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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

DISCIPLINARY PROCEEDING

No. D-79-2

DECISION

Before: Judge Merlin

The above-captioned matter came on for consideration as scheduled on September 19, 1979. After hearing from those involved, I rendered the following bench decision:

This case is a disciplinary proceeding which is being heard pursuant to the Commission's order dated August 20, 1979. This matter was referred to the Commission on July 27, 1979, by Administrative Law Judge George A. Koutras, for possible disciplinary proceedings due to the failure of counsel to appear at a hearing in two penalty cases styled Secretary of Labor v. CO-OP Mining Company, DENV 79-128-P and DENV 79-129-P. The parties through their counsel did not appear because counsel had agreed between themselves to settle these cases. However, they did not advise the administrative law judge sufficiently in advance of the hearing so that his approval of the proposed settlement could be obtained. The operator's counsel eventually entered an appearance at the hearing after being personally contacted at least twice by Judge Koutras, once after the hearing was scheduled to begin. The Solicitor entered no appearance.

By letter dated August 24, 1979, addressed to Judge Koutras, the Associate Regional Solicitor accepted full responsibility for what had occurred and extended a full apology. In addition, the attorney in the Solicitor's office, who had failed to appear in the two penalty cases, wrote to Judge Koutras on August 24, 1979, apologizing for his conduct.

On September 10, 1979, the Regional Solicitor filed a motion for summary disposition of these proceedings stating that both the Associate Regional Solicitor and the particular attorney involved had been personally

reprimanded by the Regional Solicitor and by the Solicitor. The Associate Regional Solicitor attached to his motion a copy of a memorandum to all regional solicitors from the Solicitor dated September 10, 1979, stating, inter alia, that failure or refusal by an attorney in the Solicitor's Office to appear at a hearing before an adjudicative officer, such as an administrative law judge of any tribunal before which the Solicitor practices, or any other conduct disrespectful to such officer, is a fundamental violation of Solicitor-office policy, which will not be tolerated. The Solicitor's memorandum further sets forth that she considers this a very serious matter and that failure to adhere to stated policy could result in an attorney's dismissal. On September 10, I denied the motion for summary disposition.

At the hearing this morning, the Regional Solicitor, the Associate Regional Solicitor, and the attorney involved, again apologized. In addition, counsel for the operator also has apologized. I accept these apologies.

Counsel for the operator has supported the Solicitor's representations that the Solicitor did not exercise any coercion upon him with respect to his conduct. I accept these representations, and I find there was no coercion.

I also take note of the Solicitor's memorandum dated September 10, 1979. However, I do not believe this occasion should pass without a statement from me on behalf of the Commission with respect to what has transpired and what is involved in this situation.

The Commission and its judges have been charged by Congress with the responsibility of hearing and deciding cases under the Federal Mine Safety and Health Act of 1977. As the Solicitor's memorandum of September 10 now recognizes, the Solicitor's attorneys have an obligation to comply with orders of the Commission and its judges. In particular, there is no excuse for defying an administrative law judge by failing to comply with a specific order to appear at a hearing. The absolute necessity for the Solicitor and the operator's counsel to comply with notices of hearing and other orders issued by administrative law judges of the Commission is rendered even more urgent by the stringent circumstances under which the Commission and its judges operate. The Commission has, at present, only 15 judges who are located in Arlington, Virginia. The Commission soon will have two more administrative law judges located in Denver.

In order to dispose of the growing number of cases which come on for hearing under the Act, the judges of the Commission, who are so few in number, must travel widely and establish precise hearing schedules well in advance.

The schedule of Judge Koutras, an individual of undoubted diligence, during the weeks in question graphically illustrates the point. On July 10, he heard a case in Spokane, Washington. On July 11 and 12, he heard cases in Wallace, Idaho. On July 17, he heard a case in Helena, Montana. The subject penalty cases were scheduled for hearing in Salt Lake City on July 19 and the notices of hearing for them were issued 3 months in advance. Only with such planning and only with such schedules can the Commission, through its judges, discharge its statutory responsibilities of hearing and deciding all the cases that come on for hearing. Obviously, neither the Solicitor nor any operators' counsel can be allowed to frustrate or thwart the Commission's fulfillment of its statutorily-imposed obligations by conduct such as occurred in this case. Nothing less than the efficient enforcement of the Mine Safety and Health Act is at stake.

There is an additional matter involved which must be discussed. The failure of counsel to appear at the hearing and otherwise comply with Judge Koutras' orders were due to the fact that they did not understand the crucial role which the 1977 Act gives administrative law judges in settlement cases. Under the 1977 Act, it is not enough for the parties themselves to agree upon a settlement. Section 110(k) specifically provides that no proposed penalty shall be compromised, mitigated, or settled, except with the approval of the Commission. Accordingly, administrative law judges must approve any settlement. Without the judge's approval, there is no settlement. Indeed, without the judge's approval, there is nothing. Therefore, not only was it improper as a matter of attorney conduct and courtesy for counsel not to appear before Judge Koutras as he had ordered; but, in addition, because he had not given his approval to the proposed settlement, there was no settlement, and, therefore, counsel should have been prepared to go to hearing on the designated date. The legislative history of the 1977 Act makes clear that Congress was dissatisfied with the performance of the Department of Interior in settlement cases under the prior 1969 Act. Under that statute, approval by administrative law judges was not necessary for settlements. The judges of the independent Commission were injected four-square into the settlement process by the 1977 Act in order, in

the words of the Senate Report, to assure that abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations be avoided and that the public interest be adequately protected before approval of any reduction in penalties. Senate Report No. 95-181, p. 45.

Conduct of counsel in this case, as well as the statements of the operator's counsel at the hearing before Judge Koutras, demonstrate an unfortunate lack of understanding of the judge's role in settlement cases under the 1977 Act. There was also a failure to appreciate that last-minute settlement agreements reached only between the parties are insufficient where the judge is not afforded adequate time in advance of the hearing to review the matter and determine if his approval is warranted. In this respect, counsel have to be aware of the long and difficult hearing schedules followed by the judges. Counsel have to be aware of the logistics as well as the legalities of the process. I hope that in addition to instructing her attorneys that they must appear in accordance with orders from administrative law judges, the Solicitor also will instruct her attorneys as to how settlements must be handled under the law.

It is disturbing that at the hearing before Judge Koutras, the operator's counsel did not understand that the Commission is a wholly separate and independent entity from the Department of Labor. However, some of the Solicitor's own attorneys appear at times to operate under the same misapprehension. It should not be necessary at this late date to tell attorneys who practice under the Act that the House version of the 1977 Act gave all enforcement responsibility, including hearings, to the Secretary of Labor, whereas the Senate bill established an independent Commission with five Commissioners appointed by the President. Having been given the choice, Congress enacted the Senate version which became the law and is now the 1977 Act. Accordingly, the Commission is entirely separate from the Secretary of Labor and from the Solicitor of Labor. The enforcement and adjudicatory functions in mine safety and health have been separated. The Commission is answerable to Congress, not to the Secretary of Labor. It should not be necessary at this late date to set forth such fundamentals to attorneys who practice under the Act, but I do so now because it is apparent that ignorance of such basics still exists.

It is my hope that the conduct of the Solicitor's attorney and operator's counsel in this case will never

occur again. I recognize, as do all the judges of the Commission, that the Solicitor has delegated much authority to her regional solicitors. The internal organization of the Solicitor's office is solely a matter for her determination. However, attorneys in all the Solicitor's regional offices should understand that they are bound to follow orders of the administrative law judges of the independent Commission and they should understand how the settlement process is designed to operate under the 1977 Act. Conduct such as has occurred in this case cannot be tolerated by the Commission and if repeated will inevitably result in disciplinary proceedings and disciplinary sanctions against the individual attorneys involved with all the adverse consequences such proceedings and actions may entail.

Finally, this case demonstrates the wisdom of having a regulation authorizing a judge to exercise disciplinary authority in appropriate instances. Because of this regulation, the administrative law judge in this case was not left powerless to deal with the situation which made discharge of his statutory duty difficult, if not impossible. The Commission in considering the matter and then referring it to the Chief Judge or his designee, in accordance with section 2700.80 of the regulations, demonstrated its awareness and sensitivity to the problems encountered by the judge in this instance. Moreover, under the regulation, the time lapse involved in referring this matter to the Commission, then referring it back to the Chief Judge, and lastly in setting a hearing, although only a short period of time, afforded those involved, and, most particularly, the Solicitor herself, the opportunity to consider the matter and take appropriate action including, as set forth above, her personal reprimand of the attorneys involved and the memorandum to all attorneys as well as the written apologies to Judge Koutras. Accordingly, under the procedures set forth in the regulations, the problem has been recognized while at the same time precipitate action by the Commission against the individuals involved has been rendered unnecessary.

Hopefully, because of the action already taken by the Solicitor and in light of the comments I have made here today, the matter has been completely resolved with better enforcement of the Act as the result. As previously stated, I accept the apologies, both written and oral, of all counsel involved. In addition, as already stated, I take note of the Solicitor's memorandum dated September 10, 1979.

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In view of the complete nature of the apologies, in light of the Solicitor's memorandum, and since this is the first time such a situation has arisen, I determine that no disciplinary proceedings are warranted. Therefore, it is hereby ordered that no action whatsoever be taken and that these proceedings be and are hereby dissolved.

The bench decision is hereby AFFIRMED.

Paul Merlin
Assistant Chief Administrative Law Judge