

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 7, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of LEONARD BERNARDYN	:	
	:	
	:	
v.	:	Docket Nos. PENN 99-129-D
	:	PENN 99-158-D
READING ANTHRACITE COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), the Secretary of Labor has challenged, inter alia, Administrative Law Judge Avram Weisberger’s order dissolving his previously issued order granting the temporary reinstatement of Leonard Bernardyn. For the reasons that follow, we vacate the judge’s dissolution order.

On November 12, 1998, Bernardyn filed a discrimination complaint with the Department of Labor’s Mine Safety and Health Administration alleging that he had been discharged by Reading Anthracite Company (“Reading”) in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). Mot. at 3-4. On March 19, 1999, the judge issued an order granting the Secretary’s application to temporarily reinstate Bernardyn as a haulage truck driver, the position he held prior to his termination. *Id.* at 4; 21 FMSHRC 339, 342 (Mar. 1999) (ALJ). On July 26, the judge issued a decision dismissing the Secretary’s complaint against Reading. 21 FMSHRC 819, 824 (July 1999) (ALJ). In his decision, the judge also “ordered that the Order of Temporary Reinstatement, issued on March 19, 1999, . . . is hereby dissolved.” *Id.* (emphases removed). Reading discharged Bernardyn on August 2, 1999. Mot. at 4.

On August 24, 1999, the Secretary filed with the Commission a petition for discretionary review of the judge’s decision vacating Bernardyn’s complaint together with a “Motion to Vacate Portion of Judge’s Decision Dissolving Order of Temporary Reinstatement or, in the Alternative,

for Stay of Judge's Decision Dissolving Order of Temporary Reinstatement." The Secretary submits that the judge's order dissolving the order of temporary reinstatement is legally invalid. Mot. at 5. She explains that the judge did not have authority under the Mine Act to issue such an order because there has not yet been a final determination by the Commission on the merits of Bernardyn's complaint. *Id.* at 5-8. Alternatively, the Secretary argues that, under criteria the Commission has established, a stay of the judge's order dissolving the order of temporary reinstatement pending the Commission's review of the underlying discrimination complaint is appropriate. *Id.* at 8-16.

On August 26, 1999, Reading filed an opposition to the Secretary's motion for relief from the judge's dissolution order. Reading asserts that, to the extent the Secretary's motion should be construed as the equivalent of a request for an order granting or denying temporary reinstatement, such a request is time-barred under Commission Procedural Rule 45(f). R. Reply at 2. Reading also submits that none of the Commission's criteria for evaluating stay requests supports the Secretary's motion to stay the judge's order dissolving the temporary reinstatement order. *Id.* at 7-8. The operator also argues that the result should not be harsher for Reading under the present circumstances than it would be when a temporary reinstatement order is dissolved pursuant to Commission Procedural Rule 45(g) due to the Secretary's decision not to proceed with a complaint. *Id.* at 5. Reading also filed an opposition to the Secretary's petition for discretionary review. R. Br. in Resp. to PDR. The Commission granted review of the judge's decision on August 27, 1999.

Section 113(d)(2)(A) specifies that review of a judge's decision may be obtained by filing a petition for discretionary review, which must set forth the issues being appealed. 30 U.S.C. § 823(d)(2)(A). We note at the outset that the Secretary's motion to vacate or stay the judge's dissolution order was filed on the same day as the petition for discretionary review of the judge's determination on the merits of the discrimination complaint. Furthermore, the motion makes explicit reference to the petition. Mot. at 4, 9. Thus, since the Secretary's motion challenges that portion of the judge's decision dissolving his temporary reinstatement order, we treat it as part of the Secretary's granted petition for discretionary review.¹ See *Walter Kuhl & Son*, 16 FMSHRC 1405 (July 1994) (construing motion filed by Secretary as petition for discretionary review). Accordingly, the issue of the dissolution of the temporary reinstatement order is properly before us. See *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998) (broadly construing petition for discretionary review), *aff'd in part on other grounds*, 170 F.3d 148 (2d Cir. 1998); *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 & n.4 (Sept. 1997) (same).

Regarding Reading's suggestion that the Secretary's challenge to the judge's dissolution order should be rejected as untimely under Commission Procedural Rule 45(f), 29 C.F.R.

¹ The decision issued by the judge which is the subject of the Secretary's PDR affected both the temporary reinstatement previously granted by the judge in Docket No. PENN 99-129-D and the underlying discrimination issue in Docket No. PENN 99-158-D, effectively consolidating those dockets.

§ 2700.45(f),² we note that Rule 45(f) covers only Commission review of a judge's initial grant or denial of a temporary reinstatement application. By contrast, in the instant matter, the temporary reinstatement application was already granted by order dated March 19. The issue presently before us is the Secretary's challenge to the judge's dissolution of his previously issued reinstatement order, a subject not covered by Rule 45(f). The current matter falls outside the scope of Rule 45(f), and we therefore reject Reading's timeliness argument.

Section 105(c)(2) of the Mine Act states that, once it has been determined that an application for temporary reinstatement has not been frivolously brought, the Commission, "shall order the immediate reinstatement of the [complaining] miner *pending final order on the complaint.*" 30 U.S.C. § 815(c)(2) (emphasis added). Section 113(d)(1) of the Act states: "The decision of the administrative law judge . . . shall become the final decision of the Commission 40 days after its issuance *unless* within such period the Commission has directed that such decision shall be reviewed" 30 U.S.C. § 824(d)(1) (emphasis added). Therefore, the language of the Mine Act requires that a temporary reinstatement order remain in effect while the Commission reviews the judge's decision.

In the instant matter, when the judge purportedly dissolved the temporary reinstatement order, the time had not yet passed for the Commission to review the judge's decision on the merits of Bernardyn's discrimination complaint. Accordingly, the judge's decision had not yet become a final Commission decision. 30 U.S.C. § 824(d)(1). Thus, the judge lacked statutory authority to dissolve the temporary reinstatement order concurrently with his discrimination decision or at any time before we could direct review. Since we have granted the Secretary's petition for review of the judge's determination on the merits, the judge's dismissal of the complaint will not become a final decision under section 113(d)(1) of the Act until we review and issue a decision upon that matter. Accordingly, the judge's purported dissolution of the temporary reinstatement order is legally invalid.

We also find unpersuasive Reading's suggestion that it would be inequitable to reinstate Bernardyn following the judge's dissolution order, when Commission Procedural Rule 45(g), 29 C.F.R. § 2700.45(g)³, permits dissolution of a temporary reinstatement order upon the Secretary's decision not to proceed on the complaint. Rule 45(g) provides for the judge's dissolution of a temporary reinstatement order if the Secretary determines that no discrimination occurred. 29

² Commission Procedural Rule 45(f) provides that "[r]eview by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition for review with supporting arguments within 5 days following receipt of the Judge's written order." 29 C.F.R. § 2700.45(f).

³ Commission Procedural Rule 45(g) provides, in pertinent part: "If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified and shall enter an order dissolving the order of reinstatement." 29 C.F.R. § 2700.45(g).

C.F.R. § 2700.45(g). This is a “gap filling” provision designed to deal with a situation not addressed by the statute — the status of a temporary reinstatement order following a determination by the Secretary that there has been no violation of section 105(c). In the instant matter, the Secretary determined that discrimination had occurred and filed a complaint on behalf of Bernardyn. Under these circumstances, the statutory language of section 105(c)(2), which provides for maintenance of the temporary reinstatement order pending final determination on the merits of the complaint, must be followed.⁴

We find the facts and circumstances that led the Secretary to move for the dissolution or stay of the judge’s order unusual. Indeed, the issue of the propriety of such an order is one of first impression. Unlike an appeal of a temporary reinstatement order taken when the order is first issued, *see* 29 C.F.R. § 2700.45(f), at issue in this case is the ultimate fate of such a temporary reinstatement order at the close of proceedings before one of our judges. Although we dispose of this issue in our ruling today, we recognize that Bernardyn’s reinstatement imposes additional obligations on the parties. Therefore, we will order expedited briefing in this case according to the following schedule: the Secretary’s brief shall be filed no later than September 21, 1999. Reading’s response brief shall be filed no later than 25 days after service of the Secretary’s brief. The Secretary may file a reply brief within 5 days of service of Reading’s response brief. All briefs shall be filed and served by facsimile.⁵

⁴ In light of our disposition based on the statutory language of sections 105(c)(2) and 113(d)(1), we need not address the Secretary’s alternative argument requesting a stay of the judge’s order.

⁵ Commissioner Beatty agrees in principle with his colleagues regarding the need to expedite briefing in this case. He would, however, expand this principle to direct expedited briefing on review of a judge’s decision on the merits before the Commission in all cases in which there is an underlying temporary reinstatement order. He also believes that the Commission should issue its ruling no later than 60 days after the close of briefing in such cases.

For the foregoing reasons, we vacate the judge's order dissolving his previously issued temporary reinstatement order of Bernardyn, and order the immediate temporary reinstatement of the complainant pending a final Commission decision on the complaint.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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