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SOL (MSHA) V. OIL SHALE
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF ROBERT K. ROLAND,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEST 83-90-DM

MSHA Case No. MD 83-01

v.

Parachute Creek Mine

OIL SHALE CONSTRUCTORS,
RESPONDENT

ORDER OF DISMISSAL

Before: Judge Carlson

The Secretary of Labor has filed a motion styled "Motion to Withdraw Proposal for Penalty" in which he seeks to withdraw as representative of the complaining miner in this discrimination case, and to withdraw the complaint. (Penalty is mentioned in the title of the motion because the discrimination complaint includes a plea for a civil penalty of \$5,000 in addition to remedies for the miner.)

Before I rule upon the motion, certain prefatory matters must be set forth. On December 14, 1983, Robert K. Roland, the complaining miner, came to the offices of the Commission in Denver and spoke to the undersigned judge. He expressed concern that the Office of the Solicitor had orally advised him on November 21, 1983 that the Secretary would no longer furnish counsel in his case. He was unsure of the posture of his case since the Solicitor's office had not yet made any filing evidencing an intent to withdraw. As Mr. Roland spoke, he made declarations which touched directly upon the merits of the case. I must regard these declarations as an ex parte communication forbidden by Commission rules. While Mr. Roland was in my belief innocent of any improper intent, I concluded at that time that I should disqualify myself from any further proceedings in the case.

On the following day the Secretary's motion for withdrawal was filed. On December 16, 1983, I initiated a telephone conference call with the counsel for Oil Shale Constructors, counsel for the Secretary, and Mr. Roland on the line. At the outset I made known that an ex parte communication respecting the merits had been made, and that I had decided that disqualification was the only proper action on my part. I did not disclose the content of the ex parte declaration in view of the decision to disqualify.

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I did, however, indicate a willingness to rule upon the pending motion should all of the parties agree that I should do so, since that act would not relate to the merits, and would move the matter one step closer to possible resolution. All participants were agreeable.

I further advised Mr. Roland that I would give him fifteen days, if he wished them, in which to file formal objections to the Secretary's motion to withdraw. Mr. Roland indicated an understanding of what was involved and affirmatively waived his right to object.

I also made clear to the parties my intent to grant the motion. I indicated that a question exists as to whether the Secretary possesses an absolute right to decide whether or not to continue representation, once begun, but that for reasons of practicality and fundamental fairness I was not inclined to require the Secretary to particularize his reasons for withdrawal for fear such reasons, if spread upon the record, might substantially prejudice the complaining miner's cause should he elect to refile the case on his own behalf.

No party contested this reasoning. Consequently, the motion is granted, and docket number WEST 83-90-DM is dismissed.

The complaining miner is advised, as he was during the telephone conference, that under my interpretation of the relevant statutory provisions and Commission rules, he has 30 days from the issuance of this order to refile the complaint with the Commission on his own behalf.

John A. Carlson
Administrative Law Judge