

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

July 26, 2007

SECRETARY OF LABOR, MSHA, on	:	TEMPORARY REINSTATEMENT
behalf of LAWRENCE PENDLEY,	:	
Complainant	:	Docket No. KENT 2007-265-D
	:	MADI CD 2007-05
v.	:	
HIGHLAND MINING COMPANY, LLC,	:	Mine ID 15-02709
Respondent	:	Highland 9 Mine

DENIAL OF MOTION TO ENFORCE ORDER OF TEMPORARY REINSTATEMENT

The Secretary moves to enforce an order of temporary reinstatement issued on May 30, 2007. The order requires Highland Mining Co. (Highland) to “reinstate Lawrence Pendley to the position from which he was suspended . . . on March 21, 2006, or to an equivalent position, at the same rate of pay and with equivalent duties.” Order 5. The order is based on my finding Mr. Pendley’s complaint of discrimination, which he filed with the Secretary on March 22, 2007, was not frivolously brought. ¹

¹ The temporary reinstatement proceeding is related to another matter involving Mr. Pendly and Highland. See Order of Temporary Reinstatement n.5. In the other matter, the Secretary filed a discrimination complaint on behalf of Mr. Pendley alleging Highland disciplined him because of various safety complaints he made in the fall of 2006. The Secretary’s complaint was docketed as KENT 2006-506-D. It was settled and dismissed, but because Mr. Pendley maintained that he was not a party to the settlement, the Commission vacated the order approving the settlement and remanded the matter for “appropriate proceedings”. 29 FMSHRC 164, 166 (April, 2007). In the meantime, Mr. Pendley lodged another complaint with the Secretary alleging he was harassed and laid off because, among other things, in March, 2007 he expressed more safety concerns. He sought temporary reinstatement, which, as noted above, I granted. While all of this was going on, the Secretary continued to investigate Mr. Pendley’s March complaint to determine whether to file another discrimination proceeding based on the incidents in March. The parties and I agreed Docket Kent 2006-506-D should be effectively stayed pending the conclusion of the Secretary’s investigation. If the Secretary filed another complaint, the parties and I further agreed all of the pending matters should be resolved together.

The Secretary recently filed another complaint on Mr. Pendley’s behalf. The case is in the process of being docketed. Once a docket number is assigned and an answer is filed, the case will be assigned to me. As agreed, when I receive the case, I will consolidate it with previously

In seeking the enforcement order, the Secretary asserts, *inter alia*, that “[s]ince his return to work [on June 7, 2007], [Mr.] Pendley . . . has encountered a number of difficulties[.]” Sec’s Mot. 1. Among the “difficulties” (all of which are attested to in Mr. Pendley’s attached affidavit) are a delay in reinstating his health insurance, assignment of more work than in the past, assignment of different and unusual work, encountering a “dummy hanging with a noose around its neck “(*Id.* 2), failure to receive a “man-light” (*Id.* [²],) failure to be placed on the seniority list, the receipt by all miners working in similar positions of letters informing them of their job duties while miners working in all other positions did not receive such “job duty letters”, and, finally, the posting of Mr. Pendley’s “job duty letter” on a mine bulletin board. *Id.* 1-2.

The Secretary states the “difficulties” “appear[] . . . calculated to embarrass and harass Mr. Pendly” and she asserts Highland and its agents “appear to be subjecting . . . [Mr. Pendley] to petty harassment.”Sec’s Br. 2. To remedy this, the Secretary wants an order enforcing the original order of temporary reinstatement and again directing Mr. Pendley’s “reinstatement in his prior or equivalent position”. Sec’s Mot. 2. The Secretary also wants the enforcement order to require “appropriate work assignments in line with the number of hours in a shift and comparable to assignments given to other miners in the same position.” *Id.* 2-3. The Secretary further wants the order to require Mr. Pendley “receive all benefits, in pay and otherwise, including seniority list status, and equipment that he normally would have been awarded or received had he not been discharged.” Sec’s Mot. 3. Additionally, the Secretary wants Highland to “ensure[] . . . Mr. Pendley is not harassed or treated disparately based upon his reinstatement or other protected activity”, and she wants a copy of the enforcement order posted on a bulletin board in a “common area” of the mine. *Id.*

In response, Highland either denies the Secretary’s allegations or claims incidents regarding the direction of its work force are wholly within its prerogatives as Mr. Pendly’s employer. Highland asserts Mr. Pendley’s health insurance was in fact reinstated on June 6, 2007 back to its original effective date so that Mr. Pendley never suffered a lapse of coverage; that the letter detailing his work assignments was issued to all three miners holding the job of supply man after Mr. Pendley appeared to be confused about his work duties and that all of the work assignments were completely within Mr. Pendley’s job description; that Highland has no evidence the letter was placed on the mine bulletin board; that the “dummy incident” was directed at another employee, not at Mr. Pendley; that Mr. Pendley’s “man-light” was assigned to him on June 8, and that in the interim other lights were available and apparently were used by Mr. Pendley; that Mr. Pendley was in fact on the seniority list whether his name appeared on a posted roster or not, that he was offered a job based on his seniority during the week of June 18

filed Docket No. Kent 2006-506-D. I intend to hear the matters on September 10, 11 and 12, 2007 in Evansville, Indiana, or at an earlier date if possible, and will soon issue an order to that effect.

² The Secretary’s counsel orally advised me the term refers to a miner’s cap lamp.

and that he turned it down. Finally, the company argues the Act does not provide for a copy of any order arising as a result of the Secretary's motion to be placed on a mine bulletin board. Highland's Response 1-6. Like the Secretary, Highland supports its assertions with affidavits.

RULING

_____ The motion is **DENIED**. Virtually all of the things the Secretary seeks are included *sub silentio* in the original order of reinstatement, which, requires Highland to reinstate Pendley to his prior position or to an equivalent position, at the same rate of pay and with equivalent duties. The requirement Pendley return to his old job or to an equivalent position carries with it the requirement he return under the same circumstances that would exist if he had not been suspended. In other words, under the original order, Mr. Pendley was required to be assigned to his usual work duties or to those someone in his position normally would be assigned. Moreover, under the original order Mr. Pendley was required to receive the same benefits and equipment he previously received or to be given the benefits and the equipment someone in his position normally would receive. Further, under the original order, Mr. Pendley was required to be returned to his old place on the seniority list or to the place he would have held had he not been suspended, and he was required to be treated as he had been treated prior to his suspension or to be treated as all other miners in his position currently are treated.

To issue a detailed order specifying requirements and prohibitions included in the previous order would be to engage in an essentially meaningless exercise. If the Secretary believes the initial order is not being fully enforced, her remedy is to go to a United States district court and seek injunctive relief, a restraining order or other appropriate relief. Like it or not, the Commission and its judges have no authority to enforce their own orders. 30 U.S.C. §818(a)(1)(A).

Further, and as noted, all of the Secretary's allegations have been challenged, and the process of resolving the factual conflicts created by the challenges would involve the Commission and the parties in a hearing concerning not so much the basis for the original order as new allegations of discrimination. Such allegations are reserved in the first instance for the employee to complain of and for the Secretary to investigate. It is the Secretary, not the Commission, who is required to make the initial findings regarding whether the complained of incidents constitute prohibited discrimination.

While I recognize I have continuing jurisdiction over the original reinstatement order (29 C.F.R. §2700.45(e)(4)), I also recognize, as should the parties, that all disputes involving implementation of the original order are not amenable to resolution by the Commission. With the possibility of still more complaints looming on the horizon, rather than moving for orders to enforce orders, it behooves all involved to redouble their efforts to promptly settle the pending matters and to end what promises to be interminable litigation. In the meantime, the Secretary should advise Mr. Pendley regarding the realities of the work place and the Secretary's and Commission's inability to right every perceived wrong or slight, and Highland should consider offering Mr. Pendley economic reinstatement to minimize the chances of future allegations of discrimination. In the alternative, Highland should make every effort to ensure Mr. Pendley's reinstatement in fact and in appearance comports with the letter and intent of the original order.

David F. Barbour
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/rao