may seek review on all the discovery issues raised.

I accept the Commission's Direction for Review and Order as the law of the case. On remand, for the reasons provided in my initial order, as reiterated below, I hereby dismiss this case effective immediately, without stay. Mr. Nagel is hereby placed on notice that he has 30 days to file a petition for discretionary review of this revised decision with the Commission pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and the Commission's Procedural Rule 70(a), 29 C.F.R. § 2700.70(a).

Once again, a detailed outline of the salient procedural motions and Administrative Law Judge (ALJ) orders leading up to my dismissal of this proceeding is set forth below.

A. The Complaint and Order to Answer

On January 5, 2010, Complainant Nagel filed a complaint of discrimination under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended. On January 6 and February 16, 2010, the Commission sent a letter requesting certain material from Complainant before the case could be processed. More specifically, Complainant was requested to provide proof that he had served Respondent with a copy of his Complaint. On March 16, 2010, Chief Judge Lesnick issued an Order to Respondent to Answer the Complaint.

B. Initial Order Denying Respondent's Motion to Dismiss

On March 26, 2010, Respondent filed a Motion To Dismiss for failure to state a claim upon which relief could be granted. On April 30, 2010, the Complainant filed a letter with the Commission explaining his service of the Complaint and attaching as Exhibit A, a copy of an audio recording of a meeting that Complainant had with Respondent's management representatives

Thayne Church, Monty Holland, and Mike Woodland concerning certain events surrounding his termination on or about August 20, 2009. On May 28, 2010, Chief Judge Lesnick issued an Order Denying Respondent's Motion to Dismiss.

On June 2, 2010, this discrimination proceeding was assigned to the undersigned. On July 2, 2010, I issued a Pre-Hearing Order in this proceeding. Also on July 2, 2010, I issued an Order Consolidating Cases and Denying Complainant Motion for Temporary Reinstatement.

On June 10, 2010, Respondent served its Answer on Complainant.¹

C. Initial Conference Calls, Extension for Time to Procure Counsel, and Order Confirming Discovery Schedule and Trial Dates

On August 3, 2010, I participated in a conference call with Mr. Nagel and Respondent's counsel to discuss issues related to this matter, particularly Mr. Nagel's request for an extension of time to obtain an attorney and file a pre-conference statement. His request for an extension of time was granted during the conference call. At that time, Mr. Nagel indicated that he was "very close" to obtaining an attorney based on several referrals. Respondent's counsel indicated that discovery from Mr. Nagel was due on August 16, 2010. Mr. Nagel indicated that he thought he would have an attorney by that time. Accordingly, I scheduled another conference call for August 17, 2010.

On August 17, 2010, I participated in another conference call between Mr. Nagel and counsel for Respondent. Mr. Nagel indicated that he had been unsuccessful in obtaining an attorney to represent him in this matter despite contact with the referrals and with two state bar associations. Nevertheless, he expressed confidence that he could obtain an attorney by August 31, 2010. Otherwise, he assured this tribunal that he was prepared to proceed *pro se* and represent himself at trial, which was scheduled for October 25 and 26, 2010 in Elko, Nevada. Respondent's counsel argued that Mr. Nagel's responses to discovery were inadequate and non-responsive. Counsel further indicated that Respondent had been served with discovery requests from Mr. Nagel. Based on the discussion at the conference call concerning the issues of legal representation, outstanding discovery, and trial dates, I informed the parties that I would issue an order codifying the parties' agreements and my instructions.

On August 19, 2010, I issued an Order Confirming Conference Call Agreements and Discovery Schedule. That order set this matter for trial, as follows:

A conference call will be held on August 31, 2010 at 4:00 pm E.S.T. (2:00 pm M.S.T., 1:00 pm P.S.T.) to discuss Mr. Nagel's continuing efforts at obtaining counsel, the status of discovery, and any remaining pre-hearing issues related to this matter.

Mr. Nagel has agreed to acquire legal representation by August 31, 2010, or to continue

¹Upon inquiry from my office, Respondent filed its Answer with the Commission on October 27, 2010.

to represent himself in this matter.

Mr. Nagel shall provide full and complete responses to Newmont's discovery requests no later than September 14, 2010. Privileged information, and the names of other miner witnesses, need not be disclosed at this time.

Newmont shall provide responses to Mr. Nagel's discovery requests no later than September 21, 2010.

Newmont will take Mr. Nagel's deposition on September 28, 2010 in Spokane, Washington [later changed to Elko, Nevada].

A hearing on the merits will take place in Elko, Nevada, on October 25-26, 2010. A Notice of Hearing containing further details will be issued to the parties after the August 31, 2010 conference call.

The parties are hereby ORDERED to comply with the above schedule and agreements.

D. Complainant's Inability to Procure Counsel and Agreement to Proceed Pro Se

On August 31, 2010, I held a conference call with the parties. Complainant Nagel indicated that despite his best efforts, he had been unable to obtain counsel in this matter and he would represent himself.

E. The Onslaught of Procedural Motions and ALJ Orders

On September 9, 2010, Respondent filed a Motion for Partial Summary Decision or to Strike or Limit Certain Claims. On September 22, 2010, Complainant Nagel filed a response. On September 27, 2010, I issued an Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment on certain claims. My Order specifically set forth the claims of interference and discrimination at issue in this case.

On September 20, 2010, Complainant filed a Motion to Dismiss [Counsel] for Ethics Violations. On September 23, 2010, Complainant filed a Motion to [Amend] and Correct Motion to Dismiss [Counsel] for Ethics Violations. On September 24, 2010, Counsel for Respondent filed a Statement in Opposition to Complainant's Motion to Dismiss Patton Boggs for Ethics Violation[s]. On September 30, 2010, Complainant filed a Disciplinary Referral with the Commission. On October 5, 2010, counsel for Respondent filed a Statement in Opposition to Complainant's Disciplinary Referral.

During a conference call between the parties on September 24, 2010, Respondent requested that they be allowed to hire private security for the scheduled September 28, 2010 deposition of Complainant, and that all participants in said deposition submit to a reasonable search upon entry. I orally granted that request, as reasonable, to be followed up by written Order. Said Order Granting

Respondent's Request For Security issued on October 13, 2010. On October 20, 2010, I issued an Order Denying [Complainant's] Motion to Require Respondent to Reduce its Oral Motion for Security to Writing.

In the interim, on September 24, 2010, Respondent filed a Motion to Compel Production of Recorded Conversations that Complainant had made with representatives of Newmont management concerning discussions or meetings related to allegations of interference and discrimination, as alleged in his Complaint.

On September 28, 2010, Complainant was deposed by Counsel for Respondent. During the deposition, counsel for Respondent asked Complainant how many tape recordings of conversations Complainant had with Respondent's management about issues in this case. Complainant answered that he thought that he had five tapes in his possession.

On October 5, 2010, Complainant filed a notarized Affidavit pursuant to Commission Rule 80, requesting that I withdraw and recuse myself from hearing this matter on the grounds of bias and impossibility for a fair trial.

On October 13, 2010, Complainant Nagel filed his Response to Newmont's Motion to Compel Production of Recorded Conversations.

On October 14, 2010, Complainant Nagel filed a Motion for Partial Summary Judgment. On October 14, 2010, Respondent filed its Opposition. On October 14, 2010, Complainant filed a Response to the Opposition. On October 15 and 21, 2010, respectively, Complainant Nagel filed Amendment to Partial Summary Judgment and [Second] Amendment to Partial Summary Judgment, with 2008 employee handbook attached. As further set forth below, on October 21, 2010, I issued an Order Denying Complainant's Motion for Partial Summary Judgment.

In the interim, on October 15, 2010, Complainant served Respondent with a motion entitled "Motion to Review Decision of Releasing the Number of Tapes and Strike from Deposition Record." In his motion, Complainant states that he incorrectly stated the number of tapes in his possession during his deposition in order to "protect the integrity of criminal investigation and any informants that may or may not be on audio recordings." This motion eventually was filed with the Commission on October 21, 2010, although the motion had been brought to my attention as Exhibit B to Respondent's Response to Complainant's Motion for Continuance and Motion to Dismiss, discussed below. I denied Complainant's October 15 Motion in my October 22, 2010 Order Denying Motion to Strike Testimony From Deposition Record.

Also on Friday, October 15, 2010, I convened a conference call with the parties to discuss settlement prospects and any outstanding discovery matters. Respondent's counsel indicated that Mr. Nagel had not provided Respondent with a copy of his affidavit motion that I recuse myself. I informed the parties that my clerk would send Respondent a copy. My clerk did so.

Because I was concerned this *pro se* Complainant had made one-party consent recordings that may be illegal under Nevada law and implicated Fifth Amendment self-incrimination issues, I

further informed the parties that I had researched Nevada law and concluded that the act of producing in-person recordings, which are legal in Nevada, raised no Fifth Amendment privilege against self-incrimination. Accordingly, I ordered Nagel to produce all in-person recordings, but not any telephone recordings, as the later appeared to be illegal under Nevada law (see *Lane v. Allstate Insurance Co.*, 969 P.2d 938 (Nev. 1998)), and the act of production itself implicated self-incrimination concerns. I also ordered Nagel to provide answers to interrogatories 13 and 15. I informed the parties that my written Order compelling discovery would issue on Monday, October 18, 2010.

During the conference call on October 15, 2010, Mr. Nagel agreed to overnight copies of the five audio recordings to Respondent's counsel for delivery on Monday, October 18, 2010. Complainant Nagel assured the Court and Respondent that he would do so. Mr. Nagel further agreed to provide answers to interrogatories 13 and 15 by said date. To preclude premature disclosure of any potential miner witnesses under Commission Rule 62, the parties agreed to a redaction procedure, which was incorporated into the terms of my Order compelling discovery.

On October 18, 2010, I issued my Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15. On October 18, 2010, I also issued an Order Denying Complainant's Motion for Recusal.

On October 18, 2010, Complainant Nagel did not provide Respondent's counsel with answers to Interrogatories 13 and 15 or provide Respondent's counsel with the in-person audio recordings, as he had agreed to do during the conference call with the undersigned on October 15, 2010.

On October 19, 2010, Complainant Nagel filed a Motion for New Hearing Date. In his motion, Complainant Nagel requested that the upcoming hearing in this matter, scheduled for October 25-26, 2010 in Elko, Nevada, be postponed.

F. Respondent's Instant Motion to Dismiss

On October 19, 2010, Respondent filed a Response to Complainant's Motion for Continuance and the instant Motion to Dismiss. Respondent opposed Complainant's request that the hearing be postponed and moved to dismiss this proceeding due to Mr. Nagel's repeated failure to comply with my Orders pursuant to Commission Rule 59. Respondent argues that Complainant has demonstrated a pattern of unwillingness to comply with direct orders from the undersigned and is not likely to abide by my orders or Commission procedural rules in any future proceeding, including the impending hearing, no matter when it may be scheduled. Because the Complainant has demonstrated clear contempt of my direct orders and Commission rules, Respondent argues that this discrimination proceeding should be dismissed.

More specifically, the Respondent argues that when a party refuses to comply with an order directing the production of discoverable information, the Judge has the authority under Commission Rule 59 to "make such orders with regard to the failure as are just and appropriate, including . . .

dismissing the proceedings in favor of the party seeking discovery.” Respondent argues that Complainant has continually abused the discovery process and refused to abide by my orders and Commission procedural rules. While the Respondent acknowledges that dismissal is considered a harsh sanction, Respondent argues that Complainant has demonstrated that he considers himself to be above the authority of this tribunal, and therefore un-sanctionable. As a result, Respondent contends that any sanction short of dismissal is insufficient to remedy the continual contempt that the Complainant has demonstrated for the authority of this tribunal and Commission rules and procedures.

In its Motion to Dismiss, Respondent enumerates how the Complainant's alleged contempt for ALJ authority is evidenced by the following instances of refusal to comply with ALJ orders. I set forth Respondent’s specific arguments below:

1. Refusal to Respond to Interrogatories Despite [Judge] Orders

Respondent contends that the Complainant has refused to respond to Respondent's interrogatories, despite four separate orders to do so. Respondent notes that Newmont issued its interrogatories to Mr. Nagel on July 15, 2010. Respondent states that after Mr. Nagel neglected to respond to two interrogatories, Nos. 13 and 15, the ALJ required him to do so. The Respondent states that during a conference call held on September 24, 2010, the ALJ issued his third order to Mr. Nagel to respond to Respondent's interrogatories Nos. 13 and 15. (See Ex. A, attached to Respondent’s Motion). Respondent further notes that on September 29, 2010, the Respondent e-mailed the Complainant, alerting him to the fact that his ordered responses were still outstanding. *Id.* Respondent further notes that during the conference call on October 15, 2010, the ALJ issued, for the fourth time, an order requiring the Complainant to provide the outstanding interrogatory responses. (See Ex. B, attached to Respondent’s Motion). Respondent asserts that as of October 19, 2010, six days prior to trial, the Complainant has yet to respond to the ALJ’s orders.

2.. Refusal to Comply with [ALJ] Order by
Untruthfully Responding to Deposition Questions

The Respondent argues that the Complainant refused to truthfully answer deposition questions under oath because he disagreed with the ALJ’s order to respond to the questions posed. Specifically, Respondent notes that during his deposition, Mr. Nagel was asked about the tape recordings that he made of conversations with Newmont supervisors and management while he was employed at Newmont. Respondent states that Mr. Nagel refused to answer questions pertaining to those tapes. Respondent notes that pursuant to prior agreement, the parties contacted the ALJ, who ordered that Mr. Nagel respond to the questions, and Mr. Nagel provided answers during the deposition. (See Tr. 214:5-15, 217:1-10, attached as Ex. C to Respondent’s Motion). Respondent points out that subsequent to the deposition, on October 15, 2010, Mr. Nagel moved to strike his deposition testimony responsive to the questions at issue because he had not truthfully answered the questions regarding the number of tape recordings that he has

in his possession. (See Ex. D, attached to Respondent's Motion). Respondent argues that Mr. Nagel has taken the position that he was not required to give a truthful answer at deposition because he disagreed with the ALJ order. Id.

Respondent argues that Mr. Nagel has likewise demonstrated contempt for the discovery process and procedures by refusing to truthfully answer deposition questions. Respondent argues that in his deposition testimony, Mr. Nagel specifically stated, under oath, that he intended to call six miner-witnesses at trial. (See Ex. C at Tr. 239:21-25, attached to Respondent's Motion). Respondent notes, however, that in his recently filed pre-hearing statement,² Mr. Nagel identifies nine separate unnamed individuals as confidential miner witnesses. (See Ex. E, attached to Respondent's Motion). Respondent states that in order for Newmont to successfully prepare its case for trial, it has the right to depose Mr. Nagel's miner witnesses within the 48 hours prior to trial. Since Mr. Nagel cannot truthfully provide the number of witnesses that Newmont is required to depose, Respondent argues that it has been disadvantaged in its deposition scheduling and trial preparation.

3. Refusal to Comply with [ALJ] Order to Produce Tape Recordings

Despite expressly agreeing to comply, Respondent argues that Complainant has also refused to abide by my Order to produce the tape recordings that he made of conversations with Newmont management representatives. Respondent notes that during the [October 15, 2010] conference call with the Court, the ALJ informed Mr. Nagel that he was requiring Mr. Nagel to produce the tape recordings at issue. (See Ex. F, attached to Respondent's Motion). Respondent states that during this call, Mr. Nagel expressly agreed to have the tapes delivered overnight to Newmont's counsel by Monday, October 18, 2010, which was exactly one week before trial. Respondent further states that after the conference call, Mr. Nagel further indicated his compliance with my order in e-mail correspondence with Newmont's counsel regarding the manner of transcription of the tapes. (See Ex. G, attached to Respondent's Motion).

Respondent confirms that on Monday, October 18, 2010, after the tapes did not arrive in the morning delivery, Newmont's counsel contacted Mr. Nagel to request the relevant delivery information and tracking numbers. (See Ex. H, attached to Respondent's Motion). According to Respondent, after several hours, Mr. Nagel responded, indicating that the tapes had not been sent because he is "Appealing the Judges (sic) Decision to the Commission." Id. Respondent states that Newmont is not

²Complainant Nagel did not file his pre-hearing statement with my office at the Commission, he just served Respondent.

aware that any appeal has been filed.³

Respondent argues that this alleged instance of contempt is particularly troubling given the short amount of time that Newmont was given to transcribe and redact relevant information on the tapes prior to trial, which is scheduled for October 25 and 26, 2010. Respondent further argues that it is clear from Mr. Nagel's pre-hearing statement, filed on October 19, 2010, that he intends to use the tape recordings, or evidence derived from the tape recordings, at trial. (See Ex. E, attached to Respondent's Motion). By way of example, Respondent notes that the first paragraph of Mr. Nagel's statement appears to have quotations derived from tape recordings, upon which Mr. Nagel intends to rely. (Id. "I don't care if you're recording this.").

Respondent argues that although the above illustrations by no means represent an exhaustive list of the myriad examples of Mr. Nagel's contempt and frustration of judicial authority, such instances demonstrate that Mr. Nagel has little respect for, or intention of abiding by, the Judge's orders in this matter. Respondent reiterates that Mr. Nagel has been issued repeated orders to comply with discovery, and continually has agreed to comply with such orders in word, and then has flat-out refused to comply. Respondent argues that Mr. Nagel has demonstrated that if he does not agree with this tribunal, he is not bound by its authority, nor, apparently, is he bound by the oath he took prior to the deposition. Consequently, Respondent argues that Mr. Nagel has demonstrated that any sanctions issued to him for failure to comply with the Judge's Order will be disregarded, ignored or overlooked. Accordingly, Respondent argues that the only appropriate response to Mr. Nagel's constant refusal to fairly participate in this proceeding is to dismiss the matter for repeated failures to comply with the Judge's orders.

Finally, Respondent states that despite Mr. Nagel's actions, Newmont is prepared to go forward with the scheduled trial date. However, should the Judge determine that a postponement is appropriate, Newmont asks that it be conditioned as follows: First, that no further postponements be allowed, and second, that Mr. Nagel be advised that any further failure to comply with Judge's Orders will result in the dismissal of the case. In conclusion, Respondent argues that the ALJ should deny Complainant's Request to Postpone the Hearing and grant the Respondent's Motion to Dismiss.

**G. Pre-Hearing Statements, Additional Conference Calls,
and Additional Orders**

On October 19, 2010, the parties filed their respective Pre-Hearing Statements.

³As explained below, on October 25, 2010, Complainant Nagel filed "Petitions of Discretionary Review, Order to produce recordings."

On October 20, 2010, I convened a 90-minute conference call with the parties. I indicated that I would issue an Order on October 21, 2010, Denying Complainant's Motion for Continuance. I again ordered Mr. Nagel to comply with my discovery orders. I indicated that my office had not received any Motion to Compel Discovery from Complainant Nagel. He indicated that perhaps he did not send my office a copy, just Respondent.⁴ Nevertheless, on the conference call, I went through each of the discovery requests that Mr. Nagel indicated that Respondent had not complied with, and resolved them, reserving the right to draw adverse inferences against Respondent at trial for any non-production or failure to preserve evidence.

I also asked Mr. Nagel to explain what the five tapes involved. Mr. Nagel explained that the tapes involved the following: a conversation that he had with management representative Monty Holland and Shane Eisenbarth concerning his reported safety concern regarding alleged improper disposal of pressurized paint cans; the grievance meeting concerning his disciplinary warning for alleged failure to guard an open hole at the waste breaker; the grievance meeting concerning his alleged failure to receive proper training; a conversation he had with supervisor Gilbert Liguizmo, concerning Respondent's alleged failure to give Nagel a pay upgrade; and a conversation he had with management representatives Mike Woodland, Thayne Church and Monty Holland concerning his alleged failure to water roads (the missing water truck incident), which Respondent claims led in part to his termination on August 20, 2010. Accordingly, these tapes concern events surrounding critical allegations of interference and discrimination as alleged in Nagel's section 105(c)(3) complaint. See also my September 27, 2010 Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment, which described the allegations of interference and discrimination at issue in this matter.

During the October 20, 2010 conference call, I informed the parties that Complainant's Motion for Partial Summary Judgment, as amended, would be denied and that an Order to that effect would issue the next day. As noted above, that Order issued on October 21, 2010.

During that same conference call on October 20, 2010, Complainant Nagel again agreed to turn over the tapes and overnight them to Respondent. As explained below, he again renegeed on this agreement the next day.

On October 21, 2010, I issued an Order Denying Complainant's Motion for Continuance. I noted that the critical events at issue in this discrimination proceeding were at least 14 months old and in some cases more than two years old. I further noted that back on August 19, 2010, I issued an Order Confirming Conference Call Agreements and Discovery Schedule. I found that the parties have had sufficient time to complete discovery

⁴On October 20, 2010, Respondent filed its Responses to Complainant's Motion to Compel Discovery. To date, my office has received no Motion to Compel Discovery from Complainant Nagel.

and prepare for trial. I then explained in detail, why I was denying each reason advanced by Complainant for a continuance. After denying each one of Complainant's reasons for a continuance, I concluded that further delay in this matter was contrary to the public interest and the interests of all parties in a timely resolution of their dispute.

On October 21, 2010, I also issued an Order Denying [Complainant's] Motion to Strike Testimony from Deposition Record.

On October 21, 2010, Complainant Nagel finally provided Respondent with answers to Interrogatories 13 and 15. He also provided Respondent with a list of minor witnesses, since the parties were two business days before trial.

On October 21, 2010, I convened another conference call with the parties. Respondent explained that Mr. Nagel again had refused to overnight the tapes as he had agreed to do. Mr. Nagel explained that he was refusing to turn over the tapes because he was appealing my decision to the Commission. I explained to Complainant Nagel, as set forth in my October 21, 2010 Order Denying Complainant's Motion for Continuance, that interlocutory review is governed by Commission Rule 76, and that any interlocutory review by the Commission, assuming that it is granted, shall not operate to suspend the hearing, unless otherwise ordered by the Commission. Nevertheless, Mr. Nagel refused to comply with my Order to turn over the audio tapes to Respondent because he was appealing my Order to the Commission.

H. The Orders to Show Cause Why Dismissal Is Not Appropriate for Failure to Comply with Discovery Orders, Complainant's Submission of Cause Not To Dismiss, and Respondent's Response To Complainant's Reasons Not To Dismiss

Accordingly, during the conference call on October 21, 2010, Complainant was **ORDERED TO SHOW CAUSE** by email to the Court and Respondent by noon E.S.T. on October 22, 2010, why this proceeding should not be dismissed for failure to comply with my discovery order to produce the audio tapes. A final conference call was scheduled for noon E.S.T. on October 22, 2010. My conference call Order to Show Cause was followed up by written **ORDER TO SHOW CAUSE WHY DISCRIMINATION PROCEEDING SHOULD NOT BE DISMISSED FOR FAILURE TO PRODUCE AUDIO TAPES CONCERNING ALLEGED ACTS OF INTERFERENCE AND DISCRIMINATION AS ORDERED BY THE COURT.**

By attachment to e-mail sent to the Court and Respondent at 6:39 E.S.T. on Thursday, October 21, 2010, Complainant Nagel submitted his explanation for Cause Not to Dismiss. He argued as follows:

Under 29 C.F.R. 2700.56(e) states that discover must be completed 20 days prior to the scheduled hearing date. For good cause shown the Judge may extend or shorten the time of discovery. Both Newmont and I are still in discovery. On or about October, 15

2010 Judge McCarthy ruled of Newmont's Motion to compel recordings. Under Commission Rule 2700.70 Any person adversely affected by a Judge's decision or order may file with the Commission a petition for discretionary review within 30 days of the decision or order. I have stated I'm pursuing this option and I'm within 30 days. I have 30 days to appeal Judge McCarthy's decision. Judge McCarthy stated something about rule 76 criminal procedure, this is civil court. There is no 30 C.F.R 2700 as stated in the order for security. I know who the U.S. Marshals and the Elko County Sheriff are. I have 30 days to ask the commission to review the order. There is a thin line between coercion and corruption. To the extent that I wasted time with a Disciplinary referral, If the court would up hold it's laws I wouldn't have to do their job for them.

Respectfully,
Justin Nagel 10-21-2010

Complainant Nagel failed to appear or participate in the final conference call with the undersigned and Respondent at noon E.S.T. or 9 a.m. Pacific time, on October 22, 2010. The undersigned and Respondent's outside and in-house counsel waited for Mr. Nagel to call in for twenty minutes and my office tried to reach him by phone leaving voice messages, but received no response, until Monday, October 25, as set forth below. Accordingly, at 1:45 p.m. E.S.T. on October 21, 2010, I sent the following email to the parties:

Good afternoon gentlemen,

Complainant Justin Nagel did not appear for the conference call scheduled for 12 noon E.S.T. today. I have received Mr. Nagel's response to my Order to Show Cause why this matter should not be dismissed. Given Mr. Nagel's refusal to turn over the audio tapes concerning critical allegations of interference and discrimination alleged in his complaint, I have concluded that Respondent cannot receive a fair hearing in this matter. Accordingly, the hearing scheduled for October 25 and 26, 2010 in Elko, Nevada is cancelled. My Order concerning Respondent's Motion to Dismiss will issue by close of business on Monday, October 25, 2010.⁵

On Saturday, October 23, 2010, counsel for Respondent sent the following email to the my office and Complainant Nagel concerning the events of Friday, October 22, 2010.

Dear Judge McCarthy

I am writing to relay to the Court the following information, which I believe may be material to its ruling on Respondent's Motion to Dismiss. We have copied Mr.

⁵Given the subsequent events and filings in this case discussed below, I notified the parties by email on October 25 and 26, that my Order concerning Respondent's Motion to Dismiss would not issue until Wednesday, October 27, 2010.

Nagel on this email so that the parties and the Court do not engage in any ex parte communications regarding potentially substantive information.

On Tuesday, October 19, my associate, Caroline Davidson-Hood, emailed Mr. Nagel, and copied the Court, informing him that we intended to hold depositions of his miner witnesses on Friday October 21, and that he may attend the depositions, if he so chose. On Wednesday October 20, Mr. Nagel responded to that email, noting that the day and date didn't match, and asked on what day we would hold depositions. My colleague noted the mistake and responded that depositions would be held on Friday the 22nd of October. Aside from noting the mismatched day and date, Mr. Nagel did not give any indication that he planned on attending the deposition. The relevant email string is displayed below.

On Thursday October, 21, after Mr. Nagel had issued his list of miner witnesses, after the Court had issued its Order to Show Cause Why not to Dismiss the Case, and after the Court scheduled a conference call for all parties at 9:00am Pacific Time [noon E.S.T.] October 22, Respondent determined that formal depositions on Friday morning would be impractical, because the employees listed as witnesses were members of a crew that would not be coming to work until Friday evening, and therefore we could not serve any of the Newmont employees for depositions until after the time had passed for the previously scheduled depositions. Moreover, it appeared impractical to conduct depositions during a conference call with the Court which would determine the status of the hearing and the necessity to conduct any depositions at all. Therefore, I decided that it was more efficient to cancel the depositions and attempt to speak to the employees once they had arrived at the mine on Friday night, if we needed to speak to them at all.

Because of the number of issues that had arisen, it was not until the afternoon on Friday October 22, 2010, that my paralegal contacted the courthouse to cancel the room reservation that we had made for depositions. At that time, the woman at the courthouse stated that "the dark haired guy" that we deposed last time, had showed up at the courthouse at 8:00 am for depositions and waited around until 9:00 am before he left.

Newmont and its counsel would like to state for the record, that although we did not inform Mr. Nagel that we would not be holding depositions on Friday morning, we had no indication from him that he intended to attend them. Moreover, we had expected him to be a party on the conference call on Friday, at which time each party would be fully aware of whether the hearing, and therefore the depositions, would go forward. As of this writing, the undersigned has not received any oral or written communication from Mr. Nagel regarding the events described above.

If it is a fact that Mr. Nagel did go to the courthouse on Friday morning for depositions, we regret if any miscommunications caused him any inconvenience. However, we had no way of knowing that he would be there, not only because he didn't inform us of his intention, but also because we expected that he would be aware that

depositions would not be held during a conference call scheduled with the court, in which he was required to participate. Regardless of any possible miscommunication regarding the depositions, Mr. Nagel was aware of the conference call and simply failed to participate or notify the Court of the reasons for his failure.

In its last filing with the Court, Respondent noted that Mr. Nagel's failure to appear at the October 22 conference call could, without more, constitute a ground for dismissal of this matter. However, as we also pointed out in that filing, there are numerous additional bases on which dismissal can, and should, be based in this matter.

Should the Court desire additional information regarding this matter, Ms. Davidson-Hood and I will be available for a conference call at the Court's convenience.

Respectfully,
Mark N. Savit
Patton Boggs LLP
Counsel for Respondent

On Monday, October 25, 2010, during the preparation of this Order, the undersigned received the following email from Complainant, with copy to Respondent's counsel.

I apologize [sic] for missing the conference [sic] call. I was at the court house [sic] with the witnesses to be disposed [sic]. I left my cell phone information and was hoping to obtain it from Mr. Savit at 8:00 am when the deposition was scheduled. Only myself and the witnesses show up.

Respectfully, Justin Nagel

Shortly thereafter, I received the following email from Respondent's counsel, with copy to Complainant Nagel.

Judge McCarthy,

Just to make sure the record contains all pertinent information, we did not notice any witnesses for deposition, so no witnesses would have been there unless Mr. Nagel brought them with him. The court employee who gave us the information has told us that he appeared to be there by himself. We can check further if the court wishes.

Respectfully,
Mark N. Savit
Patton Boggs LLP

Also on Monday afternoon E.S.T., the undersigned received Newmont's Response to Complainant's Reasons Not to Dismiss. In essence, Respondent again moves to dismiss this matter under the Court's broad authority to manage the course of the proceedings under Commission

Rules. See e.g., Rules 55, 56, 59, 66, and 80. Respondent's arguments re-emphasize Complainant Nagel's continual lack of candor to the Court and repeated refusal to comply with direct orders to turn over the tapes. Respondent further argues that Complainant's asserted justification in response to the Order to Show Cause, i.e., that he is unwilling to comply with my orders to produce the tapes because he has filed an appeal of said orders with the Commission, is procedurally improper under Commission Procedural Rule 76 governing interlocutory review. Respondent points out that Complainant Nagel has neither submitted a motion to the Judge seeking certification of his interlocutory appeal on the discovery order to produce the tapes, nor has the judge certified that appeal upon his own motion. Thus, Respondent argues that Complainant Nagel's direct appeal to the Commission has not met any of the requirements laid out in Rule 76, and is procedurally improper in direct violation of Commission rules of procedure.

Respondent further argues that even if Complainant Nagel had properly applied to the Commission for interlocutory review, he was still obligated to comply with the direct order of the court to turn over the tapes. Respondent notes, as the Judge previously advised Complainant, that Rule 76(a)(2) expressly states that, "[i]nterlocutory review by the Commission shall not operate to suspend the hearing unless otherwise ordered by the Commission." Since the Commission has issued no order suspending proceedings, Respondent argues that Nagel had a duty to release the tapes so that Respondent could prepare for the scheduled hearing date. Respondent argues that as a result of Complainant Nagel's failure to do so, the Respondent has been prejudiced and proceeding with the hearing has been rendered impractical.

Further, Respondent argues that even if Complainant Nagel properly sought certification of this matter for interlocutory review, said certification would have been properly denied by the Judge and the Commission because it presented a routine issue of discovery as to whether tapes should be produced before trial, and therefore was not of sufficient weight and importance to interrupt the normal course of the proceeding in order to appeal for a decision of the Commission. Respondent relies on Commission precedent holding that interlocutory review is not appropriate where the issue has been determined in a prior Commission decision or the issue is not a controlling question of law. See *United States Steel Mining Co.*, 16 FMSHRC 1043 (May 1994); *Northwestern Resources Co.*, 22 FMSHRC 255 (Feb. 2000). Respondent notes that the tapes have been deemed non-privileged and relevant by the Judge, and Commission rules state that all relevant, non-privileged evidence is admissible. See Rule 63; cf. Rule 56(b) governing scope of discovery. Respondent further notes that Nagel has refused to produce the tapes because he believes that they may be relevant for some potential, future, criminal proceeding against Respondent in support of charges that have not yet been filed. Respondent argues that such tangential and irrelevant justifications do not trump the well-established Commission rule that non-privileged relevant evidence is admissible. Thus, Respondent argues that the question of law governing the admissibility of the relevant evidence is well-established and it is neither a controlling question in this matter, nor will it immediately materially advance this proceeding.

In sum, Respondent argues that this case should be dismissed for Complainant Nagel's continuing lack of honesty and candor, his failure to participate in relevant proceedings, and his gamesmanship in causing delay and waste in order to garner more time to prepare for trial. Respondent emphasizes that Nagel has not only refused to follow procedural rules and the direct

order of the ALJ, but his continuing and constant misrepresentations demonstrate that no amount of delay or relief short of dismissal is appropriate. Accordingly, Respondent requests dismissal for Complainant's continual misconduct.

I. Complainant's Petitions For Discretionary Review

On October 25, 2010, Complainant Nagel filed Petitions for Discretionary Review, Order to produce recordings, with attached exhibits. It is confusing, rambling, and at times incomprehensible. Despite Respondent's arguments to the contrary, consistent with my practice of liberally construing the pleadings of this *pro se* Complainant, I treated it as a motion for certification of my interlocutory discovery ruling to the Commission under Rule 76.

On October 26, 2010, Complainant Nagel filed another Petition for Discretionary Review concerning my October 13, 2010 Order Granting Respondent's Request for Security. I declined to certify that interlocutory ruling for interlocutory review as my Order did not materially advance the final disposition of this proceeding, and has been rendered moot because the deposition has already occurred.

On October 29, 2010, after my initial October 27, 2010 Dismissal Order issued, Complainant Nagel sent the following email to myself and my clerk:

1. In 2008 I was able to warn Elko Nevada resident and co-worker Rubin Garcia in the presence of 4 witness at Newmont Mining of an attempt to murder him with an approximate date and reported it to LAW ENFORCEMENT, not a security guard, Lt. Trouten, Elko City Police.

2. While discussing the death of Rubin Garcia and how I obtained the information with LAW ENFORCEMENT, not a security guard, Trooper Perez of the Nevada State Patrol I was able to Identify the Fort Hood, approximate date, and rank of the offender.

3. In 2009 I was able to Name the date, approximate location, of the BP oil well break off as described to LAW ENFORCEMENT, not a security guard.

4. In 2009 I was able to name the 2nd BP Oil well break off on Oct, 29 2010 at 1:36 PST to everyone on the Internet.

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I'm not perfect but I run about 80%.

If I'm correct today the name Honorable Judge McCarthy will begin to be synonymous with corruption, greed, and murder.

You have about a 20% chance of getting away. Good luck.

Sincerely, Justin Nagel 10/29/2010 10:00 AM PST

As noted above, on November 23, 2010, the Commission issued its Direction for Review and Order in this matter.

Most recently, on January 3, 2010, after remand from the Commission, Mr. Nagel filed a “Motion to Dismiss Newmont for failure to comply with discovery and destroying evidence.” On January 5, 2010, Mr. Nagel supplemented that motion with additional arguments and exhibits. Mr. Nagel alleges that his August 17, 2009 discovery request and his October 12, 2009 motion to compel discovery (Exhibit B) sought his training file in an effort to show that hanging a sign or installing a barricade at the breakers is not part of Respondent’s training. Mr. Nagel alleges that during an October 20, 2010 teleconference with Respondent’s counsel and the undersigned, he requested the investigation results that Newmont used to terminate him. He alleges that Respondent’s counsel stated that the investigation results had been destroyed, that Respondent had no other records of Nagel’s training other than those already provided, and that the training department did not exist. Mr. Nagel argues that the requested evidence should have been retained. Based on Newmont’s alleged willful act of destroying evidence, Mr. Nagel alleges that all arguments made by Respondent be dismissed and that judgment issue in his favor.

I deny Mr. Nagel’s recent motion. There is no probative evidence that Respondent destroyed evidence or withheld requested discovery of documents that in fact exist, and those discovery issues and any adverse inferences that they may warrant, were addressed and resolved during the October 20, 2010 conference call, explained above.

II. Order Granting Respondent’s Motion to Dismiss

Commission Procedural Rule 59 provides that if a party fails to comply with an order compelling discovery, the Judge may make such orders as are just and appropriate, including dismissing the proceeding in favor of the party seeking discovery. For good cause shown, the Judge may excuse an objecting party from complying with the discovery request.⁶

Commission Procedural Rule 66(a) requires that “[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal.”

As detailed above, on October 18, 2010, I issued my Order Partially Granting [Respondent’s] Motion to Compel Production of Recorded Conversations and Order Granting

⁶Specifically, Commission Rule 59 provides, as follows:

§ 2700.59 Failure to cooperate in discovery; sanctions.

Upon the failure of any person, including a party, to respond to a discovery request or upon an objection to such a request, the party seeking discovery may file a motion with the Judge requesting an order compelling discovery. If any person, including a party, fails to comply with an order compelling discovery, the Judge may make such orders with regard to the failure as are just and appropriate, including deeming as established the matters sought to be discovered or dismissing the proceeding in favor of the party seeking discovery. For good cause shown the Judge may excuse an objecting party from complying with the request.

[Respondent's] Motion To Compel Answers to Interrogatories 13 and 15. I cited Commission Rule 59, thereby warning Complainant that failure to comply with my order compelling discovery of the audio tapes may result in dismissal of his case. As further outlined above, I then issued Orders to Show Cause why this proceeding should not be dismissed. Accordingly, the procedural requirements for dismissal of this proceeding as a discovery sanction have been met.

Given the severity of the sanction, the issue remains whether dismissal is just and appropriate, i.e., related to the particular claim at issue and not an abuse of discretion. *See Keefer v. Provident Life and Accident Insurance Co.*, 238 F.3d 937 (8th Cir. 2001)(dismissal of action as discovery sanction under Fed. R. Civ. P. 37(b)(2)(A) was not abuse of discretion given order compelling discovery, willful violation of that order, and prejudice to other party); *see also Ladien v. Astrachan*, 128 F.3d 1051 (7th Cir. 1997) (dismissal of case as sanction under Fed. R. Civ. P. 37(b)(2)(A) for repeated discovery violations not abuse of discretion). Based on the totality of circumstances, I find that dismissal is just and appropriate here as a sanction for Complainant's repeated failure to comply with discovery Orders and lack of candor with the tribunal, which has interfered substantially with a fair hearing in this matter, unduly burdened the record, and caused additional work, delay, and expense through refusal to comply with discovery Orders and Commission rules.

In determining whether dismissal is a just sanction for a party's failure to obey a discovery order under Fed. R. Civ. P. 37(b)(2)(A), district courts generally consider the following factors: the culpability of the non-complying party; the degree of actual prejudice to the party seeking discovery; the amount of interference with the judicial process; whether the non-complying party was warned in advance that dismissal would be a likely sanction for noncompliance; and the efficacy of lesser sanctions. *See e.g., EBI Securities Corporation, Inc. v. Hamouth*, 219 F.R.D. 642, 647 (D. Colo.) citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920-21 (10th Cir. 1992).

Applying these factors, I find that Complainant's noncompliance with my discovery orders was repeated and deliberate. Complainant repeatedly failed to respond to two of Respondent's interrogatories until two business days before trial, despite being ordered on several occasions to do so. Complainant admitted in his motion to strike deposition testimony that he incorrectly stated the number of tapes in his possession during his deposition. Most importantly, however, Complainant refused to comply with multiple discovery orders to produce the tape recordings, despite promising to do so, thereby demonstrating forthright lack of candor with this tribunal.

Specifically, during the October 15, 2010 conference call, I explained the basis for my impending October 18 Order compelling discovery of the tapes. I ordered Complainant to provide copies of the tapes to Respondent by overnight mail for morning delivery on October 18, 2010. Complainant agreed to do so and the parties agreed to a redaction procedure for the names of minor witnesses. Complainant then broke his promise to this tribunal and Respondent.

Complainant was served with my written Order to compel production of the recorded conversations on October 18, 2010. Complainant did not produce the tapes. During a subsequent conference call on October 20, 2010, I again ordered Complainant to provide copies of the tapes to

Respondent by overnight mail. Complainant again promised this tribunal and Respondent that he would do so. Complainant again breached his promise.

On the October 21, 2010 conference call, Complainant Nagel stated that he was refusing to comply with my Order to turn over the audio tapes to Respondent because he was appealing my Order to the Commission. In doing so, Complainant Nagel failed to comply with Commission Rule 79 governing interlocutory review of my discovery orders, even though he was informed of this rule and further informed that the Commission's grant of such review shall not operate to suspend the hearing, unless otherwise ordered by the Commission. Nevertheless, Mr. Nagel persisted in his refusal to turn over the tapes. Moreover, he failed to participate in the final conference call before trial.

There is no doubt on this record, that the tapes withheld from discovery relate to events that comprise the gravamen of Complainant's allegations of interference and unlawful discipline, suspension and termination. In fact, during the October 20, 2010 conference call, Mr. Nagel acknowledged that the tapes involved the following critical events relative to his protected activity and allegations of interference and discrimination: a conversation that he had with management representatives Monty Holland and Shane Eisenbarth concerning his reported safety concern regarding alleged improper disposal of pressurized paint cans; the grievance meeting concerning his disciplinary warning for alleged failure to guard an open hole at the waste breaker; the grievance meeting concerning his alleged failure to receive proper training; a conversation he had with supervisor Gilbert Liguizmo concerning Respondent's alleged failure to give Nagel a pay upgrade; and a conversation he had with management representatives Mike Woodland, Thayne Church and Monty Holland concerning his alleged failure to water roads (the missing water truck incident), which Respondent claims led, in part, to his suspension and termination.

Since the tapes concern events surrounding critical allegations of interference and discrimination as alleged in Nagel's section 105(c)(3) complaint, I find that Respondent would be prejudiced significantly by not having an opportunity to review the tapes before trial and adjust its defense strategy or settlement posture accordingly. As set forth in my October 18, 2010 Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15, the Commission's discovery rules are construed liberally to permit wide-ranging discovery of all information reasonably calculated to lead to the discovery of admissible evidence, but discoverable information need not be admissible at trial. Thus, a request for discovery should be considered relevant if there is any possibility that information sought may be relevant to the subject matter of the action and discovery should ordinarily be allowed unless it is clear that information sought can have no possible bearing upon subject matter of action, or it is protected by privilege. *See e.g., Billy Brannon v. Panther Mining, LLC*, 31 FMSHRC 717 (May 2009) (ALJ Barbour) (granting motion to compel audiotapes of mine conversations involving the complainant and other miners made during the time frame of the alleged discrimination).

That standard is clearly met here. Respondent was prejudiced in the preparation of its defense and evaluation of settlement, particularly given the number of tapes at issue and their nexus to critical allegations of interference and discrimination alleged in the Complaint. Furthermore,

Complainant's repeated disregard of my discovery orders to turn over the tapes interfered with the judicial process, necessitating cancellation of the hearing to ensure a fair trial for Respondent.

It also cannot be overlooked, that the Court has bent over backwards to ensure that this *pro se* Complainant could receive a fair trial, and has acted consistent with Supreme Court and Commission precedent generally holding the pleadings of *pro se* litigants to less stringent standards than pleadings drafted by attorneys. See *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*pro se* litigant's complaint held to less stringent standards than complaint drafted by attorneys); *Tony M. Stanley, emp. by Mgt. Consultants, Inc.*, 24 FMSHRC 144, 145 n.1 (Feb. 2001) (same); *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992)(Commission recognized that courts generally consider the special circumstances of litigants untutored in the law).

Consistent with this precedent, the undersigned granted Complainant an extension of time to procure counsel after the Secretary decided that his Complaints (09-06 and 09-11) lacked merit. When Complainant was unable to retain counsel, the Court, consistent with Commission precedent, permitted Complainant to proceed *pro se*, which is his right under section 105(c)(3), even though his case would have been best served by legal counsel or non-legal representative, who could clearly articulate his position in timely and responsive pleadings that were properly served, and engage in meaningful discovery and settlement negotiations. Cf. *Jaxun v. Asarco*, 29 FMSHRC 616, 621 (Aug. 2007). The undersigned then broadly construed Complainant's allegations in my September 27, 2010 Order Conditionally Limiting Certain Claims and Granting Partial Summary Judgment on certain claims. The undersigned then examined Complainant's acts of recording under Nevada law with an eye toward protecting any privilege against self-incrimination that may be implicated. See my October 18, 2010 Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations and Order Granting [Respondent's] Motion To Compel Answers to Interrogatories 13 and 15. Furthermore, as outlined above, Complainant has on several occasions failed to properly file his motions with this tribunal, however, I have treated his motions as properly filed. See e.g., my Order Denying Motion to Strike Testimony from Deposition Record. Finally, over the objection of Respondent, and consistent with my practice of liberally construing the pleadings of this *pro se* Complainant, I treated Complainant's "Petitions for Discretionary Review, Order to produce recordings," with attached exhibits, as a motion for certification of my interlocutory discovery ruling to the Commission under Rule 76. The Commission agreed with such liberal construction, although noting that interlocutory review was inappropriate.

Despite such liberal treatment of this *pro se* litigant, there is a limit to how far this tribunal can go, and Complainant exceeded that limit here, even though acting *pro se*. The Complainant's repeated refusals to comply with my discovery orders to turn over the tapes, despite promising on numerous occasions that he would do so, placed Respondent at a significant disadvantage from unfair surprise and unnecessary expense during trial preparation, and took away the possibility of a fair trial because the discoverable matter concerned the crux of Complainant's case. Given the subject matter of the tapes, their number, and their nexus to the critical allegations of unlawful interference, discipline, suspension, and termination, a lesser sanction under Rule 59, i.e., deeming as established the matters sought to be discovered, would strike at the heart of Complaint allegations in any event, thereby precluding both meaningful relief sought by Complainant and a practical, fair trial for Respondent.

In these circumstances, in the exercise of my discretion, I find that a lesser sanction would have neither cured the prejudice to Respondent, deterred additional misconduct by Complainant, nor provided an effective or practical sanction. After all, courts are not constrained to impose the least onerous sanction available, but exercise discretion to choose the most appropriate sanction under the totality of circumstances. *Keefe*, 238 F.3d at 941. Given Complainant Nagel's repeated lack of candor and refusal to turn over the audio tapes concerning critical allegations of interference and discrimination alleged in his Complaint, I concluded that Respondent could not receive a fair hearing in this matter and I cancelled the hearing.

Finally, Complainant was warned in advance that dismissal would be a likely sanction for continued noncompliance with my discovery orders to provide copies of the tapes, absent good cause shown. As emphasized above, my October 18, 2010 written discovery Order Partially Granting [Respondent's] Motion to Compel Production of Recorded Conversations, specifically cited Commission Rule 59, thereby warning Complainant that failure to comply with my order compelling discovery may result in dismissal of his case. Thereafter, during conference calls on October 18 and 20, 2010, when Complainant Nagel promised to overnight the tapes and then renege on his agreement, Mr. Nagel was made aware that dismissal would be a likely sanction for continued non-compliance. Thereafter, during the conference call on October 21, 2010, I issued an oral Order to Show Cause why this proceeding should not be dismissed. On October 22, 2010, I issued my written Order to Show Cause why this proceeding should not be dismissed for failure to produce audio tapes concerning alleged acts of interference and discrimination as ordered by the Court. Accordingly, the procedural requirements for dismissal of this proceeding as a discovery sanction were satisfied.

Thereafter, Complainant submitted his explanation for cause arguing that the parties were still in discovery, that he had 30 days to appeal my Order compelling production of the tapes, and that if the Court would uphold its laws, Complainant Nagel would not have to do the Court's job for it. Complainant Nagel then failed to participate in the final conference call with this tribunal.

Having carefully reviewed Complainant Nagel's submission, I find that his explanation does not constitute good cause under Rule 59, which provides that for good cause shown, the Judge may excuse an objecting party from complying with the discovery request. I find no good cause to excuse Complainant Nagel from complying with the discovery request for the audio tapes. First, contrary to his contentions, discovery has ended. Complainant has simply failed to comply with my repeated rulings to turn over the tapes because he seeks review before the Commission. Second, as Respondent correctly points out, Complainant inappropriately relies on Rule 70 concerning petitions for discretionary review of final case disposition from the judge, as opposed to petitioning under Rule 76 for interlocutory review of my discovery orders.

In sum, based on the totality of circumstances, dismissal is a just and appropriate sanction for Complainant's repeated failure to comply with my discovery Orders and for his repeated lack of candor with this tribunal, which has interfered with the judicial process and precluded Respondent from obtaining a fair trial. Complainant's noncompliance with my discovery orders was repeated and deliberate. Complainant repeatedly failed to respond to two of Respondent's interrogatories until two business days before trial, despite being ordered on several occasions to do so. In addition, Complainant admitted in his motion to strike deposition testimony that he incorrectly stated the

number of tapes in his possession. Most importantly, Complainant refused to comply with multiple discovery orders to produce the tape recordings, despite repeatedly promising to do so. His lack of candor with this tribunal was willful and deliberate. Since the tapes concern events surrounding critical allegations of interference and discrimination alleged in Complainant's section 105(c)(3) complaint, Respondent was prejudiced significantly by not having an opportunity to review the tapes before trial and adjust its defense strategy or settlement posture. Complainant's conduct interfered with the judicial process and forced cancellation of the hearing. Complainant was warned times in advance that dismissal would be a likely sanction for his repeated noncompliance with my discovery orders and failure to honor his agreements with this tribunal and Respondent. Given the subject matter of the tapes, which strike at the core of this case, lesser sanctions are inappropriate.

In light of the foregoing, **IT IS ORDERED** that Respondent's Motion to Dismiss is hereby **GRANTED** and the case is **DISMISSED**. Complaint Nagel has 30 days to file his petition for discretionary review pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i), and the Commission's Procedural Rule 70(a), 29 C.F.R. § 2700.70(a), consistent with the Commission's November 23, 2010 Direction for Review and Order.

Thomas P. McCarthy
Administrative Law Judge

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/cp