

SPECIAL INSTITUTE ON MINE SAFETY & HEALTH LAW
A Primer on Section 105(c) Complaints and Temporary Reinstatement

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TEMPORARY REINSTATEMENT UNDER THE MINE ACT

1. Authority and Procedures for Temporary Reinstatement

a. Section 105(c)(2) of the Mine Act

i. “[The Secretary’s investigation of a discrimination complaint] shall commence within 15 days of the Secretary’s receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.”

b. 30 C.F.R § 2700.45

- i. Secretary files application for temporary reinstatement, accompanied by affidavit setting forth reasons for finding that the miner’s complaint was not frivolously brought
- ii. respondent has 10 days from receipt of application to request a hearing
- iii. if a hearing is requested, it must be held within 10 days of the request, unless compelling reasons for an extension are shown
- iv. administrative law judge must issue an order within 7 days of hearing, absent extraordinary circumstances
- v. any petition for review of temporary reinstatement an order must be filed within 5 days of receipt of the order
 1. petition for review does not stay the judge’s order, unless the Commission so directs
 2. any response must be filed within 5 days of service of the petition
 3. Commission’s ruling must be made within 10 days of the response or expiration of the time for filing a response

2. Rationale (Legislative History)
 - a. temporary reinstatement protects the miner from the hardship of bureaucratic delay during the Secretary's investigation
 - b. mining often takes place in remote sections of the country where work in the mines offers the only real employment opportunity
 - c. operators should bear the greater economic burden during the Secretary's investigation and pending a hearing on the complaint if the Secretary determines that the complaint has merit
3. "Frivolously Brought" Standard
 - a. requires only that the miner's complaint must appear to have merit
 - i. *Secretary o/b/o Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153 (Feb. 2000)
 - b. conflicts in testimony are not to be resolved at this stage; miner's testimony sufficient to meet standard
 - i. *Secretary o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009)
 - ii. *Secretary o/b/o Gatlin v. Ken American Resources, Inc.*, 31 FMSHRC 1050 (Oct. 2009)
 - c. credibility determinations are not to be resolved at this stage; miner's testimony sufficient to meet standard
 - i. *Secretary o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717 (July 1999)
 - d. operator's rebuttal or affirmative defense (e.g., that the miner was discharged for legitimate business reasons) should not be weighed against a prima facie case
 - i. *Secretary o/b/o Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009)
4. Eligibility for Temporary Reinstatement
 - a. Miners
 - i. temporary reinstatement remedy does not extend to applicants for employment
 1. *Secretary o/b/o Young v. Lone Mountain Processing, Inc.*, 20 FMSHRC 927 (Sept. 1998)

5. Duration of Temporary Reinstatement

- a. continues until there is a final order on the complaint
 - i. *Secretary o/b/o Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999): even when the judge finds that the operator did not discriminate against the miner, the judge lacks authority to dissolve the miner's temporary reinstatement; the judge's dismissal of the discrimination complaint does not become a "final order" until the latter of forty days after its issuance or the issuance by the Commission of a decision on review
- b. does not continue if the Secretary, during his/her investigation, determines that there has been no discrimination and declines to file a complaint on the miner's behalf under section 105(c)(2)
 - i. *Phillips v. A&S Construction Co.*, 31 FMSHRC 975 (Sept. 2009): an ALJ should issue an order dissolving temporary reinstatement if the Secretary does not file a complaint on behalf of the miner and the miner files a discrimination action on his/her own behalf under section 105(c)(3)
- c. continues only for the period during which the miner would have worked but for the unlawful discrimination
 - i. *Secretary o/b/o Gatlin v. Ken American Resources, Inc.*, 31 FMSHRC 1050 (Oct. 2009): temporary reinstatement ceases at the time when the operator can prove by a preponderance of the evidence that the miner would have been laid off for reasons entirely unrelated to his/her protected activities

6. Mechanics of Temporary Reinstatement

- a. miner must be reinstated to same or equivalent job
- b. miner may accept economic reinstatement in lieu of reinstatement to job
 - i. under an order of temporary reinstatement, an operator loses the ability to control its workforce
 - ii. by agreement between the miner and the operator, the operator can pay the miner his/her salary and benefits without having the miner physically return to the job

- iii. operator must reinstate the miner to all benefits previously enjoyed
 - 1. overtime
 - 2. production bonuses
 - 3. health insurance
 - 4. retirement benefits
 - 5. seniority