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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 27, 1979

SECRETARY OF LABOR,
ex rel. ROY A. JONES

v. Docket No. NORT 78-415

JAMES OLIVER AND WAYNE SEAL
d/b/a OLIVER MINE MAINTENANCE COMPANY

DIRECTION FOR REVIEW AND ORDER

The petition for discretionary review filed by the Secretary of Labor is granted. The issues on review are those raised by the petition, including whether the Administrative Law Judge has authority to censure attorneys.

On February 16, 1979, Administrative Law Judge Joseph B. Kennedy issued an "Order of Censure" against two attorneys. The order contained various findings by the Judge in support of his conclusion that the attorneys had engaged in misconduct. The Judge made his findings a matter of record, censured the attorneys, and sent a copy of his order to the Commission. The order was issued by the Judge even though the Commission had not made a determination under Interim Rule 5(b), 29 CFR §2700.5(b) (1978), that disciplinary proceedings were warranted. 1/

The Commission has cautioned Judge Kennedy that administrative law judges lack the authority to censure attorneys in such circumstances. In re Kale, No. D-78-1 (November 15, 1978). In Kale we held that a

1/ Interim Procedural Rule 5(b) states:

Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the

circumstances reported to the Commission warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, the Commission shall issue a show cause order to such individual and refer the matter to a Commission panel, a Commissioner, or a Judge for hearing and decision. The hearing tribunal appointed by the Commission shall give the individual adequate notice of, and opportunity for reply and hearing on, the specific charges against him, with opportunity to present evidence and cross-examine witnesses. The hearing tribunal shall render a decision incorporating findings and conclusions and issue either (1) an order dismissing the charges or (2) an appropriate disciplinary order, which may include reprimand, suspension or disbarment from practice before the Commission.

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determination by the Commission that disciplinary proceedings are warranted must precede an order of censure. The Judge's order here was therefore not authorized and is vacated. 2/ That Judge Kennedy apparently does not share this view of his authority does not justify his action. An administrative law judge must follow the rules and precedents of the Commission. 3/ We expect that in the future Judge Kennedy will follow this principle.

We also observe that procedural unfairness compounded the Judge's errors. Had Interim Rule 5(b) been followed here, the two attorneys would have been accorded elementary procedural safeguards: notice of the charges, an opportunity to reply and to be heard on them, and to present evidence and to cross-examine witnesses. The Judge accorded the two attorneys none of these rights.

The Commission will not countenance any further such abuse of its processes. It will not permit a Judge to discipline attorneys unless its rules of procedure and their procedural safeguards are followed.

Accordingly, the order of censure is vacated.

2/ The Secretary additionally requests that the Judge's findings be expunged from the record. Inasmuch as the Judge's order has been so widely disseminated, expungement would remove from our records the evidence of the Judge's error and right deny to the censured attorneys the protection that we intend for our order to provide. We are therefore not inclined to grant this relief.

3/ *Gindy Manufacturing Co.*, 1 OSHC 1717, 1973-1974 OSHD %17,790 (1974) (Occupational Safety and Health Review Commission); cf. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 54 LRRM 1109, 1112 (1963); *Insurance Agents' International Union*, 119 NLRB 768, 41 LRRM 1176, 1178 (1957). See also Ruhlen, *Manual for Administrative Law Judges*, 66-67 (Administrative Conference of the United States, 1974); and 5 U.S.C. §556(c).