FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

March 6, 1991

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 90-126 A. C. No. 01-00323-03638
v.	:	Chetopa Mine
DRUMMOND COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Douglas N. White, Esq., and Carl C. Charneski, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia: and George D. Palmer, Esq., and William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, for the Petitioner. Thomas C. Means, Esq., and J. Michael Klise, Esq., Crowell and Moring, Washington, D.C.; David M. Smith, Esq., Maynard, Cooper, Frierson and Gale, Birmingham, Alabama: and J. Fred McDuff, Esq., Drummond Company, Inc., Birmingham, Alabama, for the Respondent.

Before: Judge Merlin

Statement of the Case

This action is a petition for the assessment of six civil penalties filed by the Secretary of Labor against Drummond Company, Inc., under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), hereafter referred to as the "Act".

Drummond Company, Inc., hereafter referred to as the "operator", has filed a motion to remand for reassessment by the Secretary of proposed civil penalties and a memorandum in support thereof. The Secretary has filed a motion and brief in opposition to the motion to remand. Thereafter the operator filed a reply brief. On February 28, 1991, oral argument was heard on the motions.

The parties have agreed to the following stipulations which were accepted at the oral argument (Tr. 3): (1) the operator is the owner and operator of the subject mine: (2) the operator and the mine are subject to the provisions and jurisdiction of the Federal Mine Safety and Health Act of 1977; (3) the Administrative Law Judge of the Federal Mine Safety and Health Review

Commission has jurisdiction in this case: (4) only the proposed penalties in Docket No. SE 90-126 are the subject of the motion to remand: the Secretary agrees that the stipulations and exhibits are true and accurate, but objects to the consideration and/or admissibility of the same on the grounds of relevancy: (5) Program Policy Letter No. P90-III-4, is a true and accurate copy of the policy implemented by the Mine Safety and Health Administration, hereafter referred to as "MSHA", in assessing the penalties in this case: (6) as set forth in the letter and as was applied herein, excessive history is defined as "11 or more repeat violations of the same health or safety standard in a preceding l-year period"; (7) as set forth in the letter and as was applied herein, if the excessive history of each citation consisted of between 11 and 25 violations inclusive, then the proposed penalty was increased 20%. If the excessive history of each citation consisted of between 26 and 40 violations inclusive, then the proposed penalty was increased 30%; (8) the foregoing policy was implemented in this case resulting in four citations being increased by 20% and two citations being increased by 30%.

Issue

The operator challenges the method whereby the Secretary arrived at the amount of penalties she has proposed in this case pursuant to section 110(a) of the Act, supra. In particular, the operator disputes the use made by the Secretary of the operator's prior history of violations in reaching the proposed penalties.

Applicable Law and Policy

Section 110(a), supra, directs the Secretary to assess a civil penalty for every violation. Section 105(a), 30 U.S.C. § 815(a), provides that the Secretary shall notify the operator of the proposed penalty and of appeal rights. Section 105(b)(1)(B), 30 U.S.C. § 815(b)(l)(B), directs the Secretary in determining the proposed penalty to consider the following six factors: the operator's history of previous violations, the appropriateness of the penalty to the size of the operator's business, negligence, the effect on the operator's ability to continue in business, gravity, and demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

Section 105(a), suora, allows the operator 30 days to notify the Secretary of its intention to contest a proposed penalty assessment. If the operator does not contest the proposed assessment within the time allowed, the proposed assessment is deemed a final order of the Commission not subject to review by any court or agency. Under section 105(d), 30 U.S.C. § 815(d), when the operator notifies the Secretary of its intention to contest the proposed assessment, the Secretary must immediately

advise the Commission and the Commission must afford an opportunity for a hearing under the Administrative Procedure Act.

Pursuant to section 110(i), 30 U.S.C. § 820(i), the Commission has the authority to assess all-penalties provided for in the Act and in so doing it must consider the same criteria that the Secretary considers in proposing penalties.

In implementation of her responsibilities under sections 105(a) and (d) and 110(a), supra, the Secretary adopted 30 C.F.R. Part 100. These regulations establish a tripartite scheme for calculating the amount of proposed civil penalties.

The first method is the $20 single penalty assessment. 30 C.F.R. § 100.4. This applies where a violation is not reasonably likely to result in a reasonably serious injury, hereafter referred to as "non S&S", and is abated within the time set by the inspector. As discussed infra, under the single penalty assessment the remaining four criteria, including history of violations, are not individually analyzed in each case.

The second method is the regular assessment formula. 30 C.F.R. § 100.3. The penalty computation is based upon the six factors in section 105(b)(l)(B), supra. Points are given on a sliding scale for each of the criteria and a penalty conversion table translates the points into a dollar amount. Of particular interest for present purposes is the fact that as originally enacted, a history of single penalty assessments was expressly excluded from an operator's history of previous violations when the regular formula was used. 30 C.F.R. § 100.3(c).

The third method is the special assessment which provides that MSHA may waive the regular or single penalty assessments if it determines that conditions surrounding the violation warrant a special assessment. 30 C.F.R. § 100.5. Some types of violations may be of such a nature or seriousness that an appropriate penalty cannot be determined by the first two methods. Under such circumstances, eight categories are identified and are to be reviewed to determine whether a special assessment is appropriate. Special assessments are also to take into account the six criteria.

The genesis of the issues presented in this case is to be found in the decision of the Court of Appeals for the District of Columbia in Coal Employment Project. et al. v. Dole, 889 F.2d 1127 (1989), where the validity of the single penalty assessment was challenged on the ground that under that method individualized consideration was not given to all six statutory criteria. As set forth above, a single penalty assessment of $20 is

levied for a non S&S violation that is timely abated, but where separate consideration is not given to the other criteria.

The court of appeals held that the Secretary was not required to adopt an individualized approach to all six criteria and that as a general matter assessment of penalties according to group classifications based upon the presence or absence of specific criteria was a reasonable interpretation of the Act. The court approved the use of a non-generalized approach with respect to the operator's size, ability to continue in business, and negligence. Id. at 1134-1136.

The court however, expressed far different views regarding prior history of violations which it described as an especially important criterion in Congress' eyes. Id. at 1136. The court cited the legislative history of the Act to demonstrate that Congress had been concerned with repeat offenders and it said that Congress intended that civil penalties provide an effective deterrent against all offenders and particularly against offenders with records of past violations. The court then pointed out that violation history figured in the validity of the single penalty assessment in two ways: (1) its presence or absence in the single penalty assessment under section 100.4; and (2) the omission of single penalty assessments from history in application of the regular and special assessment formulas. Id. at 1136.

The court then turned to two scenarios to illustrate its concerns. In the first situation, an operator who commits a series of non S&S violations that are timely abated would only incur a string of $20 penalties. The court believed this was contrary to Congress' intent that the more prior infractions incurred, the higher the current penalty should be and that there was no evidence Congress did not mean this approach to apply to violations governed by the single penalty assessment. Unpersuaded by MSHA's representations about how the penalty scheme was in fact administered, the court held that the scheme must take into account the operator's history of violations whether they are significant and substantial, hereafter referred to as "S&S", or non S&S. MSHA regulations were, therefore, held unreasonable because they did not provide a method for imposing higher penalties against operators who commit numerous non S&S violations. Id. at 1136-1138. Accordingly, the court's decision may be fairly interpreted to hold that the failure to take account of previous non S&S violations in determining the assessment of a current non S&S violation was error.

In the second situation described by the court, an operator commits an S&S violation after a series of single penalty assessments. Section 100.3(c) provided that the history of single penalty assessments would not be included in a penalty computation under the regular assessment formula. Contrary to the

regulations, MSHA represented to the court that where an S&S violation was repetitious, i.e. similar to the prior non S&S violation, it could be subject to special assessment. Even assuming this were true, the court pointed out that if the later S&S violation was not repetitious of the earlier non S&S violation, only a regular assessment would be generated which would not take into account prior non S&S violations. Id. at 1138.

Therefore, the court remanded the case to (1) resolve the inconsistencies between MSHA's regulations and its representations to the court so as to insure that MSHA took account of past single penalty violations in deciding whether a special assessment is required when a current violation itself might qualify for a single penalty assessment and (2) to amend or establish regulations to clarify how administration of the single penalty standard would take account of the history of both S&S and non S&S violations. In the interim until MSHA formally complied with the remand, it was directed to instruct field personnel, (1) to consider an operator's history of non S&S violations in assessing a single penalty assessment and (2) to consider an operator's history of past single penalty assessments when imposing regular assessments against an operator who commits an S&S violation after having committed a series of non S&S violations. Id. at 1138.

MSHA initially responded to the court's order by issuing interim regulations. 54 Fed. Reg. 53609 (1989). These instructions (1) called for a special assessment review of non S&S violations involving high negligence and excessive history of the same type of violation and (2) suspended the sentence in section § 100.3(c) which excluded prior single penalty assessments from the regular assessment formula. In a per curiam opinion dated April 12, 1990, the court disapproved the use of a high negligence factor, but did not disturb the partial suspension of section 100.3(c), noted herein. The court also told MSHA to devise a suitable interim replacement responding to the court's concerns within 45 days and noted MSHA's intention to publish a proposed final rule by August, 1990. Coal Employment Project v. Dole, 900 F.2d 367, 367-368 (D.C. Cir. 1990).

Thereafter on May 29, 1990, MSHA issued Program Policy Letter No. P90-III-4. This letter states it is implementing a program of higher penalties for violations that meet a new "excessive history" criteria. For each violation both an overall history of violations and a repeat history of the same mandatory standard are calculated. Excessive history is defined as (1) 16 or more penalty points as derived from the table appearing in section 100.3(c) for the calculation of prior history points under the regular assessment formula or (2) 11 or more repeat violations of the same standard within a preceding one year period.

The program policy letter further provides that non S&S violations with excessive history are no longer eligible for the single penalty assessment and that MSHA elects to waive the single penalty in such cases and to assess penalties under the regular formula. In addition, S&S violations with excessive history that previously would have received a regular formula assessment will now receive a special history assessment, since MSHA elects to waive the regular formula assessment and assess under the special assessment method. Finally, the special history assessments for S&S violations are based on the regular formula point system plus a percentage increase for excessive history which will be added to the penalty. The percentage increases consist of three progressive increments of 20% to 40% based upon overall history points or number of repeat violations.

In the instant case the six contested violations were specially assessed pursuant to the program policy letter. Four violations cited under 30 C.F.R. § 75.503 were subject to a 20% increase in their regular assessments and two violations of 30 C.F.R. § 75.400 were subject to a 30% increase. (Stipulation No. 8).

The operator does not question the court's decision or directives in Coal Employment Project, et al. v. Dole, supra. Rather, it alleges that the program policy letter goes beyond what the court ordered, that the letter is contrary to the court's decision as well as to the Act and regulations, and that the letter was promulgated without notice and comment as required by the Administrative Procedure Act.

Jurisdiction

The threshold issue is whether or not I have jurisdiction to entertain the issues presented. In this respect, the Commission's decision in Youuhioahnev & Ohio Coal Company 9 FMSHRC 673 (1987), is instructive. In that case the operator Argued that since the Secretary had not complied with the Part 100 regulations in proposing penalties the case should be remanded to MSHA for reconsideration of the penalties. 9 FMSHRC at 679. The Commission held that since the administrative law judge had conducted an evidentiary hearing on the merits, no compelling legal or practical purpose would be served by requiring the Secretary to undertake again the proposing of the penalties. In the Commission's view, a preferable record had already been developed which allowed the Commission to assess penalties under its de novo authority. Once a hearing had been held, the

determination by the Commission or one of its judges that the secretary failed to comply with Part 100 did not require affording the Secretary further opportunity to propose penalties. The Commission however, also stated:

> * * * * We further hold, however, that in certain limited circumstances the Commission may require the Secretary to re-propose his penalties in a manner consistent with his regulations.
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> We further conclude, however that it would not be inappropriate for a mine operator prior to a hearing to raise and, if appropriate, be given an opportunity to establish that in proposing a penalty the Secretary failed to comply with his Part 100 penalty regulations. If the manner of the Secretary's proceeding under Part 100 is a legitimate concern to a mine operator, and the Secretary's departure from his regulations can be proven by the operator, then intercession by the Commission at an early stage of the litigation could seek to secure Secretarial fidelity to his regulations and possible avoidance of full adversarial proceedings.* * * *

Id. at 679-680.

In the instant case there has been no hearing on the merits. At the very outset the operator raised the issue of the validity of the method pursuant to which the Secretary proposed the six penalties involved here. Therefore, this case falls within the Commission's pronouncement that where there is no record, the Commission can require the Secretary to re-propose penalties if the operator proves the Secretary has not followed Part 100. (Operator's Reply Brief, p. 2).

The Solicitor's argument that the Commission's statements regarding jurisdiction are only suggestions cannot be accepted. (Solicitor's Brief, pp. 8-9). As set forth above, the Commission described its declaration as a holding and a conclusion. And its statements regarding what may be done in a situation like this case are straightforward and definitive. As for the Solicitor's assertion that the Commission is wrong in this respect, it need only be remembered that decisions of the Commission are binding upon its judges. I have previously rejected as mischievous any notion that I am at liberty to depart from Commission teachings. U. s. Steel Minins Company, Inc., 5 FMSHRC 746 (May 1986). The Solicitor's further assertion that this case is distinguishable

from Youshioshenv & Ohio, because it does not involve the Secretary's failure to abide by her own penalty regulations, also must be rejected. (Solicitor's Brief, p. 9). The operator contends that the Secretary's present attempt to propose penalties is based upon the invalid instructions of the program policy letter. (Operator's Brief, pp. 4-5; Operator's Reply Brief, pp. Z-4). If the instructions are found invalid, the Secretary must then propose penalties in accordance with Part 100 without recourse to the instructions. In other words, the operator's allegation is that at present the Secretary is not following Part 100 without the added instructions of the program policy *letter* which the operator believes are illegal. This case is therefore, within the purview of Youahioahenv & Ohio.

Accordingly, I conclude I have jurisdiction to consider the issues presented.

The Court's Interim Mandate

We turn now to the validity of the method whereby MSHA has proposed penalty assessments in the instant case. This inquiry depends in the first instance upon whether the method used by MSHA as set forth in the May 29, 1990, Program Policy Letter conforms to the court's decision and order in Coal Employment Project v. Dole, supra. As already noted, the operator does not contest the court's instructions to MSHA. The questions presented are what the mandate means and whether MSHA's letter complies with it. As explained heretofore, the court approved the single penalty assessment with respect to three of the four statutory criteria which received group classification treatment. The court however, took a different stance with respect to history of prior violations. The court emphasized that this factor was of singular significance in the adoption and administration of the Act and directed its attention to the effect given by Part 100 to a prior history of single penalty assessments, i.e. non S&S violations that are timely abated. It noted that 30 C.F.R. § 100.4 made no provisions for taking such history into account when proposing a single penalty assessment and that one sentence in 30 C.F.R. § 100.3(c) provided that in proposing regular assessments, a prior history of single penalty violations would not be counted.

The court held first that the regulations were unreasonable because when assessing a current non S&S violation they did not provide a reasonable and consistent method for imposing higher penalties against operators who had committed numerous past non S&S violations. The court further held that with respect to current S&S violations which are not repetitious of earlier non S&S violations, MSHA regulations and policies were deficient because they implied that the current violations would result only in regular assessments which would not reflect the earlier violations. Accordingly, the court ordered MSHA, inter alia, to

establish regulations to clarify how the single penalty assessment would take account of both a non S&S and an S&S history. In the interim the court required MSHA (1) in assessing single penalties to consider an operator's history of non S&S violations and (2) to consider a past history of single penalties when imposing regular assessments against operators who have a current S&S violation.

The May 29, 1990, Program Policy Letter establishes a new element which the Secretary must take into account when proposing civil penalties under the Act. As already explained, this element, entitled "excessive history", comes into existence either when an operator has more than 16 penalty points as derived from Table 6 in section 100.3 of the regulations or more than a given number of repeat violations of the same health and safety standard. In its "Background" discussion the letter states that increased assessments at mines with an excessive history of both S&S and non S&S violations should serve as a more effective deterrent. Clearly, therefore, excessive history encompasses both categories of violations.

The program policy letter's adoption of an excessive history standard which includes both S&S and non S&S violations, exceeds the court's interim mandate. To be sure, the court conducted a wide ranging analysis of the crucial part played by prior history in proposing and assessing penalties. But in considering the challenge before it to the single penalty assessment, the court focused upon the history of single penalty assessments as that history relates to assessments of current S&S violations and current non S&S violations. The first hypothetical given by the court was of an operator who commits a series of non S&S violations and receives only a string of $20 penalties, i.e. an operator with a current non S&S violation after of history of previous non S&S violations. The second hypothetical was concerned with an operator who commits a current S&S violation (non-repetitious) after an earlier series of non S&S violations. With these examples in mind, the court directed the Secretary as an interim matter to consider an operator's history of non S&S violations both in assessing current single penalties and imposing current regular assessments. The program policy letter goes beyond the court's interim instructions because it deals not only with the operator's history of non S&S violations but also with its S&S history.

In light of the foregoing, the program policy letter's declaration that non S&S violations with excessive history are no longer eligible for the single penalty assessment cannot be accepted as within the confines of what the court allowed MSHA to undertake immediately.

so too, the program policy letter's pronouncement that S&S violations with an excessive history will now receive a special

history assessment, as set forth heretofore, with percentage increments in penalty amounts also cannot be approved. The terms of the interim mandate are clear and the program policy letter goes beyond them.[1]

Finally, it must be recognized that the court in Coal Employment Project v. Dole, sunra, contemplated that there would be rulemaking to bring Part 100 in line with the legislative history and purposes of the Act. The second portion of the court's remand directs MSHA "to amend or establish regulations" to clarify how administration of the single penalty standard would take account of a history of violations that did and did not pose significant and substantial threats to miner safety. The court issued its interim mandate for limited agency action until MSHA "formally" complied with the remand. One must not lose sight of the clear distinction between the remand and the interim instructions. The interim instructions concern only the role of a prior non S&S history, whereas the remand, which envisages formal procedures, encompasses a history of both types of violations, S&S and non S&S.

I find unconvincing the Solicitor's representations that the rulemaking now undertaken by the Secretary with respect to prior history and other matters, is voluntary. (Solicitor's Brief, p. 17); 55 Fed. Reg. 53481 (1990). The notice of proposed rulemaking makes clear that it is being undertaken pursuant to the court's remand. The program policy letter is an attempt to put new rules regarding the treatment of history of prior violations on a fast track without reference to the court's intent regarding new regulations which would be adopted pursuant to formal compliance with its remand. In addition, the prospective nature of the proposed rulemaking which applies only to citations and orders issued after January 1, 1991, undercuts the fast track approach of the letter.

Administrative Procedure Act

The next inquiry is whether the program policy letter can stand on its own without reliance upon the court's interim

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[1] In this connection it is noted that the first interim instructions sunra, were plainly correct in suspending the sentence in section 100.3(c) which had excluded timely paid single penalty assessments from an operator's history for regular assessment purposes. The history covered was only that of non S&S violations and the offending sentence was specifically identified by the court. As already set forth, the court's per curiam decision let stand the suspension.

mandate. This depends upon whether notice and comment are required under the Administrative Procedure Act.

Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, hereafter referred to as the "APA", provides that when an agency proposes to engage in rulemaking, it must publish notice of the proposed rulemaking in the Federal Register, give interested persons an opportunity to participate in the rulemaking through submission of written data, views or arguments with or without opportunity for oral presentation, and publish the final rule incorporating a concise statement of its basis and purpose 30 days before its effective date.

Section 551(4), 5 U.S.C. § 551(4), defines a rule as follows:

> (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on-any of the foregoing;

An exception to the notice and comment requirement is however, given by section 553(b)(A), 5 U.S.C. § 553(b)(A):

> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice.

Essential to a proper determination of the instant case is recognition and acknowledgment of the important purposes served by notice and comment. One purpose of the rulemaking process is to insure a thorough exploration of relevant issues culminating in application of agency expertise after interested parties have submitted their arguments. Pacific Gas and Electric Company v. Federal Power Commission, 506 F.2d 33, 39 (D.C. Cir. 1974). Another purpose is to provide that the legislative function of administrative agencies is so far as possible exercised only upon public participation and notice as a means of assuring that an agency's decisions are both informed and responsive. American Bus Association v. United States, 627 F.2d 525, 528 (D.C. Cir. 1980). Also, public participation and fairness must be reintroduced to affected parties after governmental authority has been delegated to unrepresentative agencies. Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980). Finally, notice and comment

are necessary to the scheme of administrative governance established by the APA because they assure the legitimacy of administrative norms. Air Transaort Association of America v. Department of Transportation, 900 F.2d 369, 375 (D.C. Cir. 1990).

It is likewise critical to recognize the characteristics of "legislative" or "substantive" rules which can only be issued after notice and comment. Substantive rules establish binding *norms* which determine present rights and obligations. American Bus Association v. United States, sunra, at 532. They are rules which carry the force of law and in so doing grant rights, impose obligations or produce other significant effects on private interests. Batterton v. Marshall, supra, at 701-702. Such rules have a present binding effect. Community Nutrition Institute v. Young, 818 F.2d 943, 947 (D.C. Cir. 1987).

A particularly salient characteristic of agency action subject to notice and comment is the reduction or elimination of agency discretion. The following are instances where for this reason notice and comment were required. Parole Board guidelines reduced the decision maker's field of vision and defined a fairly tight framework, thereby circumscribing the agency's statutorily broad power. Pickus v. United States Board of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974). An agency policy letter immediately lifted restrictions against certain carriers and did not even hint to decision makers that they could exercise discretion. American Bus Association v. United States of America, supra, at 531-532. A statistical methodology adopted for computation of unemployment statistics was a formula which left no discretion to weigh or alter contributing elements. Batterton v. Marshall, supra, at 707. A part of an agency's program letter limited state discretion and imposed a new obligation on the states by establishing a mathematical formula for determining contributions to pension funds. Cabais v. Egger, 690 F.2d 234, 239 (D.C. Cir. 1982). Rules establishing allowable levels of food contaminants cabinned agency enforcement discretion by precluding prosecution of certain producers. Community Nutrition Institute v. Young, supra, at 948. Agency orders shaped and channeled enforcement by eliminating certain specific obligations regarding airline advertising. State of Alaska v. U.S. Department of Transportation, 868 F.2d 441, 447 (D.C. Cir. 1989).

Section 553(b)(A) of the APA, sunra, establishes exceptions to notice and comment, one of which is for general statements of policy. In analyzing whether an agency action falls within one of the exceptions under section 553(b)(A), the courts have established certain general principles. Exceptions to notice and comment requirements are to be narrowly construed and only reluctantly recognized. Air Transport Association of America v. Department of Transportation, supra, at 375; American Hospital Association v. Bowen, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987); Batterton v. Marshall, sunra, at 704; American Bus Association v.

United States, supra, at 528. In addition, an agency's characterization of its action is given some but not overwhelming deference. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537-538 (D.C. Cir. 1986). Thus,' an agency's description of an act as a policy statement provides some indication, but an announcement is not necessarily a policy statement because the agency has so labelled it. Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983); General Motors Cornoration v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984); Chamber of Commerce v. Occupational Safety and Health Administration, 636 F.2d 464, 468-469 (D.C. Cir. 1980); Pacific Gas and Electric Company v. Federal Power Commission, supra, at 39.

With these precepts in mind, the courts have paid much attention to the attributes of a particular exception. In the case of a general statement of policy, courts have examined whether the statement establishes a binding norm and is finally determinative of the issues or rights to which it is addressed. Pacific Gas and Electric Company v. Federal Power Commission, supra, at 38. Those agency actions that are not binding or finally determinative are viewed as policy statements. Another attribute of a general statement of policy is agency discretion. Just as the absence of agency discretion is a hallmark of a substantive rule, so the presence of such discretion connotes a general statement of policy. A policy statement genuinely leaves the agency and its decision makers free to exercise discretion. American Bus Association v. United States, sunra, at 529. Guidelines adopted for use in citing operators and independent contractors under the Mine Safety Act did not constitute a binding substantive regulation, because the language of the guidelines was replete with indications that the Secretary retained discretion to cite operators or contractors as he saw fit. Brock v. Cathedral Bluffs Shale Oil Co., supra, at 538. An agency statement that there were no grounds to delay awarding certain licenses by random selection, i.e. lottery, was not a binding rule but only interpretative, since the agency was not bound to any specific procedures or even to conduct a lottery. National Latino Media Coalition v. Federal Communications Commission, 816 F.2d 785, 789 (D.C. Cir. 1987).

Applying the foregoing principles to the case at hand, I conclude that notice and comment under the APA are required and that until they take place the program policy letter cannot be applied. By every measure, the precepts laid down by the letter must be held to be substantive and not merely a general statement of policy as asserted by the Solicitor. (Solicitor's Brief, p. 11). The letter sets forth the exact numerical levels at which an excessive history comes into being and the letter further details precisely what occurs when these levels are attained. Non S&S violations with excessive history are subject to the regular assessment formula and S&S violations with excessive history are subject to a special history assessment formula

containing prescribed percentage increments in penalty amounts. The Secretary's broad authority under the Act to propose penalties in accordance with the six criteria is channelled, shaped, and indeed circumscribed in a tight framework. Air Transport Association of America v Department of Transportation, sunra; Community Nutrition Institute v. Young, sunra; Pickus v. United States Board of Parole, sunra. Absent is agency discretion with respect to a large number of cases involving prior history of violations and in place is a rigid mathematical formula which allows no room for maneuver either with respect to the existence or consequences of an excessive history. Batterton v. Marshall, sunra; Cabais v. Egger, sunra.

Accordingly, if an operator has a certain number and type of violations within a given period it is charged with an excessive history and when it has such a history, its civil penalty liability is increased along prescribed lines. That is what happened in this case. The provisions of the letter were applied and the operator owed more money. Such circumstances demand that interested persons be given notice and opportunity to participate in rulemaking before the letter becomes final. MSHA should welcome the input of those who would be so directly and seriously affected by the dictates of the letter. Without such input the letter lacks requisite legitimacy.

I have carefully reviewed the arguments advanced by the Solicitor with respect to notice and comment, but cannot accept them. The assertion-that notice and comment are not required because the letter does not change the penalty proposal and assessment scheme is not persuasive. (Solicitor's Brief, pp. 12-14). Admittedly, the letter does not alter the steps through which each penalty proposal and assessment pass, e.g., assessment conference. 30 C.F.R. § 100.6. However, this case has nothing to do with the procedural framework for determination of individual penalty amounts, or with the division of functions between the Secretary and the Commission, or with the independent authority of the Commission to assess penalties de novo. Rather this case involves imposing additional monetary obligations upon operators pursuant to a new method of penalty calculation without allowing said operators to be heard first with respect to the propriety of the new method.

I also find misplaced the Solicitor's proposition that notice and comment are not required because the Secretary's penalty proposals are not final. (Solicitor's Brief, pp. 13-14; Oral Argument Tr. 38-41, 52-54). The appealability to the Commission of the Secretary's penalty proposals does not mean that notice and comment are unnecessary. The Secretary's proposal function is an indispensable part of the Act's civil penalty scheme. In addition, section 105(a) of the Act, sunra, provides that penalty proposals of the Secretary which are not appealed are final and not subject to any kind of review. In fact, almost

all the Secretary's penalty proposals become final under this provision. The appeal rate to the Commission from MSHA proposed assessments were 3.2% in FY'88, 3.7% in FY'89, 4% in FY'90 and 6.7% for the first four months of FY'91.[2] The realities of how the civil penalty system actually works cannot be ignored. Even in cases that come before the Commission, the Solicitor submits sufficient information for the Commission to approve settlements in the amount of the original assessment in a significant percentage of all settlement cases. Thus, in FY'90 the Commission approved settlements in the amount of the Secretary's original proposal in 29% of all settlement cases.[3] The Solicitor's purported distinction regarding finality notwithstanding, Batterton v. Marshall, sunra, is precisely on point and its holding that notice and comment are necessary for a methodology of mathematical calculations signifies how this case should be decided. (Solicitor's Brief, p. 16; Operator's Reply Brief, pp. 5-6).

Nor does Air Transport Association of America v. Department of Transportation, supra, support the Solicitor. (Solicitor's Brief, pp. 14-15). The significance of that case is to be found in the extension of notice and comment requirements to the adoption of a procedural framework for adjudication of-civil penalties before the Federal Aviation Administration. The majority of the court refused to countenance an exception to the notice and comment requirements for an agency's rules of procedure. What is significant for our purposes is that both the majority and dissent in Air Transport agreed that changes in substantive criteria-such as those embodied in the program policy letter are subject to notice and comment. Air Transport, supra, at 375-376, 382.

In this connection also, the Solicitor's representations regarding the allegedly voluntary nature of the proposed rulemaking which the Secretary has undertaken regarding citations issued after January 1, 1991, are not persuasive. As set forth herein, judicial precedent makes clear that notice and comment under the APA are required for the changes the Secretary wants to make. The proposed rulemaking recognizes this and is inconsistent with the attempt of the program policy letter to act without reference to the safeguards of the Administrative Procedure Act.

Finally, notice and comment cannot be excused on the basis of the "good cause" exception. 5 U.S.C. § 553(b)(3)(B). As noted above, the Secretary's initial response to the court's mandate in Coal Employment Project, et. al. v. Dole, sunra, was

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[2] See, Solicitor's response filed February 12, 1991.

[3] See, Memorandum dated February 25, 1991, from Chief Docket Clerk, which was admitted into the record at the Oral Argument as ALJ Exhibit No. 1. (Tr. 4).

interim regulations which relied upon the immediacy of the court's instructions as constituting good cause for dispensing with notice and comment. The court struck down that portion of the interim regulations which it perceived as contrary to its decision. The program policy letter is, of course, not an interim regulation and does not even refer to the good cause exception. The Solicitor's argument that the good cause exception applies because the letter accomplishes the result ordered by the court, must fail in light of the fact that, as held above, the letter goes far beyond the court's interim instructions. (Solicitor's Brief, pp. 18-19).

In light of the foregoing, I conclude that notice and comment under the Administrative Procedure Act are necessary before the program policy letter can be effective.

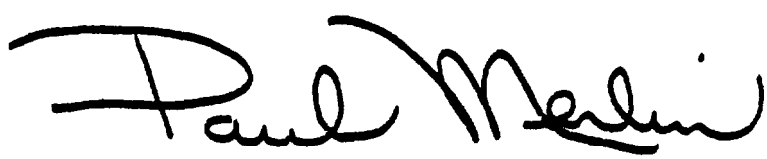
Conclusion

The foregoing is dispositive of the claims made by the parties. It is noted that the operator also attacks the program policy letter on its merits. The substantive validity of pending changes in the treatment of prior history is presented in the proposed rulemaking. In light of the several holdings rendered herein, it is neither necessary nor appropriate to consider the merits.

Order

In light of the. foregoing, it is ORDERED that the operator's motion for remand be **GRANTED.**

It is further ORDERED that the Secretary recalculate her proposed penalties without reference to Program Policy Letter No. **P90-III-4.**



Paul Merlin
Chief Administrative Law Judge

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