

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 11, 2018

WILL WILLIS,
Complainant

v.

JEFFREY TYLER for HEART OF
NATURE (NV), LLC,
Respondents

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0218-DM
MSHA No. WE-MD-2017-10

Mine: Silver Peak Mine
Mine ID: 26-02599

**ORDER REQUIRING THE MINE SAFETY AND HEALTH
ADMINISTRATION TO PRODUCE DOCUMENTS**

In this discrimination proceeding brought under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3)(1988), (“Mine Act” or “Act”), the Court is still endeavoring to obtain essential information relating to the four corners of the discrimination complaint brought by the Complainant, Will Willis. As discussed below, the Secretary of Labor has now twice refused to provide to the Court a copy of the Complainant’s discrimination complaint and the interview of the Complainant conducted by a special investigator for the Mine Safety and Health Administration (“MSHA”). These documents are absolutely essential to this discrimination proceeding for the Complainant, for the Court, and for the Respondents.

The Court, believing that the Secretary’s reasoning is antithetical to the law and to common sense, **ORDERS** that MSHA provide these documents to the Court by **Friday May 18, 2018**.

Background

On April 9, 2018, Counsel for Trial Litigation the Mine Safety and Health Division, informed the Court that

MSHA is unable to provide the details or documents of internal special investigations in cases where MSHA is not a party and where the Freedom of Information Act, the Privacy Act, and the Touhy Regulations prohibit disclosure in a third-party lawsuit. To the extent that this sort of thing has ever been provided, it was an error.

April 9, 2018 Email to the Court from Attorney Grover.

The Court replied via Email to Attorney Grover, as well as to the Complainant's legal counsel, that same evening, acknowledging the response, and stating,

[The Court is] hopeful that this is simply a matter of miscommunication. What [the Court is] seeking is the typed interview by the special investigator of Mr. Willis. This is a document signed by the complainant. Mr. Willis is certainly entitled to a copy of the interview statement he signed, as it attests to the accuracy of *his* responses to the interviewers questions about the nature and scope of his discrimination complaint. You know, . . . that per the Commission's *Hatfield* decision (*David Hatfield v. Colquest Energy, Inc.*,¹³ FMSHRC 544, April 1991), this impacts the nature of a section 105 (c)(3) proceeding, which is the type of matter involved here.

Therefore, because it is critical for the Court and because the Complainant is entitled to a copy of the interview he signed, you are directed to provide me with a copy, as well as a copy to be sent to Mr. Willis' Attorney and to the Respondent. You should consider this to be a request independently from the Complainant as well as from the Court. The Complainant has asked for the Court's assistance in obtaining this document. Should you still decline to comply, a formal order will be issued by the Court to provide this information. So Ordered.

April 9, 2018 Email Reply from the Court (italics added).

On April 11, 2018, Attorney Grover again responded to the Court, asserting

Regrettably, the Secretary is unable to comply with your emailed order because of the requirements of the Freedom of Information Act, the Privacy Act, and the Department's Touhy Regulations. If the Complainant, or any party, files a FOIA or Privacy Act request, MSHA will take prompt action on it and respond appropriately. Additionally, if any party desires that MSHA personnel testify, or comply with subpoenas duces tecum, I would urge them to do so in accordance with the Department's Touhy Regulations found at 29 C.F.R. Part 2, Subpart C. Because I imagine the Court will not be satisfied with the Secretary's position, I respectfully ask that you issue a written order that the Secretary can respond to formally laying out the FOIA, Privacy Act, and Touhy requirements and legal barriers.

April 11, 2018 Email from Attorney Grover.

In response, on April 17, 2018, the Court issued the following Order,

In this discrimination proceeding brought under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3), ("Mine Act" or "Act"), the Court is endeavoring to obtain essential information relating to the four corners of the complaint brought by the Complainant, Will Willis. For the reasons which follow, it is **ordered** that by **Friday, April 20, 2018**, the Secretary

inform the Court whether [he] will provide **to the Complainant** a copy of the complaint filed by Willis and the interview which MSHA conducted in connection Complainant's discrimination complaint filed during August 2017. An email from the Secretary's counsel regarding this matter, dated April 11, 2018, advises "[i]f the Complainant, or any party, files a FOIA or Privacy Act request, MSHA will take prompt action on it and respond appropriately." Sec'y Email of April 11, 2018. This response is equivocal about whether the Secretary *will* provide a copy of the complaint and the interview to the Complainant, assuming that a FOIA or Privacy Act request is made by the Complainant. If the Secretary refuses to supply the Complainant a copy of the complaint and the interview, the Secretary is directed to explain all reasons for such refusal, together with the authority for such refusal.

By **Friday, April 27, 2018**, the Secretary is also **ordered**, as expressed by the Secretary's Counsel, to "formally lay[] out the FOIA, Privacy Act, and Touhy requirements and legal barriers," which the Secretary asserts make [him] unable to comply with the Court's direction to provide a copy of the interview to it. Indirectly, Counsel for the Secretary acknowledges that this refusal to provide the MSHA interview is a new approach, as [he] states, "[t]o the extent that this sort of thing has ever been provided, it was an error." Sec'y Email of April 9, 2018.

Subject to considering the Secretary's Response to the Court's Order, the Court is presently of the view that the Secretary is obligated to provide a copy of the interview conducted by MSHA in connection with the Complainant discrimination complaint, which is also identified as "WE-MD-2017-10." As most recently noted by Administrative Law Judge Alan Paez in *Justice v. Rockwell Mining*, No. WEVA 2018-48-D, 2018 WL 816284 (Jan. 31, 2018) (ALJ):

Section 105(c)(3) of the Mine Act provides that if the Secretary determines that no discriminatory violation occurred, "the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Thus, the statutory scheme provides to miners an administrative investigation and evaluation of an allegation of discrimination, as well as the right to private action in the event that the administrative evaluation results in a determination that no discrimination occurred. *Hatfield v. Colquest Energy*, 13 FMSHRC 544, 545 (Apr. 1991).

Justice, 2018 WL 816284, at *3.

This is the nature of Complaint brought by Mr. Willis, a proceeding under section 105(c)(3). Upon being assigned this case, the Court held a conference call with the parties, whereupon it was learned that Mr. Willis does not have a copy of the Complaint he filed with MSHA and that he also does not have a copy of the interview he gave to the MSHA investigator.

Judge Paez's decision in *Justice* also speaks to this issue, as he noted:

In order for the statutory prerequisites for a section 105(c)(3) complaint to be met, the written discrimination complaint filed with MSHA must contain specific allegations that are investigated by MSHA and considered in the Secretary's determination of whether the Mine Act has been violated. *See Hatfield*, 13 FMSHRC at 546 (vacating order denying dismissal and remanding for consideration of whether alleged protected activities were part of Secretary's investigation). However, the Commission has recognized that it is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission. *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997).

Justice, 2018 WL 816284, at *4.

This Court made similar observations about section 105(c)(3) discrimination proceedings, noting that:

In *Hatfield*, the Commission recognized that a miner cannot expand his *pro se* claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. 13 FMSHRC at 546. In *Sec. v. Hopkins County Coal, LLC*, 38 FMSHRC 1317, June 24, 2016, the Commission expounded upon its *Hatfield* decision, stating that "the miner's complaint establishes the contours for subsequent action." *Hopkins* at 1340. It noted in *Hopkins* that "Hatfield's original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint." *Id.* at 1341 (citing *Hatfield* at 546). The Commission held that the initial complaint formed the basis of MSHA's investigation. *Id.* After MSHA refused to act on that initial complaint, the miner *could not expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA.* *Hopkins* at 1342 (emphasis added). The key element in these matters is that the determination of the scope of the complaint is not constrained entirely by the four corners of the miner's complaint, *but is also informed by MSHA's ensuing investigation:*

"The Commission has previously held that 'the Secretary's decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on the Secretary's investigation of the initiating complaint to [him], and not merely on the initiating complaint itself.' *Sec'y o/b/o Callahan v. Hubb Corp.*, 20 FMSHRC 832, 837 (Aug. 1998); see *Sec'y o/b/o Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary's investigation, then it follows that the Secretary's authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint. [*Hopkins*], at 1326, n. 15."

Mulford v. Robinson Nevada Mining, 39 FMSHRC 1957, 1959-1960, (Oct. 2017) (second emphasis added).

Accordingly, because of the centrality of the Complainant's complaint and the interview conducted by MSHA in its investigation of that complaint, it is the Court's present position that this information may not be withheld. **SO ORDERED.**

Court's Order of April 17, 2018.

The Secretary's attorney then requested an extension of time to respond to the first due date provided in the Court's Order. The extension request arrived at 3:42 p.m. on the April 20, 2018, due date by which the Secretary was to inform the Court whether he will provide to the Complainant a copy of the complaint filed by Willis and the interview which MSHA conducted in connection Complainant's discrimination complaint filed during August 2017. Secretary's April 20, 2018 Extension Request ("Extension").

The Extension advised that the Secretary is not a party to this Section 105(c)(3) action.¹ It also cited that the Privacy Act commands "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, *or to another agency*, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains. 5 U.S.C. § 552a(b) (emphasis in original)." Extension at 2.² The Extension concluded that it sought until "27 April 2018 to allow MSHA to respond after MSHA has contacted the Complainant." *Id.*

The saga continued with the Court's April 24, 2018 Order Regarding Secretary's Motion for Extension to Respond to the Court's Order, which provided:

The Court's April 17, 2018 Order required the Secretary to "inform the Court [by April 20, 2018] whether [he] will provide to the Complainant a copy of the complaint filed by [Complainant Will] Willis and the interview which MSHA conducted in connection Complainant's discrimination complaint filed during August 2017." Order at 1. On the day the Secretary was required to so inform the Court, the Secretary filed a Motion for Extension of Time to Respond to Order to Provide Documents of 17 April 2018, seeking until April 27, 2018 to comply with the Order. ("Motion"). Although the Secretary noted that he is not a party in this section 105(c)(3) discrimination proceeding, he is MSHA's attorney. The Secretary asserted that he needed additional time for its client, MSHA, to contact

¹ The Secretary added, "since the Administrative Law Judge represented that the Complainant is seeking documents under the Privacy Act, MSHA has directed the District to contact the Complainant." Extension at 1.

² Though a link citing authority was included, at <http://www.dol.gov/sol/privacy/dol-msha-10.htm>, only "Page Not Found" came up, with the Labor Department advising "The page you requested wasn't found on our website. If you followed the link from another website, the link they provided may be outdated."

the Complainant, so as to not run afoul of 5 U.S.C. §552a(b), a provision of the Privacy Act.

Counsel for the Secretary has misapprehended the first part of the Court's Order, which was due by Friday April 20, 2018, mixing a procedural issue with a substantive issue. The Order required the Secretary to advise "[i]f the Complainant, or any party, files a FOIA or Privacy Act request, [whether] MSHA will take prompt action on it and respond appropriately." Order at 1, quoting the Sec'y Email of April 11, 2018. Noting that the Secretary's response was equivocal as to whether the Secretary, acting through its client, MSHA, the Court required the Secretary to advise if he "*will* provide a copy of the complaint and the interview to the Complainant, *assuming* that a FOIA or Privacy Act request is made by the Complainant. If the Secretary refuses to supply the Complainant with a copy of the complaint and the interview, the Secretary is directed to explain all reasons for such refusal, together with the authority for such refusal." *Id.* (emphasis added). The Court was plainly inquiring whether the Secretary, as MSHA's attorney, ultimately will provide a copy of the complaint filed by Willis and the interview which MSHA conducted in connection Complainant's discrimination complaint, filed during August 2017. This is a substantive issue, which can be answered independent of the procedural process which may need to be followed to obtain those documents. Thus, the Court was requiring the Secretary to respond, apart from procedural hurdles, real or imagined, if he had some substantive basis to refuse delivery of those documents to the Complainant. As the Order then noted, "[i]f the Secretary refuses to supply the Complainant a copy of the complaint and the interview, the Secretary is directed to explain all reasons for such refusal, together with the authority for such refusal." *Id.* The Court believes that the Secretary could have answered that question in a timely manner, either by conceding that, substantively, the Complainant would be entitled to those documents or by interposing non-procedural grounds for refusing to provide them.

Given that, substantively, the Court believes the Secretary could have answered the first question in a timely manner, but that he did not do so, and now with the time for compliance having passed, the Court directs that *both* aspects of the Court's Order now be complied with by Friday, April 27, 2018. Accordingly, it is **ORDERED** that the Secretary now fully comply with the Court's Order by April 27, 2018.

April 24, 2018 Order Regarding Secretary's Motion for Extension.

The Secretary then Responded on Friday, April 27, 2018 at 3:47 p.m., repeating that he is not a party to this Section 105(c)(3) action. In pertinent part, the Secretary's attorney, Mr. Grover, advised that:

MSHA attempted to contact the Complainant. MSHA contacted Complainant's attorney on 24 April 2018. As of 27 April 2018 at 1522, MSHA has not received a written request submitted under the Privacy Act as required by 5 U.S.C. § 552a(b). Additionally, MSHA has not received any requests for production of

witnesses or documents under the Department of Labor's Touhy regulations found at 29 C.F.R. Part 2, Subpart C. Under the Department's Touhy regulations and the plain language of the Privacy Act, the Secretary is unable to supply a copy of the complaint and subsequent interview at this time.

Sec'y April 27, 2018 Response at 2-3 (footnote omitted).

Discussion

As set forth above, the Secretary has advanced three bases to refuse the Court's Order to provide it with a copy of Mr. Willis's discrimination complaint and the copy of the investigative interview Willis gave to MSHA's special investigator in connection with his complaint. They are: the Privacy Act, the Freedom of Information Act, and the Department of Labor's Touhy regulations. Relying on Commission law, as well as a measure of common sense, the Court believes that the Secretary's cramped reading of those sources works against all three critical participants in this discrimination proceeding: the Complainant, the Respondents and the Court.

The Privacy Act

Despite the Court's Order for the Secretary to explain all reasons for such refusal, together with the authority for such refusal, and despite the Secretary's Counsel's statement that he would be "formally laying out the FOIA, Privacy Act, and Touhy requirements and legal barriers," the Secretary, without any case citations, simply pointed to 5 U.S.C. § 552a(b), and its provision that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains."

The Secretary's citation to 5 U.S.C. § 552a(b) comes up short because the remainder of that provision continues, by adding "*unless* disclosure of the record would be —" which is then followed by a list of twelve (12) exceptions. 5 U.S.C. § 552a(b) (emphasis added). Exception eleven (11) to the general rule of non-disclosure provides that disclosure is *not* barred when sought "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). This Court is plainly a court of competent jurisdiction. In fact, this Court is the *only court* with jurisdiction to preside in a section 105(c)(3) discrimination complaint under the Mine Act. Therefore, the Secretary's objection is without merit. Fellow Administrative Law Judge Rae made the same observation in *Woodard v. Carmeuse Lime and Stone*, 38 FMSHRC 860, 863 (April 2016)(ALJ) ("*Woodard*").

Further, refusal to provide a copy of the Complainant's discrimination complaint and the interview of the Complainant conducted by a special investigator for MSHA, would stop the Complainant's action and the Respondents' defense in their tracks, as those documents are the critical guideposts for determining the boundaries of a complainant's discrimination complaint under section 105(c)(3). (*See Hatfield*). Nor is it an answer to assert that in this instance the Complainant has legal counsel. There are two reasons for this. First, the Court, under the Privacy Act, is entitled to those documents and the Respondents are entitled under the Commission's discovery rules. *See* 29 C.F.R. §§ 2700.56 and 58. Second, in many section 105(c)(3) actions, complaints are without legal counsel, proceeding *pro se*. At times, complainants may also have English as a second language. It would be a difficult burden to

place one seeking to invoke the right to proceed under that section with the burden of navigating the bureaucracy for the proper route to obtain the essential discrimination documents, documents which a complainant would have filled out to launch the claim and that complainant's further explanation for the claim, as set forth in the special investigator's interview

The Freedom of Information Act

The Secretary provided no citation or authority for its Freedom of Information Act ("FOIA") assertion, only advising that "MSHA is unable to provide the details or documents of internal special investigations in cases where MSHA is not a party and where the Freedom of Information Act, the Privacy Act, and the Touhy Regulations prohibit disclosure in a third-party lawsuit." April 9, 2018 Email from Secretary to the Court. With no authority cited, the Secretary deserves no more than the observation that this is not a FOIA case. To suggest that the *Complainant's* complaint and the investigative interview *of the Complainant* cannot be provided *to the Complainant*, to the Respondents and to the Court, does not add up.

The Touhy regulations

Here too the Secretary offers no useful information to support its assertion that the Touhy regulations present an obstacle for this litigation under section 105(c)(3). Instead, the Secretary asserts that he is unable to comply with the direction to provide a copy of the complaint and the complainant's interview statement about his discrimination complaint because of "the requirements of the Freedom of Information Act, the Privacy Act, and the Department's Touhy Regulations."³ April 11, 2018 Email from Attorney Grover.

The reason for the absence of any cited authority from the Secretary may be illuminated by the above-referenced decision of Administrative Law Judge Priscilla M. Rae *Woodard* in which the Secretary raised similar arguments. There, the judge noted:

The *Touhy* regulations are set forth in 29 C.F.R. Part 2, Subpart C. These regulations were promulgated by the Secretary to implement internal procedures for Department of Labor employees to follow when responding to subpoenas. *See* 29 C.F.R. §§ 2.20 to 2.25; *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (upholding authority of head of Department of Justice to promulgate similar rules). As explained in one of the cases cited by the Secretary in his subpoena response, these are intra-agency "housekeeping rules" promulgated under the authority conferred by 5 U.S.C. § 301. *Herr v. McCormick Grain-The Heiman Co.*, No. 92-1321-PFK, 1994 WL 324558, *1 (D. Kan. June 28, 1994). The enabling statute provides, in full:

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of

³ Though not requested, Attorney Grover adds that "if any party desires that MSHA personnel testify, or comply with subpoenas duces tecum, I would urge them to do so in accordance with the Department's Touhy Regulations found at 29 C.F.R. Part 2, Subpart C."

records to the public. 5 U.S.C. § 301. The statute does not authorize the Secretary to refuse to comply with a court order or subpoena, and the Secretary's Touhy regulations do not and cannot create such a privilege. The regulations merely delegate exclusive authority to one of the Secretary's high-ranking subordinates to respond to subpoenas after being furnished with a written summary of the information sought and its relevance to the proceeding. *In this case, the Secretary is aware which documents are sought and why they are relevant to this proceeding. He cannot hide behind his own intra-agency procedures as a rationale for refusing to comply with the subpoena and order.*

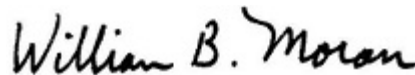
Woodard at 862 (emphasis added).

This Court notes that, as in *Woodard*, the Secretary is aware which documents are sought and why they are relevant to this proceeding and similarly concludes that the Secretary cannot hide behind his own intra-agency procedures as a rationale for refusing to comply with the Court's order here.

ORDER

For the reasons set forth above, the Mine Safety and Health Administration is **ORDERED TO PRODUCE** to the Court the Complainant's section 105(c)(2) discrimination complaint and the interview statement of the Complainant conducted by a special investigator for the Mine Safety and Health Administration, also identified as MSHA No. WE-MD2017-10, by **Friday, May 18, 2018**.

If MSHA refuses to comply with this order to produce documents, the Court will certify this Order for interlocutory review by the Commission under 29 C.F.R. § 2700.76. Enforcement of this order to compel production can only be obtained in the U.S. District Court. Prior to such enforcement, the Commission should have the opportunity to address the issues raised herein.



William B. Moran
Administrative Law Judge

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