



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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November 21, 1995

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Re: Secretary of Labor v. Manganas Painting Co., Inc.
OSHRC Docket No. 94-0588

Dear Counsel:

Enclosed is an order issued today by the Commission pertaining to the above-referenced case.

Yours very truly,

A handwritten signature in cursive script that reads "Ray H. Darling, Jr.".

Ray H. Darling, Jr.
Executive Secretary

cc: Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 996
Washington, D.C. 20036-3419

Assistant Secretary to testify¹ and we ordered the judge to stay the proceedings following the testimony of the other witnesses. For the reasons that follow, we reverse the Judge and grant the Secretary's motion to revoke the subpoena. We also order the judge to lift the stay of the proceedings.

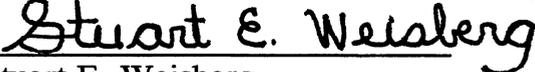
It is well-settled that, absent extraordinary circumstances, senior executive department officials should not be required to testify regarding their reasons for taking official actions. *United States v. Morgan*, 298 U.S. 468 (1936) [*Morgan I*]; 304 U.S. 1 (1938) [*Morgan II*]; 307 U.S. 183 (1939) [*Morgan III*]; 313 U.S. 409 (1941) [*Morgan IV*]; *Simplex Time Recorder Company v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). Thus, a government decision-maker will not be compelled to testify about his mental processes in reaching a decision, including the manner and extent of his study of the record and his consultation with subordinates. *Franklin Savings Association v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991). Moreover, even where the testimony sought might be otherwise relevant, high level officials need not testify where the information sought is available from other sources. *Simplex Time Recorder*, at 578; *United States v. Miracle Recreation Equipment Co.*, 118 F.R.D. 100, 104-105 (S.D. Iowa, 1987).

Respondent seeks the testimony of Assistant Secretary Dear to establish that OSHA acted arbitrarily and capriciously by citing it under the "egregious case policy" in which an employer is cited for multiple violations of a single standard. However, it has failed to explain how Mr. Dear's testimony would establish this claim and why the information is not available from other sources. We have examined those pages of the depositions of

¹In denying the motion to stay, the Judge commented that Assistant Secretary Dear "took the time to meet with and visit a couple [the parents of a young man killed in an accident in Florida] who have been complaining about a supposed injustice by OSHA and Dear has taken the time to meet with these people and issue a public apology." Chairman Weisberg believes that these remarks are irrelevant, inappropriate and injudicious.

Area Director William Murphy, Industrial Hygienist James Sweeney and Acting Director of the Directorate of Compliance Programs Barrien Zettler the parties have provided to establish Assistant Secretary Dear's involvement in the decision to apply the "egregious case policy." Messrs. Murphy, Sweeney, and Zettler all were present at the meeting with Assistant Secretary Dear at which the decision to cite Manganas under the "egregious case policy" was made. Given that these officials were present at that meeting and apparently available to testify in this case, the Respondent has not shown that the information it seeks is unavailable from other sources. Nor has it shown such extraordinary circumstances that would warrant breaching the sanctity of the decision-making process established by the *Morgan* cases. *Simplex Time Recorder, id.*; *Montrose Chemical Corporation of California v. Train*, 491 F.2d 63, 69 (D.C. Cir. 1974). Accordingly, it would be improper for us to require the testimony of the Assistant Secretary. *Community Federal Savings and Loan v. Federal Home Loan Bank*, 96 F.R.D. 619, 621 (D.D.C.. 1983).

Accordingly, it is ORDERED² that the subpoena issued to Assistant Secretary of Labor Joseph A. Dear be revoked³.


Stuart E. Weisberg
Chairman


Velma Montoya
Commissioner

Dated: November 21, 1995

²Given the result we reach today, we find it unnecessary to pass on the Secretary's motion to submit a reply to Respondent's response.

³Repeating the reasoning given by the Judge in his decision to revoke the subpoena issued to Labor Secretary Reich, Commissioner Montoya observes that the Commission is not the appropriate forum in which to seek redress of what she considers to have been an overzealous pursuit of media attention by senior government officials at the expense of this employer's reputation.

Chairman Weisberg agrees with Commissioner Montoya that the Commission is an inappropriate forum for such redress. However, he questions whether it is proper for a Commissioner to comment on or characterize press statements or actions by the Secretary or, for that matter, any party, while the merits of the case are pending before this agency.