

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO : CIVIL ACTION
 :
 v. :
 :
 JOHN J. KORESKO, V, et al. : NO. 04-mc-74

MEMORANDUM AND ORDER

McLaughlin, J.

February 23, 2006

The Secretary of Labor has moved for the incarceration of John J. Koresko, V, for his failure to produce documents requested by an administrative subpoena. The Court will grant the motion.

This matter has a long and tortured history. The Secretary of Labor filed a petition to enforce administrative subpoenas against Mr. Koresko and others on April 19, 2004. Mr. Koresko clarified in an affidavit filed on May 5, 2004, that he is the sole shareholder of the law firm that owns and possesses the documents at issue. After several hearings and the filing of several briefs, the Court granted the petition on August 23, 2004. On October 21, 2004, the Court stayed its Order of August 23 to allow the respondents to seek a stay with the United States Court of Appeals for the Third Circuit. The Court of Appeals denied the respondents' motion for such a stay on December 21, 2004. Mr. Koresko refused to comply with the subpoena.

The Secretary of Labor first moved for contempt of Mr. Koresko on November 15, 2004. The Court refrained from granting the motion several times while Mr. Koresko pursued appeal options. The Secretary of Labor then moved for contempt incarceration of Mr. Koresko on February 25, 2005. On March 16, 2005, the Court held a hearing on the contempt motion. At the hearing, Jean Bonney, a witness for the respondents, confirmed several times that Koresko and Associates had documents responsive to the subpoenas. When the Court asked whether "Koresko and Associates has the documents" responsive to the subpoena, Ms. Bonney responded, "Yes." Ms. Bonney stated that to the best of her knowledge, "Koresko and Associates is the law firm for Penn-Mont and is the possessor of whatever documents you might want to attribute to the entity Penn-Mont Benefit Services. Because Penn-Mont itself has no employees and no assets." Ms. Bonney also confirmed that Mr. Koresko is the owner of Koresko and Associates. On March 17, 2005, the Court granted the motion for contempt and set a coercive fine. Also on that date, the Court took the motion to incarcerate Mr. Koresko under advisement.

Mr. Koresko appealed the contempt Order in the Court of Appeals on March 23, 2005. On April 12, 2005, he moved to stay the contempt proceedings in this Court pending his appeal of the contempt Order. The Court denied the motion for a stay on April

25, 2005, but the Court of Appeals stayed the contempt proceedings pending resolution of the other appeals pending in that court on August 5, 2005. The Court of Appeals affirmed the Court's Orders on December 28, 2005.

The Secretary of Labor reasserted its motion to incarcerate Mr. Koresko by way of a letter dated December 30, 2005. The Court scheduled a show cause hearing, and Mr. Koresko filed a motion to stay the hearing. The Court postponed the hearing. Mr. Koresko filed a pro se emergency petition for writs of mandamus, prohibition and other equitable relief to prohibit further contempt proceedings in the Court of Appeals on January 19, 2006, which the Court of Appeals denied later that day, ruling that the hearing would proceed as scheduled. Mr. Koresko then applied to the Supreme Court of the United States for a stay of further contempt proceedings pending the filing and disposition of a petition for writ of certiorari. Justice Souter denied the application on January 23, 2006.

The Court held a show cause hearing on January 23, 2006. At the hearing, Mr. Koresko offered to produce all the documents responsive to the subpoena if the Secretary of Labor agreed not to disseminate the documents to any other government agency, especially the IRS. The Secretary refused, stating that it does not have the authority to make such an agreement. The Court does not decide here whether the Secretary of Labor may or

may not give any documents to another governmental agency. There is no evidence that the Secretary intends to do so and the issue of the Secretary's authority to do so has not been briefed. The Court does note that Mr. Koresko's willingness to produce the documents as long as they are not given to the IRS undermines his argument that production of the documents violates the participants' privacy rights.

The Court has the power to "order a contemnor imprisoned until such time as the contemnor complies with the court's directives." Northeast Women's Center, Inc. v. McMonagle, 939 F.2d 57, 70 (3d Cir. 1991). It is proper to incarcerate a person in civil contempt for an indefinite period when that person can free himself from incarceration by complying with the court's orders because he "carries the keys of the prison in his own pocket." Int'l Union v. Bagwell, 512 U.S. 821, 828 (1994)(internal citation omitted).

The Court has no choice but to incarcerate Mr. Koresko at this point. The Court has exhausted all other options. This Court and the United States Court of Appeals for the Third Circuit have determined that the Secretary of Labor is entitled to the requested documents. The likelihood of the United States Supreme Court accepting certiorari on this matter is so slight that the Court concludes that it would be unfair to the Secretary

of Labor to allow this matter to go on any longer. Mr. Koresko can relieve himself of this Order by producing the documents.

An appropriate Order follows.

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ORDER

AND NOW, this 23rd day of February, 2006, upon consideration of the petitioner's Motion for Incarceration of John J. Koresko, V, (Docket No. 68), the respondents' opposition thereto, and after a hearing held on January 23, 2006, IT IS HEREBY ORDERED that the motion is GRANTED. IT IS FURTHER ORDERED that Mr. Koresko shall surrender himself to the Office of the United States Marshal on or before 2:00 P.M., on March 10, 2006. Mr. Koresko is to be taken into custody and confined indefinitely, until such time as he produces or causes the production of the documents requested by the administrative subpoenas and pays the daily fines and costs imposed, and thus complies with the Court's prior Orders.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.