

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 10 1981

Disciplinary Proceeding : Docket No. D 81-1
(Minerals Exploration Company) :
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:

DECISION

Appearances: John A. Macleod, Esq., Crowell and Moring,
Washington, D.C.;
Page H. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia.

Before: Judge Merlin

The above-captioned matter came on for consideration as scheduled on August 6, 1981. After hearing from those involved, I rendered the following bench decision:

This case is a referral for possible disciplinary proceedings given by the Solicitor to Judge John A. Carlson, a judge of the Commission, during a conference in chambers on June 29, 1981, and transmitted by Judge Carlson to the Commission by memorandum dated July 13, 1981.

By order dated July 23, 1981, the Commission referred the case to the Chief Administrative Law Judge and the Chief Administrative Law Judge has, in turn, assigned the case to me.

This matter arises out of certain remarks made by counsel for the operator during a telephone conference call on June 22, 1981, participated in by Judge Carlson, his law clerk, an attorney in the Solicitor's office, a miners' representative and, of course, counsel for the operator.

The facts are set forth in the joint stipulations submitted to me by the Solicitor and by the attorney retained by counsel for the operator. I have reviewed the stipulations and have accepted them. They have been made a part of the record.

As set forth in the stipulations, the salient facts are briefly as follows: Judge Carlson was presiding in a review proceeding challenging the validity of a section 107(a) withdrawal order issued against Minerals Exploration Company. The conference call was specifically concerned with the union's participation in the hearing which was already underway. Of the two miners' representatives involved, one was on sick leave and one was on disability-maternity leave at the time. According to counsel for the operator, the company's personnel policy required that employees'

activities while on leave be consistent with their leave status. For this reason, therefore, counsel for the operator represents that during the telephone conference call he intended to alert the miners' representative to possible adverse personnel action if the miners' representatives traveled to Denver for the hearing without first changing their leave status. During the course of the conference call, counsel for the operator used such words as "discipline" and "discharge." Counsel for the operator has stated that he did not intend to interfere with the union's right under the Mine Safety Act and the Commission's regulations to participate in the hearing. Regardless of his intent, however, it appears that his remarks could have been, and were, in fact, interpreted by some of the other participants to the conference call as a deterrent to the union's participation in the review proceeding.

The attorney retained by counsel for the operator has stated at length this morning that counsel did not intend to prevent or frustrate the union's participation in the review proceeding, and that a misunderstanding of the words used occurred. In addition, this morning before me counsel for the operator also has stated that such was not his intent, and he has expressed regret for the untoward consequences of his remarks and for any inconvenience caused to the Commission and to me.

It must be stated that in light of what transpired during the telephone conference call, Judge Carlson's concern as evidenced in the conference in chambers was undoubtedly well-founded. So, too, under the circumstances, the Solicitor's referral was appropriate.

One has only to undertake a cursory reading of the Mine Safety Act and the regulations of the Commission to become readily aware that throughout the statutory and regulatory scheme, participation by miners and miners' representatives is not only allowed but also approved of and encouraged in the strongest manner possible. Attorneys who deal with this law and who practice before the Commission must be expected to be alert and sensitive to these participatory rights which are so integral a part of mine safety as envisaged and enacted by Congress.

Over and above the particular statute involved here is the responsibility of an attorney toward potential witnesses and parties. One of counsel's most fundamental responsibilities, if not his most fundamental responsibility, is his duty to insure the integrity of the administration of justice. Accordingly, when counsel speaks, he must think not only of what he means by his statements, but of how his statements will be perceived and interpreted by those to whom he is speaking, especially when they are not attorneys.

The remarks of counsel for the operator this morning demonstrate that he now is aware of these important considerations. As already noted, I have accepted the stipulations. I further accept the representations of

counsel for the operator that he did not intend his remarks to have any effect contrary to the Mine Safety Act and to the Commission's regulations regarding union participation. Yet it cannot be denied that his words may well have had and indeed, did have the proscribed effect, even if he did not so intend. Therefore, it is clear that counsel misspoke. Counsel must be more careful in the future. It is not only what counsel says but what others hear. The care which counsel exercises must be particularly intense when critical issues such as we see here today are involved.

As already indicated, I accept counsel's remarks and apology this morning. I note that the remarks made during the conference call on June 22, 1981, occurred during the first case in which counsel appeared under the Mine Safety Act and the Commission's regulations. I also note that they occurred during a conference call to which the presiding judge and his law clerk themselves were participants. I am confident that there will be no repetition of any such unfortunate situation involving counsel.

In light of the fact that counsel did not intend to violate the Mine Safety Act or the Commission's regulations, in view of his statements here this morning and because this was his first appearance in a Mine Safety Act proceeding, I conclude that no disciplinary proceedings are warranted.

There is one further matter which should be mentioned. This concerns not only the particular matter before me today but disciplinary cases generally. Both the Solicitor and the attorney retained by counsel for the operator have pointed out that at present, the Commission's regulations do not set forth how disciplinary proceedings are to be conducted. For instance, the regulations do not indicate if an individual referring a matter for disciplinary proceedings has the responsibility of presenting evidence in support of possible disciplinary action. Of course, circumstances vary. If an Administrative Law Judge of the Commission refers a matter for possible disciplinary proceedings, he should not be expected to present the evidence himself in any resultant hearing. On the other hand, the situation might be different where the Solicitor or an operator refers a matter for possible disciplinary proceedings. I recognize that under existing regulations the individual against whom possible disciplinary proceedings are considered is given adequate notice, opportunity for reply, and a hearing with opportunity to present evidence and cross-examine. Nevertheless, the overall context in which these rights are to be exercised is not delineated. Certainly, the judge who presides in a disciplinary matter should not have any other function. The situation obviously has many facets. I agree that the matter is worthy of attention and consideration.

The bench decision issued August 6, 1981 is hereby AFFIRMED and this matter is DISMISSED.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style.

Paul Merlin
Assistant Chief Administrative Law Judge

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