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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

DISCIPLINARY PROCEEDING

Docket No. D 85-2

DECISION

Appearances: W. Sydney Trivette, Esq., Pikeville, Kentucky

Before: Judge Melick

This case is before me upon referral by the Commission on September 23, 1985, for disciplinary proceedings under Commission Rule 80(c) 29 C.F.R. 2700.80(c).(FOOTNOTE.1) This matter had been initiated and forwarded to the Commission by one of its administrative law judges for consideration of circumstances regarding the conduct of counsel in a case before that judge, Tennis R. Daniels v. Woodman Three Mining Co., Inc., KENT 85-86-D, a discrimination proceeding pursuant

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to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3). In particular, W. Sidney Trivette, counsel for the complainant in that case was referred for allegedly failing "to substantiate (1) his excuses for his failure to appear at the hearing in this matter in Paintsville, Kentucky on Thursday, July 25, 1985, or (2) his failure to file a timely written motion for continuance or dismissal."

There is no dispute that Mr. Trivette did not appear at the hearing scheduled in the underlying discrimination proceeding and did not file any motion for continuance or dismissal of that case. At initial hearings in this proceeding Mr. Trivette testified that he failed to appear at the hearing in the discrimination case because neither he nor his secretary had placed that hearing date on his calendar. He was sure he received the hearing notice but explained "evidently this had gotten by". His trial calendar maintained by his secretary indeed does not reflect any entry corresponding to hearings in that case for July 25, 1985.

At subsequent hearings, after reviewing the official Commission files in the discrimination case, Mr. Trivette observed that the return receipt (green card) for the certified mailing of the Notice of Hearing to his office was signed by his wife and he explained that he receives both personal and business mail at his office address. Since his secretary indicated that the office file did not as of the date of this hearing contain the subject notice, we are presumably to infer that the notice may have been misplaced or lost before the information it contained could be logged on the trial calendar.

However even had that Notice of Hearing been lost or misplaced it is clear from the record that Mr. Trivette was aware as of May 23, 1985, that a trial had in fact been scheduled in the discrimination case. A "Note to File" dated May 23, 1985, and filed in the official Commission file shows that the judge's secretary asked Mr. Trivette in a telephone call if he had a copy of the May 9, 1985, Notice of Hearing. The note indicates that Mr. Trivette replied that he did not and that the secretary then stated she would send him a copy. (FOOTNOTE.2) At these proceedings Mr. Trivette said he could not recall the conversation. He maintains that he does not know, and cannot explain, why the trial date was not logged

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on his trial calendar. He explains however that because the trial date was not logged on the calendar he was not then aware of the need for his court appearance on that date.

Under the circumstances I believe that Mr. Trivette has now explained as best he can "his excuses for his failure not to appear at the hearing in this matter . . . [and] his failure to file a timely written motion for continuance or dismissal." Thus the stated purpose for the referral of this case by the trial judge and the Commission has been achieved. The reasons for counsel's failure to have appeared at the scheduled trial nevertheless give rise to legitimate concern and deserve comment.

The failure of counsel to have established adequate procedures to assure the proper receipt and logging of trial notices to his office constitutes unacceptable negligence for a practitioner before this Commission. It is particularly tragic in this case because, as a result of this negligence, this marginally literate complainant who was seeking redress for perceived discrimination under the Federal Mine Safety and Health Act lost his opportunity for a trial and disposition on the merits of his complaint.(FOOTNOTE.3) It is also disturbing that counsel, after learning that the discrimination case had been dismissed because of his failure to appear, did not consult with his client about efforts to reinstate the case but allowed the dismissal to stand without challenge.

I also find troubling in these proceedings counsel's statement that it is to be expected of a busy lawyer such as himself that trial dates will occasionally be missed and that over the 12 years of his practice he had missed 2 or 3 other scheduled trial dates. Indeed, failure to appear at trial has resulted in severe sanctions against lawyers. I am also concerned by counsel's suggestion that it was his client's

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obligation to remind him of the trial date. This suggestion indicates a serious lack of understanding of the responsibilities of a lawyer.

In mitigation I note that Mr. Trivette has apologized to the judge who presided at the discrimination case and to the Commission for his failure to have appeared at the scheduled trial and regretted any resulting problems and inconveniences. There is, moreover, no evidence that Mr. Trivette has ever before conducted himself in a less than acceptable manner before this Commission. Finally, I believe that Mr. Trivette is now sufficiently concerned so as to take measures necessary to prevent a repetition of events that led to this unfortunate situation. Because of these mitigating factors I do not believe that any further disciplinary referral is warranted at this time. It would be my recommendation however that any repetition of similar incidents be referred to the Commission for disciplinary action.

This disciplinary proceeding is accordingly terminated. A copy of this decision is being furnished to the Kentucky Bar Association for informational purposes.

Gary Melick
Administrative Law Judge

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FOOTNOTES START HERE:-

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1 20 C.F.R. 2700.80(c) provides as follows: "Procedure. Except as provided in subsection (e), a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission, shall forward such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that the circumstances reported to it warrant disciplinary proceedings, the Commission shall either hold a hearing and issue a decision or refer the matter to a Judge for hearing and decision. Except as provided in subsection (e), no disciplinary action may be taken except by the Commission or the Judge to whom the Commission has referred the matter. The Commission or the Judge to whom the matter has been referred 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 decision shall include findings and conclusions and 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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2 It cannot be determined from that "Note to File" whether the judge's secretary also informed Mr. Trivette in this telephone conversation of the actual trial date appearing in the Notice of Hearing.

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3 The Complainant below, Tennis Daniels, testified at these proceedings that he too did not know of the trial date for his discrimination case and that he did not receive the Notice of Hearing. Since Mr. Daniels concedes that it appears to be his signature on the return receipt (green card) for the registered mailing of that notice, the testimony that he did not receive the notice must be viewed with some skepticism. It is possible, however, because of his limited ability to read (as demonstrated at hearing) that Mr. Daniels did not comprehend the nature and significance of that notice. Mr. Daniels was informed at these hearings that in any event the undersigned did not have jurisdiction to reopen that case and that efforts in that regard should be directed to the Commission.