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FMSHRC-WDC
MAY 27, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

on behalf of JAMES M. CLARKE

v. Docket No. LAKE 83-97-D

T.P. MINING, INC.

BEFORE: Backley, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

The Commission concluded previously in this matter that Commission Administrative Law Judge Joseph B. Kennedy and counsel for respondent T.P. Mining, Inc. ("T.P. Mining"), engaged in a prohibited ex parte communication in violation of Commission Procedural Rule 82, 29 C.F.R. § 2700.82. 7 FMSHRC 1010 (July 1985). 1/ That conclusion resulted from

1/ Rule 82, entitled "Ex parte communications," provides:

(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 of 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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an inquiry conducted to determine whether Rule 82 had been violated during the course of pre-trial proceedings in this case. Through counsel, Judge Kennedy has moved for reconsideration of the Commission decision. For the reasons that follow, the motion for reconsideration is denied.

The thrust of the motion for reconsideration is that the judge was entitled to, and was denied, notice of the specific charges against him and an evidentiary hearing. This assertion evidences a misunderstanding of the nature of this proceeding and the meaning of Rule 82. As shown below, the judge not only had full notice of the concerns at issue in this matter and not only received such process as was due under the circumstances, but in addition he, through his counsel, demanded termination of the inquiry short of an evidentiary hearing.

The factual background and procedural history of this matter are fully described in the Commission's previous decision (7 FMSHRC at 1011-14), and will not be repeated in detail here. In view of the tone of the present motion for reconsideration, however, it bears reemphasis that the challenged inquiry was triggered by the judge sending an unsolicited letter to the Commission baldly announcing that "the basis for the settlement [of the underlying discrimination case] was fully disclosed in a discussion between counsel for the operator and the trial judge to which [counsel for the Secretary] was not a party." Because the judge's statement indicated on its face that an ex parte communication had occurred, the participants to the conversation, namely, the judge and the operator's counsel, were ordered to submit affidavits "providing full disclosure of the details and substance" of their conversation.

When an alleged ex parte communication is brought to the Commission's attention, the Commission has a legal and ethical responsibility to pursue the matter. See e.g., *Secretary of Labor on behalf of Ronnie D. Beavers et al. v. Kitt Energy Corp.*, 8 FMSHRC 15 (January 1986). An appropriate means of commencing that task is for the Commission to examine the record of the relevant proceeding and to solicit statements from those who may have engaged in such a communication or have knowledge of the events at issue, in order to examine facts bearing on the question of whether a violation of Commission rules occurred. If the results of such a preliminary inquiry plainly disclose that no impropriety transpired, the whole matter can then be terminated. See e.g., *Beavers supra*, 8 FMSHRC at 17-21. Conversely, when the record and the statements received are corroborative or un rebutted as to the pertinent issues and establish

a violation, a summary conclusion that a violation occurred may be wholly proper under Rule 82 and settled norms of due process. If materially conflicting allegations surface, however, a hearing may be necessary. Against this background, we turn to the judge's allegations that the procedures followed by the Commission in this specific inquiry were improper.

After the Commission received Judge Kennedy's unsolicited letter disclosing that he had engaged in an off-the-record conversation with counsel for one of the parties before him, the Commission solicited affidavits from the participants to the conversation. The initial statements received from Judge Kennedy and the operator's counsel were extremely summary in nature. Their statements averred that on March 28, 1984, they had engaged in a brief telephone conversation pertaining to the status of the settlement, including whether a settlement check had been mailed to the claimant. 7 FMSHRC at 1012-13. After the submission of these statements, the Commission received and accepted from Michael McCord, the Secretary of Labor's appellate counsel, a sworn statement containing further information relevant to the March 28 telephone conversation. In his statement, the Secretary's appellate counsel asserted that he had reason to believe, because of conversations with the operator's counsel, that the initial statements filed with the Commission did not disclose fully the substance and the details of the March 28 telephone conversation. The Secretary's appellate counsel alleged that the operator's counsel had told him that the March 28 conversation included complaints by Judge Kennedy regarding alleged misconduct by the Secretary's trial counsel and an inquiry by Judge Kennedy as to whether the operator's counsel intended to seek a particular document from the Secretary. 7 FMSHRC at 1013.

Because the Secretary's appellate counsel's statement suggested a much more extensive telephone conversation than was described initially by Judge Kennedy and the operator's counsel, and because the description of the Secretary's appellate counsel was based on his conversation with the operator's counsel, the Commission ordered the operator's counsel to submit a further affidavit. In his second affidavit, received on September 20, 1984, the operator's counsel stated that during the conversation in question, Judge Kennedy repeatedly had complained to him about the conduct of the Secretary's trial counsel and had asked him whether he intended to request the Secretary's investigative file -- suggesting that such a course of action might be helpful. 7 FMSHRC at 1014. Judge Kennedy filed no response to the affidavits of the Secretary's appellate counsel or to the second affidavit of the operator's counsel. 2/

On October 10, 1984, after both of the now-challenged statements had been received by the Commission, counsel for the judge requested that the Commission close the record in this inquiry. Counsel stated:

2/ The operator's counsel apparently did not serve his second statement upon the judge. This defect was cured when the judge

obtained a copy shortly after the statement was received by the Commission.

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The record, which now consists of affidavits from Judge Kennedy, [the operator's counsel] and [the Secretary's appellate counsel], as well as a number of letters from myself on behalf of the Judge, is unquestionably sufficient to enable the Commission to bring the inquiry to an end. 1/

1/ I therefore request that the Commission formally close the record in this ... inquiry.

In my August 24 letter to you, I indicated that I intended to depose [the Secretary's appellate counsel] and [the operator's counsel]. I have now concluded that these depositions are not necessary.

Acting upon this request and because there existed no material factual disputes, the Commission closed the record and proceeded to consider all details and substance of the March 28 telephone conversation. On July 10, 1985, we issued our decision stating our findings and conclusions. Only after entry of findings adverse to him did the judge belatedly assert that he was not afforded sufficient opportunity to deny or rebut the opposing accounts of the conversation. This argument is without merit.

The assertion by the judge that he was not afforded sufficient opportunity to respond is belied by his counsel's statement, which establishes that the judge had full knowledge of the contents of the affidavits, believed that the documents in the record were sufficient and requested that the inquiry be closed. Furthermore, nothing had prevented the judge from responding to the affidavits prior to making his request that the record be closed. The judge's contention that he lacked notice of the allegations of the ex parte communication in this matter strains credulity and is rejected. The judge's additional claim that he was denied an evidentiary hearing fails for the same reasons. It was he who failed to avail himself of the opportunity to rebut the assertions of the operator's counsel and the Secretary's appellate counsel, and it was he who sought to close this inquiry short of a trial.

The Commission issued its decision on the basis of the record, the judge's own statement and the unchallenged and consistent statements of other involved individuals. Summary decision based on undisputed or un rebutted factual allegations is a procedural course well known to the law. Due process is the 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). Moreover, Commission Rule 82 does not require a trial in all cases, but rather states that if a violation occurs, the "Commission ... may make such orders or take such action as fairness requires." 29 C.F.R. § 2700.82(b). A hearing is required only if the Commission contemplates the taking of disciplinary action. *Id.* The Commission has not disciplined the judge. As the

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judge's own submission states: "The Commission did not impose any discipline in its July 10 decision, but instead retained 'for further consideration, the question of appropriate discipline.'" The Commission only has concluded that a prohibited ex parte communication occurred. 3/

We conclude that the process afforded in this matter falls well within the substantial discretion given an administrative agency in adopting, interpreting, and applying procedural rules. See e.g., *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 537, 539 (1980); *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 451 (10th Cir. 1983). Because the judge failed to offer a rebuttal at a time appropriate and available under our procedure, and because the matter was closed at his counsel's clear and specific request, the judge's submission of a belated "declaration" denying the account of the ex parte conversation sworn to by the other participants was untimely and is rejected.

Accordingly, the administrative law judge's motion for reconsideration of the Commission's decision of July 10, 1985 is denied. 4/

Richard V. Backley, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

3/ The judge's extended reliance on the procedure set forth in Commission Rule 80 is seriously misplaced. Rule 80 expressly sets standards of conduct, and procedures for addressing breaches thereof, for "individuals practicing before the Commission." A Commission administrative law judge is not such an individual.

4/ 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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