

CCASE:

UMWA V. PEABODY COAL

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FMSHRC-WDC

May 27, 1986

UNITED MINE WORKERS OF AMERICA

(UMWA)

on behalf of JAMES ROWE, et al.,

Docket Nos. KENT 82-103-D

JERRY D. MOORE, LARRY D.

KENT 82-105-D

KESSINGER

KENT 82-106-D

v.

PEABODY COAL COMPANY

SECRETARY OF LABOR,

MINE SAFETY AND HEALTH

ADMINISTRATION (MSHA)

on behalf of THOMAS L. WILLIAMS

Docket No. LAKE 83-69-D

v.

PEABODY COAL COMPANY

BEFORE: Backley, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

The Commission concluded previously that Commission Administrative Law Judge Joseph B. Kennedy, while presiding in the above-captioned matter, acted improperly by: (1) engaging in a prohibited ex parte communication; (2) verbally abusing attorneys appearing before him; and (3) commenting publicly on a pending proceeding. United Mine Workers on behalf of Rowe v. Peabody Coal Co., 7 FMSHRC 1136 (August 1985). The Commission's decision was the result of an inquiry into allegations contained in a letter to the Commission from Francis X. Lilly, then the Solicitor of the Department of Labor. 1/ Judge Kennedy has moved for reconsideration of the decision. For the reasons that follow the motion is denied.

1/ The Commission is an independent adjudicatory agency established by Congress to resolve legal disputes under the Federal Mine Safety and Health Act of 1977 ("the Mine Act"), 30 U.S.C. § 823 (1982).

The Commission is not a part of and is in no way connected with the Department of Labor. Rather, the Department of Labor appears before the Commission as a party to litigation under the Mine Act.

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Although the factual background and procedural history of this matter are fully described in the Commission's previous decision, we will briefly set forth those facts pertinent to an

understanding of the present order. The Solicitor asserted that Judge Kennedy had initiated a prohibited ex parte telephone conversation with a Department of Labor attorney, Linda Leasure, in which they discussed the merits of the above-captioned discrimination proceeding. The Solicitor also asserted that the judge exhibited abusive conduct toward the Secretary's trial counsel, Frederick W. Moncrief, and toward counsel for the United Mine Workers of America and Peabody Coal Company at an oral argument on the merits of the captioned proceeding. Finally, the Solicitor asserted that Judge Kennedy had threatened Moncrief during a confrontation between the two, occurring at the judge's office subsequent to the oral argument. The Solicitor's letter was accompanied by affidavits from Leasure and Moncrief and by portions of the transcript of the oral argument.

The Commission deemed the Solicitor's letter and the accompanying materials to be, in part, a notification of a prohibited ex parte communication and a request for appropriate action under Commission Procedural Rule 82. 29 C.F.R. § 2700.82. 2/ The Commission served the judge and the parties with copies of the letter and attachments. The Commission also severed the allegations of judicial misconduct from the merits of the discrimination proceedings, reassigned the merits to the Chief Administrative Law Judge, and retained jurisdiction over the misconduct allegations.

2/ Rule 82 states:

- (a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.
- (b) Procedure in case of violation.
 - (1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.
 - (2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding.
- (c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners,

or docket information shall be directed to the Office of the Executive Director of the Commission.... 29 C.F.R. § 2700.82.

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In order to determine whether any improper conduct occurred, an inquiry was initiated by the Commission. The Commission ordered the judge to file a complete and detailed affidavit concerning the reported matters. The Commission also noted that the judge had been quoted in the Lexington [Kentucky] Herald-Leader as characterizing the telephone conversation with Ms. Leasure as a trivial incident and making critical comments regarding Mr. Moncrief. The Commission therefore directed the judge also to disclose in his sworn statement the substance of his conversation with the author of the article and to state whether he had been quoted accurately.

In response to the Commission's order, the judge moved that the inquiry be dismissed and that the order directing the filing of his sworn statement be stayed. The judge asserted that the inquiry was disciplinary in nature and that the Commission had no jurisdiction to discipline a judge. The Commission denied the judge's motion stating: Before this Commission undertakes to discipline, or seek discipline of, an administrative law judge it needs first to determine whether any disciplinary action is required. The Commission has followed, and will continue to follow, appropriate procedures in seeking to examine the allegations of misconduct that have been raised in this matter. If the Commission later determines that grounds exist for forwarding this matter to the Merit Systems Protection Board, it will do so. [3/]

The judge subsequently filed a sworn statement and the Commission thereafter accepted for filing affidavits from Mr. Moncrief and Cynthia A. Attwood, the Department of Labor's Associate Solicitor for Mine Safety and Health. These affidavits responded to points raised in the judge's affidavit. No further affidavits or other submissions were filed and our decision followed.

The judge now asserts that in reaching our decision on the basis of affidavits and without a confrontational hearing the Commission denied him due process. He also asserts that, in any event, the Commission lacks authority to issue a decision disciplining him and that our decision improperly did so. We find these assertions to be without merit.

3/ Under the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 and Stat. 1111 (1978), the Merit Systems Protection Board ("MSPB") hears decides an employing agency's complaint proposing certain designated types of adverse action against an administrative law judge. 5 U.S.C. § 7521 (1982); see also 5 C.F.R. § 1201.133 (1986).

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The judge's argument that he was entitled to, and was denied, an evidentiary hearing affording him the rights of confrontation and cross-examination discloses confusion and misunderstanding over the nature of the inquiry in this matter. When a possible ex parte communication is brought to the Commission's attention, the Commission has a legal and ethical responsibility under its rules to investigate the matter. *Secretary of Labor on behalf of Ronnie D. Beavers v. Kitt Energy Corp. and United Mine Workers of America*, 8 FMSHRC 15 (January 1986). The Commission also has the responsibility to investigate reported possible instances of unethical or unprofessional conduct in connection with Commission proceedings. When reports of such conduct are made to the Commission an appropriate means to commence our task is to solicit sworn statements from those who have knowledge of the alleged prohibited conduct. Such statements can establish facts bearing upon whether the actions occurred and were in violation of the Commission's rules and applicable standards of conduct. See 29 C.F.R. § 2700.80(a), (b), and (c).

Through this procedure and through the submission of motions and argument, an individual involved in such an inquiry has the right and the opportunity to be heard. There is, however, no requirement that the right to be heard necessarily incorporates an evidentiary hearing. When the record and the sworn statements received are corroborative or unrebutted as to the material issues, and establish a violation of the Commission's rules or applicable standards of conduct, it is proper for the Commission to enter an appropriate finding on the basis of undisputed material facts. As we have stated this same date in *Secretary of Labor on behalf of James M. Clarke v. T.P. Mining, Inc.*, LAKE 83-97-D, slip op. at 4: "Summary decision based on undisputed or unrebutted factual allegations is a procedural course well known to the law. Due process is process that is due under particular circumstances, and does not invariably mandate trial-type proceedings. See, e.g., *Hannah v. Larche*, 363 U.S. 420, 442-43 (1960)." Conversely, when materially conflicting allegations exist, an evidentiary hearing may be necessary in order to resolve the conflicts. See *T.P. Mining*, supra, slip op. at 2.

Our actions here are in accord with these principles. The judge was given full opportunity to be heard, as were the other individuals involved. The Commission solicited the judge's sworn statement. The Commission entertained the judge's various motions and supporting arguments. In concluding that the subject communication was ex parte and prohibited; that the judge abused the attorneys appearing before him; and that the judge's comments as reported in the Lexington [Kentucky] Herald-Leader represented improper judicial conduct, the Commission relied on the public record

and the non-conflicting portions of the sworn statements of the judge and other parties. 4/ 7 FMSHRC at 1140-44, 1144-46, 1147-48. On the other hand, because the sworn statements

4/ Indeed, the Commission found that the ex parte communication was prohibited even as described by the judge alone. 7 FMSHRC at 1143.
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of the respondents were conflicting and thus failed to reveal the precise content of the out-of-court incident involving the judge and Mr. Moncrief, the Commission declined to conclude that standards of professional conduct were violated. 7 FMSHRC 1146-47.

The Commission was not required by either Commission Procedural Rule 80 or Rule 82 to provide the judge with an evidentiary hearing. Rule 80 sets forth standards of conduct for "individuals practicing before the Commission" and provides procedures for determining whether discipline is warranted for violations of those standards. A Commission administrative law judge is not an "individual practicing before the Commission" and, hence, Rule 80 is totally inapplicable to the conduct herein involved. Further, Rule 82(b)(1) provides that in the event of a prohibited ex parte communication that the Commission "may make such orders or take such action as fairness requires" and that "[u]pon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication." As the judge is aware the Commission has not imposed any discipline on him. ("The Commission did not impose any discipline in its August 5 decision...." Motion for Reconsideration at 2 n. 1.) As we have noted, it is the MSPB that by statute and regulation hears and decides designated types of adverse action against an administrative law judge. All that we have done is "to engage in an appropriate process to determine whether discipline is warranted." 7 FMSHRC at 1139 n. 2.

Therefore, the judge's motion for reconsideration is denied. 5/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have been designated a panel of three members to exercise the powers of the Commission in this matter.

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