

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 14, 2002

DISCIPLINARY PROCEEDING : Docket No. D 2001-1

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY: Verheggen, Chairman; Jordan, Commissioner

This disciplinary proceeding arises under Commission Procedural Rule 80.¹ On November 21, 2000, the Commission received a disciplinary referral under Rule 80(a) from a miner who filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") and was temporarily reinstated during the pendency of his case. In the referral, the miner alleges that "there was unprofessional conduct on the part of the attorneys handling [his] case," including the failure of his counsel to follow up on overtime pay of over \$13,000 to which he believed he was entitled under the judge's temporary reinstatement order; and that he was "coerced into making a settlement" of the discrimination case brought by the Secretary on his behalf. In support of his allegations, the miner attached to his referral copies of

¹ Commission Procedural Rule 80 provides in part:

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct. . . . (c) Disciplinary proceedings shall be subject to the following procedures: (1) Disciplinary referral. . . . [A] person having knowledge of circumstances that may warrant disciplinary proceedings against an individual. . . shall forward to the Commission for action such information. . . (2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted.

notes of several phone conversations with counsel in the Solicitor's Office, and an April 2000 letter from counsel in the Solicitor's Office to the operator's counsel inquiring about the status of the miner's overtime pay, which the solicitor stated was due under the judge's order of temporary reinstatement, but which had not been paid to the miner.

This is the second of two disciplinary matters arising from the miner's discrimination case. In D 2000-1, we considered a disciplinary referral based on a 19-month delay by MSHA and the Office of the Solicitor of Labor in applying to the Commission for the miner's temporary reinstatement. 24 FMSHRC 28 (Jan. 2002) ("*Disciplinary Proceeding I*"). A majority of Commissioners dismissed the referral in *Disciplinary Proceeding I*.

In reaching our conclusion in this matter, we considered the material submitted by the miner as well as the record of the Commission's investigation into *Disciplinary Proceeding I*, which includes testimony from the Solicitor of Labor, interviews with the miner, and the record in the underlying discrimination proceeding. Regarding the miner's allegation that he was "coerced into making a settlement," we find no evidence that the miner was subjected to undue pressure or compelled, against his will, to settle. We also note that the parties' settlement agreement was approved by a Commission Administrative Law Judge after a brief hearing. During the hearing, the judge asked whether the settlement disposed of any claims the miner might have, and was assured that it did. In response to the judge's questions, the miner confirmed that he had read the agreement, discussed it with counsel, and agreed to it. In his decision approving settlement, the judge also stated that he confirmed that all the parties understood and agreed to the settlement agreement. The record of this proceeding clearly indicates that no coercion occurred.

As for the other allegations made by the miner, even assuming that the allegations are a true and unbiased recitation of what occurred, we find no indication that any individual attorney acted unethically.

Regarding the issue of the miner's overtime pay, in his decision temporarily reinstating the miner, the judge awarded the miner his former position with full pay and benefits, which under Commission case law customarily includes overtime pay. See *Sec'y of Labor on behalf of Franco v. W.A. Morris Sand & Gravel Inc.*, 18 FMSHRC 278, 289 (Feb. 1996) (ALJ); *Sec'y of Labor on behalf of Walker v. Dravo Basic Materials Co.*, 12 FMSHRC 1127, 1128 (May 1990) (ALJ). As reflected in the April 2000 letter from the miner's attorney in the Solicitor's Office to the operator's counsel, the operator failed to include overtime in the checks it sent to the miner pursuant to the judge's reinstatement order.

The miner maintains that he contacted the solicitor by phone to ask about the letter that was sent to the operator's counsel, and that he was told there had been no response. The miner recalls the solicitor telling him that he (the solicitor) had not had the time to follow up on it, and that it would be better to do so after trial. The miner's case was to have gone to trial during August 2000, but settled the same day. A hearing was held during which the judge approved the parties' settlement agreement. Although the agreement the miner signed states that "he waives

any further claim to payment pursuant to [the temporary reinstatement order],” the miner insists that he was not told at any time before settlement that a settlement agreement would include or cover past-due overtime payments. In the weeks following settlement, the miner recalls that he asked attorneys in the Solicitor’s Office about the overtime pay, but was told that under the settlement agreement, he was not entitled to any such money.

Notwithstanding whether the miner would have been able to prove entitlement to overtime pay,² we cannot overlook the settlement agreement that the miner signed. The agreement clearly states that the miner “waives any further claim to payment pursuant to [the] Order of Temporary Reinstatement.” The agreement also includes a separate Release and Waiver of All Claims, which contains very comprehensive language in which the miner releases the operator “from any and all actions, claims, causes of action, demands, costs and expenses.” Furthermore, as we state above, the judge who approved this settlement agreement questioned the parties and satisfied himself that the parties, including the miner, understood the settlement.

It is difficult to conceive how anyone could read the releases in the settlement agreement and sign the document if they felt there was more due to them than the consideration offered in the agreement, particularly in light of the judge’s questions regarding whether the parties understood the settlement. If anything, the release ought to have put the miner on notice that it was his last chance to resolve any remaining matters, and the judge’s questions provided him the opportunity to raise any lingering concerns.

We will refrain from responding to all of the assertions made in our colleague’s opinion, but feel compelled to speak to some of the more serious allegations. First, our colleague’s opinion suggests that the mere existence of *Disciplinary Proceeding I* (which was based on the 19-month delay in filing the application for temporary reinstatement) precluded the ability of attorneys in the Solicitor’s Office to objectively recommend a fair settlement. Our colleague postulates that attorneys in the Solicitor’s Office wanted to settle the case to avoid a trial where information adverse to their interests in the disciplinary proceeding might surface. Slip op. at 6-7,

² Our colleague contends the miner’s un rebutted testimony at the temporary reinstatement hearing proved his entitlement to 20 hours a week overtime. Slip op. at 14-15 & n.14. We disagree. Pleadings filed on behalf of the miner, both before and after that hearing (including the discrimination complaint and a declaration by the Solicitor representing the miner), allege entitlement to only half as much overtime. Moreover, due to the necessarily truncated nature of temporary reinstatement proceedings, parties must not be expected to conduct a preliminary adjudication of the merits of a discrimination claim. *Sec’y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987) (“[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought”), *aff’d*, 920 F.2d 738 (11th Cir. 1990). To expect parties to go into a temporary reinstatement proceeding, ready to litigate not only the entitlement to reinstatement but also the dollar amount of damages at issue should a violation ultimately be found, would unduly burden the proceeding.

10. This speculative theory is based on the unsupported assumption that the hearing would somehow have focused on the Secretary's delay in filing the temporary reinstatement application, and not on whether the miner was fired in violation of section 105(c). We choose not to engage in any such speculation, and refuse to draw any such conclusions.

To the contrary, we find that the record before us belies Commissioner Beatty's suggestion that the attorneys in the Solicitor's office rushed to settlement to avoid a trial that would reveal information harmful to them. Conversations about settling the discrimination case occurred many months before the case actually settled in August 2000, and *before* the Disciplinary Referral was filed on May 17, 2000. In fact, the judge himself, in his April 12, 2000 Prehearing Order, directed the parties "to confer for the purpose of discussing settlement."

Commissioner Beatty also asserts that the attorneys in the Solicitor's Office pressured the miner to settle the case. However, the notes submitted by the miner reveal no undue pressure or improper conduct. Indeed, they depict dialogue typical of the kind that occurs between a lawyer and client on the subject of settlement. In one conversation, which according to the miner's notes occurred about three weeks before the case settled, the lawyer asked the miner what he would accept to settle the case. The miner responded with a figure. The lawyer explained the problems of proof he expected to confront at trial and proposed a lower figure, suggesting the employer would be more inclined to consider this to be a reasonable offer. The miner agreed to the figure and the case ultimately settled for this amount.³

Finally, our colleague implies that an attorney from the Solicitor's office might have pressured the miner into accepting the settlement by suggesting that a hearing on the miner's 105(c) complaint might lead to the resurrection of the 110(c) investigation of the miner. We find this assertion completely unfounded and without record support. According to the miner's notes, one of the attorneys did mention that the operator could argue that the miner should be held personally liable for the safety violations that led MSHA to investigate the miner under section 110(c). However, the attorney was simply repeating what the operator had argued at the temporary reinstatement hearing. In any event, the miner's notes state that one of the other attorneys from the Solicitor's Office had previously assured the miner that MSHA had already decided not to bring a 110(c) charge against him, and that he had been "let off the hook."

³ Commissioner Beatty also makes the serious charge that attorneys in the Solicitor's Office refused to relay the miner's settlement offer. Slip op. at 12-13. Our colleague cites nothing in the record to support this assertion, and we have found none. The miner's notes describe a conversation in which one of the attorneys reacts to the miner's settlement proposal with skepticism, but says nothing about refusing to convey it. The notes also reflect a subsequent conversation that same day between the miner and another attorney. The attorney expressed concern that the offer was so high that it would stymie settlement discussions. The miner told him he would consider a lower figure and call him back.

In light of the foregoing considerations, we thus conclude that assignment of this matter to an administrative law judge for further proceedings is unwarranted. Accordingly, this disciplinary referral is terminated.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Commissioner Beatty, dissenting:

I respectfully dissent from my colleagues' decision to dismiss this proceeding without further investigating the complaint made by the miner regarding the quality of the representation he was provided by the Solicitor's Office with respect to settlement of his discrimination complaint and economic reinstatement pending resolution of his complaint.

The background of this proceeding must be fully considered to understand the gravity of the miner's complaint. Much of that factual background is set forth in the opinions of the Commission in *Disciplinary Proceeding*, 24 FMSHRC 28 (Jan. 2002) ("*Disciplinary Proceeding I*"). In short, despite the Mine Act's requirement that the Secretary of Labor act expeditiously on a discharged miner's request for temporary reinstatement under section 105(c), the Secretary did not act on the miner's request for temporary reinstatement for 19 months.¹ Upon the application's eventual filing, a Commission administrative law judge ordered the operator to reinstate the miner and the Commission quickly affirmed that order. The miner did not return to work, but instead the parties agreed to economic reinstatement which, according to the judge's order, was supposed to return the miner to the same economic position he was in before his termination.

In light of the 19-month delay in the filing of the application — a period of time so contrary to the intent of the Mine Act's temporary reinstatement provision that it stands as a monument to the Secretary's failure to comprehend the purpose of the remedy — I became concerned that Department of Labor attorneys may have been involved in failing to timely act upon the miner's reinstatement application. Consequently, I filed a disciplinary referral with the Commission on May 17, 2000, which eventually resulted in *Disciplinary Proceeding I*. It is important to note that my referral to the Commission was pending for nearly 3 months *before* the scheduled hearing date on the merits of the miner's discrimination complaint, August 15, 2000.

Ironically, on the day of the hearing, the miner, at the Secretary's insistence, settled his case with the operator. Approximately 3 months later, the miner filed a disciplinary referral with the Commission, taking issue with the representation he was provided by the Solicitor's Office attorneys in connection with the settlement agreement, and, more importantly, the terms of the settlement agreement as they related to the money he was owed as part of his temporary economic reinstatement.

In response to the disciplinary referrals, the former Solicitor of Labor, Henry Solano, appeared before the Commission to discuss both the miner's disciplinary referral and *Disciplinary Proceeding I*. During our meeting the Solicitor attempted to explain away the first 12 months of

¹ As I outlined in my dissenting opinion in *Disciplinary Proceeding I*, the miner's discrimination complaint against the operator here was clearly not frivolous, thus satisfying the extremely low standard necessary for the Secretary to seek immediate temporary reinstatement on behalf of the miner. 24 FMSHRC at 36, 46.

the 19-month delay because of a potential conflict of interest. According to the Solicitor, his agency made a decision to forego pursuing temporary reinstatement for the miner because of an alleged investigation by MSHA for possible 110(c) charges against the miner. He opined that while MSHA was investigating the miner for a potential 110(c) charge, the case presented a potential “conflict of interest” between the Solicitor’s obligation to represent its client, MSHA, and their statutory obligation to pursue temporary reinstatement for the miner.² Because the majority in *Disciplinary Proceeding I* refused to conduct a complete investigation into Salono’s explanation, no one outside the Department of Labor, including the miner, knows why or how the investigation could have resulted in a delay of an entire year.

It is only after a year had elapsed that MSHA decided to forward the case to the regional Solicitor’s Office to process the miner’s discrimination case, its section 110(c) investigation of the miner having apparently concluded without the filing of charges against him. *Disciplinary Proceeding I*, 24 FMSHRC at 31. Notwithstanding the previous 12-month delay, the Solicitor’s Office held the case an additional 7 months before acting on the miner’s temporary reinstatement application. Salono again attempted to explain away this delay by suggesting that his office needed to conduct an additional investigation into the miner’s complaint because they were concerned about the strength of the case.

The factual background of this case makes it unlike any case that has ever come before the Commission. In spite of the Solicitor’s Office slothful lawyering during the 19 months that led up to the miner’s temporary reinstatement,³ my colleagues in the majority now choose to treat the miner’s *post-settlement* complaints as if he was any other litigant before the Commission, merely expressing the normal after-the-fact “buyer’s remorse.” In my opinion, when the circumstances in which the miner was put by the Department of Labor are fully considered, the majority’s decision

² As I stated in *Disciplinary Proceeding I*, the “conflict of interest” excuse was simply one of the ever-changing explanations offered by the Solicitor’s Office of how and why it took 19 months to file a temporary reinstatement application. It should be noted that previous explanations included: a lengthy investigation of the miner’s allegations, requests for additional information by the district and the Solicitor’s Office, a delay in forwarding the case to the regional Solicitor’s Office, and a 7-month delay in reviewing and filing the temporary reinstatement application by the regional office. We were also informed by the Solicitor that regardless of how dilatory his office was in filing a temporary reinstatement application, it was an exercise of prosecutorial discretion and therefore not subject to the Commission’s disciplinary rules. Finally, the Solicitor offered the conflict of interest explanation that provided the impetus for my colleagues’ decision to dismiss the disciplinary referral in *Disciplinary Proceeding I*. 24 FMSHRC at 41-43.

³ In *Disciplinary Proceeding I*, my colleagues in the majority described the delay in the filing of the temporary reinstatement application, as, inter alia, “unacceptable, inexcusable, and wholly avoidable,” and based in part on the Solicitor’s Office failure to properly implement the discrimination provisions of the Mine Act. *Disciplinary Proceeding I*, 24 FMSHRC at 31.

to summarily dismiss this proceeding without seriously examining the allegations does a grave disservice to the mining community that looks to the Commission as an objective evaluator of cases involving the Secretary.

Before addressing the specific allegations made by the miner and the inadequacy of the majority's response in light of the attention those allegations merit, I cannot leave unremarked upon the extremely truncated nature of the Commission's "investigation" of the miner's disciplinary referral. In reaching its decision, the majority had before it for consideration a very limited amount of the information relevant to the miner's allegations. Quite conspicuous by its absence is the most probative information in the case: the recollections of the three Solicitor's Office attorneys directly involved in the settlement. During our investigation, I attempted to fill that glaring hole in the record by preparing a short set of specific interrogatories that I suggested we submit to the three attorneys. An abridged version of those questions is attached as Appendix A. As the record in this case reflects, we never received any of the information sought because the majority simply refused my attempts to submit these questions to the Solicitor's Office.

As a result of the majority's decision to limit our investigation into the miner's disciplinary referral, we are without any first-hand account of how and why the Solicitor's Office attorneys came to strongly recommend settlement of the miner's case, and what steps they took to quickly effectuate the settlement agreement that is now the subject of controversy. The majority's decision to dismiss this matter without a complete look at what occurred, in my opinion, does nothing to exonerate those involved in representing the miner, as a dismissal of a proceeding properly conducted normally would.⁴

A. The Questions Surrounding the Miner's Agreement to Settle the Cases

The miner, in his letter referral, alleges he was "coerced" into settling his cases. In this case, the Commission should have simply followed the same practice it historically has followed when reviewing disciplinary referrals against individuals in the private sector, that is, to establish what it expects of those practicing before us, and conduct an objective inquiry into the matter designed to gather the facts necessary to establish whether the person met the expected standard. *See, e.g., Disciplinary Proceeding*, 22 FMSHRC 1289, 1289-90 (Nov. 2000) (dismissing disciplinary referral because allegations, even if true, did not support disciplinary proceeding); *see also In the Matter of Connie Prater*, 22 FMSHRC 733, 738-39 (June 2000) (ALJ) (at Commission's direction, examining practitioner's conduct at issue and whether it violated Commission's disciplinary rules).

⁴ I emphasize at the outset that I have no opinion on the propriety of the conduct of the Solicitor's Office attorneys involved in the settlement. There simply is not a sufficient record on which to base any opinion, positive or negative. Consequently, I believe the majority does a disservice to these individuals in giving such plainly limited consideration to the miner's complaints.

In this proceeding, a case not involving the private sector but instead involving the conduct of attorneys in the Solicitor's Office, the majority has decided to do neither. My colleagues do not bother to discuss what it expected of the Solicitor's Office attorneys in recommending that the miner settle his cases, or the allegations raised by the miner concerning how the Solicitor's Office effectuated the settlement. Instead, the majority, citing the notes provided by the miner and the Commission's limited investigation in the first disciplinary proceeding, as well as the miner's acquiescence to the settlement before the judge, concludes that there was no "coercion" because there is "no evidence that the miner was subjected to undue pressure or compelled, against his will, to settle." Slip op. at 2.

Leaving aside for now how incomplete the record is in support of the majority's factual conclusion, the question of whether this, or any, disciplinary proceeding should be dismissed does not hinge on whether the evidence supports the exact terminology chosen by the person making the referral, especially when that person is not even a practitioner before the Commission. Rather, we should look to our own disciplinary rules, which require that "[i]ndividuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. § 2700.80(a). The majority, inexplicably, has failed to do so in this case.⁵

Looking to the American Bar Association's ("ABA") Model Rules of Professional Conduct as a general guide to the "standards of ethical conduct required of practitioners in the courts of the United States,"⁶ see 29 C.F.R. § 2700.80(a), a number of the Model Rules govern what transpired between the miner and the Solicitor's Office attorneys with respect to the settlement. For instance, a lawyer is expected to explain a matter to a client in a manner sufficient to permit the client to make an informed decision. ABA Model Rule 1.4(b). Also, according to ABA Model Rule 2.1, the lawyer is required to exercise *independent* professional judgment and

⁵ As discussed in *Disciplinary Proceeding I*, the Solicitor has claimed that no attorney-client relationship exists between the Solicitor and a miner in a discrimination case. 24 FMSHRC at 34. However, the Commission pointed out that the Solicitor had failed to inform the miner in this case of that position, so the Solicitor's Office would not be permitted to escape the duties the attorney-client relationship imposes upon the attorney. *Id.* at 31-35. Included in those duties are the ethical obligations that govern the attorney-client relationship. See, e.g., American Bar Association Model Rules of Professional Conduct 1.1 to 1.17 (2001) ("ABA Model Rules"). Clearly, permitting an attorney to appear before the Commission "on behalf of a miner," as Solicitor's Office attorneys do in discrimination cases, without having to adhere to the ethical obligations imposed upon attorneys, would result in a huge loophole in the Commission's disciplinary rules.

⁶ Reference to the Model Rules is also appropriate because the Commission is without information as to the states the involved attorneys are admitted in, and the fact that the miner lived on one state while the attorneys were based in one or more other states.

render candid advice, drawing upon not only the law but other factors that may be relevant to the client's situation.

Of course, because the Commission has failed to conduct a complete investigation into the miner's allegations, we do not have the information necessary to draw any reasoned conclusions regarding the extent to which, if at all, these or other ethical guidelines were actually violated. What we do have is evidence that should have raised a red flag with the majority that a thorough investigation was warranted. Most significantly, there is no disputing that the Solicitor's Office found itself in an awkward position here, representing a miner in a discrimination case when it had failed to act on his temporary reinstatement application for 19 months. This fact alone should have been a cause for concern to the majority because the Solicitor's Office continually recommended settlement while its actions were under review in *Disciplinary Proceeding I* for that extended delay.⁷

In an effort to provide further guidance with respect to the independent professional judgment an attorney is required to exercise, ABA Model Rule 1.7 recites extensive requirements designed to *prevent* representational conflicts from arising, both between *the interests of the attorney* and the client and between *the different clients* of the attorney.⁸ Here, both types of

⁷ That the Solicitor's Office began actively promoting settlement some 3 months before I filed the original disciplinary referral hardly absolves it of a conflict, the majority's suggestion to the contrary notwithstanding. Slip op. at 4. It surely became apparent to the Solicitor's Office well before that time that, as long as the miner's case remained unresolved, it would reflect poorly upon the Solicitor's Office.

⁸ ABA Model Rule 1.7 states that:

(a) A lawyer shall not represent a client if the representation of that client will be *directly adverse to another client*, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client *may be materially limited* by the lawyer's responsibilities to another client or to a third person, or *by the lawyer's own interests*, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

conflict were arguably present. First, settlement of the miner's case eliminated the need for a trial on the merits of the miner's discrimination complaint, at which one of the primary issues may have been the reasons for the 19-month temporary reinstatement application delay also at issue in *Disciplinary Proceeding I*.⁹ As mentioned, the first 12 months of delay was attributed to MSHA, which, like the miner, was a client of the Solicitor's Office.

In addition, the other 7 months of delay was attributable to the Solicitor's Office itself. In defending itself in *Disciplinary Proceeding I*, the Solicitor's Office took the position that the delay was the result of the weakness of the miner's case. Of course, settlement of the miner's discrimination case before trial prevented that claim from being tested.

Despite the fact that both MSHA, a client of the Solicitor's Office, as well as individual attorneys in that office, stood to be in a better position in *Disciplinary Proceeding I* from settlement of the miner's case, to my knowledge none of the safeguards in Model Rule 1.7 that should have protected the miner's interests in light of the conflicts faced by his attorney, the Solicitor's Office, were in place at any point during which settlement was being considered. In addition, the Solicitor's Office did not mention the *Disciplinary Proceeding I* and the settlement's relation to it to the judge who approved the settlement agreement, and it is unrealistic to expect the miner to have *ever* recognized the import of the issue. Thus, a case that was delayed for a year by the Solicitor's Office, allegedly because of concerns that it faced a conflict in its dual representation of the miner and the Secretary, was nevertheless settled by the Solicitor's Office in

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(Emphasis added).

⁹ Amazingly, the majority questions whether the issue of the Secretary's delay in filing for temporary reinstatement, and bringing the miner's discrimination case, would have been an issue at the scheduled hearing. Slip op. at 4. I believe the operator's 40-page motion for summary decision, which was almost entirely based on the Secretary's failure to bring the case in a timely manner, and was pending at the time of settlement, provides more than sufficient grounds to suggest that the operator was not going to drop the issue. The operator clearly would have continued arguing that the delay prejudiced its ability to defend against the miner's claims. Interestingly, in another MSHA Western District case, with even less of a delay, the Secretary eventually bowed to such a defense. See *United Metro Materials*, 24 FMSHRC 140, 141 (Feb. 2002) (vacating direction of review that Commission had issued sua sponte upon Secretary's subsequent vacation of citation, leaving standing judge's decision dismissing proceeding on ground that Secretary unreasonably delayed 14 months in proposing a penalty).

the face of a direct conflict of interest. In my opinion, nothing shines a brighter light on the credibility of the Solicitor's Office's reason for the delay in bringing the miner's case than the realization that, in spite of the fact that the Solicitor's Office's was the subject of an investigation for ethical violations in its representation of the miner, Solicitor's Office attorneys not only continued to represent the miner, but also counseled the miner to settle the case before trial.

The majority's willingness to dismiss the miner's complaints regarding the validity of the settlement in this case leaves us to ponder two important questions: if the miner's discrimination case had been heard by a judge on the merits, or if the Commission would have conducted a complete investigation into the attorneys' involvement, what would we have learned about the validity of the Solicitor's excuse that MSHA took 12 months to conduct a 110(c) investigation, and more importantly what was the *true* strength of the miner's discrimination case against his employer? In my view, answers to these questions would have laid the groundwork for a significantly different outcome in this case, and the disciplinary referral tossed out by the majority in *Disciplinary Proceeding I*.

The majority has also dismissed the referral without giving objective consideration to the miner's notes that reflect various conversations he had with the Solicitor's Office attorneys. Specifically the miner's notes reflect that:

- (1) Despite making the miner wait 19 months before filing his temporary reinstatement application, in the conversation informing the miner of the reinstatement ordered by the judge, the Solicitor's Office trial attorney immediately raised the prospect of settling the case, months before trial and even before the commencement of discovery, as the complaint had not yet been filed;
- (2) Less than 2 weeks later, the same attorney raised the possibility that the Secretary could drop the case;
- (3) The attorney later informed the miner that the judge did not seem sympathetic to the miner's position, and to get around that they would need to make it very clear that the operator's witnesses were "bad actors;"
- (4) Within days after the filing of the original disciplinary referral, the trial attorney requested the miner to specify a compromise back pay figure. However, the attorney did not relay to the operator the miner's offer to accept approximately 75% of his estimated lost earnings, despite the miner's request that the attorney do so. Instead, another Solicitor's Office attorney called the miner that same day to persuade him to accept "a figure a lot lower." The miner was told by still another Solicitor's Office attorney that,

having experience in many cases like the miner's, such cases settle for \$15,000 or \$20,000, and the lower figure is what eventually made its way into the settlement agreement.

The majority opines that the dialogue that occurred between the miner and the Solicitor's Office attorneys was typical of the kind that occurs between lawyer and client on the subject of settlement. Slip op. at 4. I disagree. The miner's notes reflect that he requested that the trial attorney make a settlement offer of \$50,000, yet there is no record evidence of the operator being provided with that offer, or any other amount that it rejected as excessive. Moreover, even if the figure suggested by the miner may have been deemed excessive by the operator if it had been forwarded, my colleagues' unquestioning treatment of the handling of the matter by the Solicitor's Office is hardly appropriate. The significantly lower \$15,000 figure the Solicitor's Office encouraged the miner to offer to settle the case for was accepted by the operator. The wisdom of choosing that figure as an opening offer, which is what apparently occurred, speaks for itself in light of the operator's acceptance of it.

In addition to his notes, the miner reported to the Commission that he was told by one Solicitor's Office attorney that the judge sent a "clear signal" at the miner's reinstatement hearing that "unless there is a ton of new evidence" they would have a "steep uphill battle" prevailing at trial on his discrimination claim.¹⁰ The miner describes the pressure as coming to a head on the day of the discrimination hearing, to such an extent that he felt "bulldozed" into agreeing to settle his cases.

As the foregoing shows, the miner is alleging that the Solicitor's Office attorneys did not base their settlement recommendations solely on their estimates of the strength of the miner's discrimination case.¹¹ I am especially concerned about the miner's allegation that the third Solicitor's Office attorney indicated that, at trial, the operator could urge that section 110(c) charges be pursued against the miner, and the judge would permit into evidence support for that

¹⁰ However, a review of the transcript of the hearing, as well as the judge's subsequent decision, reveals no such signal. At a minimum, the Commission should have requested the attorney to provide his version of the events.

¹¹ A number of the statements appear to be without support under Mine Act precedent or usual trial procedures.

proposition.¹² I am aware of no precedent which would permit such to occur. The miner, on the other hand, who was not an attorney, could not be expected to know this.

It is important to recognize that the facts contained in this decision are only the miner's version of what occurred in this case as we do not have any accounting of the settlement negotiations from the attorneys involved. It is just as important to recognize, again, that we do not have those accounts because the majority has steadfastly denied my attempts to seek information from the Solicitor's Office regarding their attorneys' involvement in the case. In my opinion, this single fact stands as a true testament of the validity of the majority's decision to dismiss the miner's referral without first ascertaining those attorneys' versions of the events surrounding the settlement negotiations.

Simply stated, this proceeding should not have been dismissed by the majority with so many questions left unanswered. There is no excuse for the majority's reluctance to submit a series of short questions, such as those set forth in Appendix A, to the three attorneys involved requesting, at a minimum, some response to allegations raised by the miner. Without this information, the majority's conclusion about the conduct of the Solicitor's Office attorneys simply lacks the necessary evidentiary support expected of Commission decisions. Under the Mine Act, the Commission's factual conclusions must be supported by substantial evidence *on the record as a whole* to be upheld on review. 30 U.S.C. § 816(a)(1). Here, the majority's decision to stop the inquiry into the miner's referral before developing the entire record not only deprives the miner of his right to have his complaint completely investigated, but also calls into question the Commission's willingness to enforce its disciplinary rules against individuals in the Solicitor's Office.

B. The Overtime Pay Issue

Regardless of how the majority views the miner's allegations regarding the Solicitor's Office attorneys' efforts to bring about a settlement of the case prior to the hearing, it is hard to understand the majority's acceptance of the attorneys' conduct with respect to the overtime pay owed the miner during his economic reinstatement. However, similar to its treatment of the miner's coercion allegation, the majority treats his complaints regarding the overtime pay issue as if he was any other miner appearing before the Commission complaining about the terms of a settlement into which he entered. And, just as we saw in *Disciplinary I*, the majority has a gain

¹² The majority claims this to be "unfounded and without record support." Slip op. at 4. My colleagues are mistaken. According to the miner's notes, which are a matter of public record, he was clearly left with the impression from the conversation that section 110(c) charges against him remained a live issue. The majority also supports its decision to terminate the proceedings by cherry-picking the record to find an earlier conversation in which another of the Solicitor's Office attorneys had assured the miner that MSHA would not bring section 110(c) charges. *Id.* Unlike the majority, I will not impute to the miner the sophistication necessary to discern which of the Solicitor's Office attorneys was more accurate.

refused to conduct a complete inquiry into the allegations raised in the miner's disciplinary referral in spite of the fact that many unanswered factual questions cry out for a continued inquiry into this matter.

As the record indicates, and the majority acknowledges, within weeks of his economic reinstatement the miner alerted the Solicitor's Office attorney representing him that the payments he was receiving from the operator did not include any overtime pay.¹³ The miner's un rebutted testimony at the reinstatement hearing was that he was working 20 hours of overtime per week at the time of his discharge. Consequently, in a letter dated April 14, 2000, his attorney wrote the operator's counsel citing that, under Commission law, the miner was due overtime pay. Even though the settlement agreement would not be entered into for another 4 months, the Commission has no further evidence that the miner's attorney did anything more to pursue the overtime issue with the operator. Further, there is no evidence that the attorney ever raised the overtime issue with the judge.¹⁴

According to the miner, he was provided with a number of excuses for the Solicitor's Office failing to address the overtime issue. For example, when he raised the issue with the trial attorney in June 2000, after the April 14, 2000 letter, the trial attorney responded that he had been too busy to deal with the matter. The attorney opined that it may be best to raise the issue with the judge *after* the hearing on the miner's discrimination complaint.

Next, the miner alleges that, approximately a week before the settlement was reached, he again raised the overtime issue with his counsel, but was told it was not important at that time. There is no evidence in our limited record that the issue was ever raised as part of the settlement discussions.

¹³ As the majority states (slip op. at 2), the judge awarded the miner his former position *at the same pay and benefits*, which under Commission law *includes* overtime pay.

¹⁴ The majority clearly errs when it suggests that the miner would have to "prove" his entitlement to overtime pay. Slip op. at 3. Evidence on the issue of overtime pay was submitted by the Secretary through the miner's testimony at the reinstatement hearing, and was not rebutted by the operator. Consequently, under the terms of the judge's order and Commission case law cited by the majority (slip op. at 2), the miner was plainly entitled to overtime pay as part of his economic reinstatement. The only question was whether the Solicitor's Office would see fit to advance his claim to it, beyond of course the letter the Solicitor's Office sent to the operator setting forth the exact same explanation why the miner was due 20 hours of overtime per week. In light of the foregoing, I simply cannot understand why my colleagues in the majority, who affirmed the judge's decision temporarily reinstating the miner at the same pay and benefits, now find it necessary to cull the record for other evidence that the miner was due 10 hours of overtime pay per week, not 20. See slip op. at 3 n.2. To what end? The issue before us is whether the miner was adequately represented in his pursuit to recover *any* overtime pay during his economic reinstatement.

The miner further contends that, after the settlement, he asked another Solicitor's Office attorney about the overtime pay, as he thought it remained a live issue notwithstanding the settlement. At that point he received an acknowledgment from that attorney that the issue had been forgotten during the settlement agreement discussions. The miner steadfastly contends that he was never told, prior to the settlement, that the agreement would include or cover any money for the past due overtime payments.

For my colleagues in the majority, the terms of the settlement agreement are enough to dispose of the miner's claim that he did not realize that the agreement included his outstanding claim to overtime payment during his economic reinstatement. Slip op. at 3. The majority finds that because the language of the settlement releases the operator from further claims under the reinstatement order, and contains comprehensive language ending the litigation, "[i]t is difficult to conceive how anyone could read these releases in the settlement agreement and sign the document if they felt there was more due to them." *Id.*

I find several things troubling about the majority's approach on this issue. First, the majority treats the issue before us as one of contract, as if the miner were seeking further compensation from the operator. As he is not, resort to the terms of the agreement hardly disposes of the miner's claim that he received poor representation in entering into an agreement by which he forfeited his right to the overtime pay due him.

Secondly, the terms of the settlement agreement are not as clear on the overtime issue as the majority apparently views them. As the majority acknowledges, the miner waived "further claim to payment pursuant to" the temporary reinstatement order. *Id.* In the miner's eyes, his claim to overtime pay was not a "further" claim to payment, as in a new one; rather, it was an existing claim, made months previous. Buttressing the miner's belief was what he had been told by the Solicitor's Office attorney with whom he discussed the issue: that it was best addressed after the upcoming hearing.

Instead of a hearing on the merits on the day scheduled, however, the judge heard the parties' motion to settle the case. I do not believe that the miner, as a layman, should have been expected to comprehend that what was occurring that day was nullifying what the attorney had told him previously regarding how it would be more appropriate to raise the overtime pay issue at some later time. The majority Commissioners, though, disagree.

Conspicuously absent from the majority's analysis is any discussion of whether the Solicitor's Office even attempted to explain to the miner the ramifications of the settlement agreement with respect to his outstanding claim for economic reinstatement overtime pay. The disciplinary rules set forth the standards of communication expected of a lawyer advising a

client.¹⁵ Consequently, the terms of the settlement agreement are not by themselves dispositive of the issue before us.

My colleagues and I clearly disagree on the issue of whether the miner really understood the legal mumbo-jumbo in the settlement agreement and release, and how that language ultimately effected his right to a post-settlement recovery of the overtime compensation he was entitled to. But, if we simply take a common sense approach to this issue and review the numbers involved, we see strong evidence that it was unlikely the miner actually understood he was waiving his right to payment for overtime regardless of his decision to sign the agreement.

For example, during the Commission's cursory investigation, the miner provided his estimate of the overtime compensation he believes he was entitled to receive, based on the 20 hour per weeks of overtime the Solicitor's Office used in its letter to the operator. The miner calculated that over the course of his 6-month economic reinstatement he was entitled to \$13,260 in overtime pay. While standing alone this is a significant sum, it becomes much more so when viewed in light of the *total* amount the miner received from the settlement: \$15,000. It is important to remember that the miner was out of work for a total of 19 months *before* his application for temporary reinstatement was processed by the Secretary. During this time period, assuming a typical 40 hour work week, the miner would have logged approximately 3040 work hours. If we deduct the overtime pay the miner and the Solicitor's Office alleged the miner was entitled to (\$13,260) from the total settlement (\$15,000), we find that the miner then would have settled the case for \$1,740, or 57 cents for each hour of labor he would have provided (\$1,740 divided by 3040 hours).

In spite of these alarming figures, the majority maintains that this miner was fully aware of the compensatory terms of the agreement he was signing. Given all that this particular miner has been through, it is startling to me that the majority would suggest that he knowingly agreed to a settlement amount that paid him pennies on the dollar for his labor. It seems just as likely to me that because of the confusing nature of the proceedings,¹⁶ and representations made by the solicitors, the miner truly believed that the overtime issue would survive the settlement.¹⁷ As I

¹⁵ According to ABA Model Rule 1.4(a), a lawyer is to keep a client "reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Moreover, Model Rule 1.4(b) goes on to require a lawyer to "explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation."

¹⁶ The discrimination proceeding involved two separately docketed cases, with a docket number for the discrimination case, and a docket number for the temporary reinstatement application.

¹⁷ As the majority recognizes, the miner's recollection was that the solicitor told him it would be better to follow up on the overtime issue after the trial. Slip op. at 2. The miner further

have stated before, “I have confidence that miners understand, better than anyone else, the value of their labor when it comes to negotiating a back pay award.” *Sec’y of Labor on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 711 (July 1998) (Commissioner Beatty, dissenting).

Again, the foregoing account is all based on the miner’s version of events. I am certain that the attorneys from the Solicitor’s Office who were involved in this matter would add much to our understanding of this controversy if given the opportunity. The majority, however, has steadfastly refused to seek information from them regarding their recollections.

Here, the majority once again misses the forest for the trees, and, in the process, avoids addressing the ultimate issues the miner’s disciplinary referral poses. As the decisions in *Disciplinary Proceeding I* make plain, this miner was uniquely situated, given his treatment by the Secretary’s representatives. Moreover, as discussed previously, the issue of how well informed the miner was when he decided to settle his cases is open to a very serious debate. In my view, it is hardly appropriate for the majority to look to the terms of a settlement agreement, especially one which resulted from such controversial circumstances, as the only source of resolving the miner’s overtime pay dispute. It is especially inexcusable to do so after foregoing the opportunity to fully investigate the Secretary’s crafting of the settlement agreement.

Again, the ABA Model Rules of Professional Conduct provide several standards that may be relevant to the allegations made by the miner regarding the overtime pay issue. Rule 1.1 requires a lawyer to “provide competent representation to a client.” This rule specifies that competent representation “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.3 instructs attorneys to “act with reasonable diligence and promptness in representing a client.” Clearly, these standards are potentially implicated by the miner’s allegations, both with respect to the Solicitor’s Office apparent failure to follow up on the April 14, 2000 letter to the operator’s attorney concerning the miner’s entitlement to overtime pay as part of his temporary economic reinstatement, and if the Solicitor’s Office failed to raise the overtime issue during the course of negotiations to settle the discrimination case. Also open to question under these standards is the trial attorney’s alleged statement to the miner that it would be better to raise the overtime issue with the judge after the trial.

At a minimum, read against these standards, the miner’s allegations raise the issue of whether the involved Solicitor’s Office attorneys breached ethical standards by failing to provide the miner with a reasonable explanation of the consequences of entering into the settlement agreement. This would of course include his waiver of any potential entitlement to overtime pay as part of the temporary reinstatement previously ordered by the judge.

alleges that approximately a week before the settlement was reached he again raised the overtime issue with his counsel, but was told it was not important at that time.

Of course, the Commission cannot consider these issues without gathering the relevant facts, and that the majority refuses to do. Consequently, the full story behind the treatment of the overtime pay dispute by the Solicitor's Office will never be known. If all of the facts were known, it may become apparent that the attorneys from that office handled the dispute appropriately. However, given how the miner's case was handled during the preceding two years by the Department of Labor and its representatives, I, unlike the majority, am not inclined to blithely assume that was the case.

For the foregoing reasons, I respectfully dissent.

Robert H. Beatty, Jr., Commissioner

APPENDIX A

Questions for All Three Solicitor's Office Attorneys

1. Describe your efforts to pursue the miner's entitlement to overtime pay as part of his temporary economic reinstatement following the April 14, 2000 letter to the operator's attorney concerning this issue. If no such efforts were undertaken, please explain why not.
2. Describe the content of any and all conversations you had with the miner concerning his entitlement to overtime pay as part of his temporary economic reinstatement by the operator during the period following the issuance of the judge's temporary reinstatement order.
3. Was it your understanding that the miner was entitled to receive some amount of overtime pay as part of his temporary economic reinstatement by the operator? If so, approximately how many hours of overtime pay per week was the miner entitled to? Describe with particularity the basis for this assessment.
4. Was the issue of the miner's entitlement to overtime pay as part of his temporary economic reinstatement discussed with the operator's counsel in the course of negotiations to settle the miner's discrimination complaint? If so, describe each instance in which the issue was raised, by whom, and the response by opposing counsel.
5. Describe the entire course of negotiations with the operator's counsel to settle the miner's discrimination complaint? Include a description of how many meetings/conversations were held to negotiate the settlement, the miner's initial settlement proposal, the operator's response, and any subsequent proposals and counter-proposals.
6. Did the miner waive his entitlement to overtime pay as part of his temporary economic reinstatement as a result of the settlement reached with the operator in the discrimination case? If so, please describe with particularity the basis for your understanding that the miner had so waived his entitlement to overtime pay.
7. Did you or any other attorney in the Solicitor's Office ever explain to the miner that he was waiving his right to overtime pay as part of his temporary economic reinstatement as a result of the settlement reached with the operator in the discrimination case? If so, describe with particularity the substance of any such conversation with the miner. If not, please explain why this issue was not discussed with the miner.
8. Did the miner ever raise the question of his entitlement to overtime pay as part of his temporary economic reinstatement by the operator during the negotiation of the settlement agreement with the operator, or subsequently? If so, describe the circumstances of each instance when this question was raised by the miner, and how you responded to him.

9. What was your overall assessment of the strength of the miner's discrimination case against the operator? Describe with particularity the basis for your assessment.
10. What is your overall assessment of the fairness of the settlement reached with the operator in the miner's discrimination case? Describe with particularity the basis for your assessment, and how it would be influenced by the fact that the miner was entitled to a significant amount of overtime pay as part of his temporary economic reinstatement by the operator.

For Trial Attorney:

1. Did you ever advise the miner to the effect that, at the temporary reinstatement hearing, the judge sent a clear signal that a considerable amount of new evidence would be required to enable the miner to prevail on his discrimination complaint and/or that the miner would have a steep uphill battle to win his case? If so, describe with particularity the basis for that advice, and describe the miner's response.
2. Did you ever advise the miner that it would be better to pursue the issue of his entitlement to overtime pay as part of his temporary economic reinstatement following the trial in his discrimination case? If so, describe with particularity the circumstances under which that advice was given to the miner, and your basis for doing so.
3. Did you ever advise the miner that the lack of follow-up on the issue of his entitlement to overtime pay as part of his temporary economic reinstatement was not "that important of an issue"? If so, describe with particularity the circumstances under which that statement was made to the miner, and describe the miner's response.
4. Did you ever advise the miner that an initial settlement demand of \$50,000 would be excessive, and would probably not even prompt a response from the operator? If so, describe with particularity the basis for that advice, and describe the miner's response.

For Other Two Solicitor's Office Attorneys:

1. Did you ever advise the miner that an initial settlement demand of \$50,000 would be excessive, and would probably not even prompt a response from the operator? If so, describe with particularity the basis for that advice, and describe the miner's response.
2. Did you ever advise the miner that the issue of his potential liability under section 110(c) of the Mine Act could be raised by the operator as a defense in the trial of his discrimination case and/or was a significant impediment to prevailing in the discrimination case? If so, describe with particularity the basis for that advice, and describe the miner's response.

3. Did you ever advise the miner to the effect that discrimination cases similar to his usually settle for somewhere around \$15,000 or \$20,000? If so, describe with particularity the basis for that advice, and describe the miner's response. Did you ever suggest to the miner that an initial offer to A&K to settle his case for about \$15,000 would be appropriate? If so, describe with particularity the basis for that advice, and describe the miner's response.

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