

CCASE:
MSHA V. KENTUCKY CARBON
DDATE:
19810723
TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 23, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)

On behalf of:
BOBBY GOOSLIN

v. Docket No. KENT 80-145-D

KENTUCKY CARBON CORPORATION

DECISION

This case involves the temporary reinstatement of a discharged miner under section 105(c)(2) of the 1977 Mine Act, 30 U.S.C. §815(c)(2) (Supp. III 1979). 1/ The broad legal question presented here is whether

1/ Section 105(c)(2) provides:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity

for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph. [Emphasis added.]

~1708

an operator is afforded due process of law by the hearing on a Commission judge's order of temporary reinstatement that is provided for by Commission Rule 44(a). Rule 44(a) implements the temporary reinstatement provisions of section 105(c)(2) of the Mine Act. It provides:

Contents of application; procedure; hearing. An application for reinstatement shall state the Secretary's finding that the complaint of discrimination, discharge or interference was not frivolously brought and the basis for his finding. The application shall be immediately examined, and, unless it is determined from the face of the application that the Secretary's finding was arbitrarily or capriciously made, an order of temporary reinstatement shall be immediately issued. The order shall be effective upon issuance. If the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made. The Judge may then dissolve, modify or continue the order.

For the reasons that appear below, we hold that Rule 44(a), insofar as it establishes an "arbitrary or capricious" standard of review at the temporary reinstatement hearing, does not satisfy the minimum requirements of the Constitution's Fifth Amendment due process clause. The facts of the case are as follows. Bobby Gooslin was employed as a miner by Kentucky Carbon Corporation. On October 2, 1979, Kentucky Carbon suspended Gooslin, with intent to discharge, allegedly for causing an unauthorized work stoppage at the mine. 2/ He was discharged soon thereafter. Following his discharge, Gooslin filed a discrimination complaint with the Mine Safety and Health

Administration (MSHA). On January 18, 1980, after MSHA had conducted an initial investigation of Gooslin's complaint, the Secretary filed an application for temporary reinstatement with the Commission. In the application, the Secretary stated that MSHA's preliminary investigation into the merits of the discharged miner's complaint disclosed, among other things, the following:

6. On Saturday morning, September 29, 1979, several miners returning from work informed ... Gooslin that ... the roof, in several specific areas of the mine, including the main line, was in a dangerous condition, that they were fearful of working under the roof in its existing condition, and that they wanted a safety inspection to be made before their scheduled return to work on Sunday evening, third shift, September 30, 1979.

2/ In a letter to Gooslin, dated October 2, 1979, Kentucky Carbon stated:

The Company has concluded that your actions on September 30, 1979 were the efficient cause of an unauthorized work stoppage and clearly establish you as a primary contributor in the instigation of a work stoppage in violation of the Agreement.

For this offense, you are hereby suspended with intent to discharge effective immediately.

(Res. Exh. R 3).

~1709

7. Thereafter ... Gooslin made several attempts to secure an MSHA inspection. However, Mr. Gooslin was unsuccessful and did not inspect the ... mine....

8. On or about September 30, 1979, unable to secure an MSHA inspection, ... Gooslin sought assistance from the UMW District 30 Safety Inspector, James Boyd. Mr. Boyd ...agreed to meet... Gooslin at the mine prior to the commencement of the third shift that evening, Sunday, September 30, 1979.

9. ... Gooslin called [Kentucky Carbon's] Superintendent William Meade, and informed Mr. Meade that he had requested an MSHA inspection and that he wished to make a safety inspection at the ... mine later that evening prior to the commencement of the third shift. Mr. Meade initially agreed, then called ... Gooslin back and advised that the inspection would not be permitted.

10. Notwithstanding Mr. Meade's refusal to inspect, ... Gooslin proceeded to the mine to keep the previously scheduled meeting with Mr. Boyd. Upon Mr. Gooslin's arrival

at the mine, [Kentucky Carbon's] Mine Foreman James Christian informed Mr. Gooslin that an inspection of the mine would not be permitted at that time.

11. Thereafter, ... Gooslin advised the miners, who had begun to assemble on the mine property in preparation for the commencement of the shift, that a safety inspection had been refused.... Gooslin left the mine property at approximately 11:15 p.m. September 30, 1979.

12. Thereafter, approximately 1 hour later, the miners decided to not work.

13. Gooslin asserts that he at no time, encouraged, suggested, or in any way caused the resulting work stoppage that occurred ... on October 1, 1979.

14. On October 2, 1979, [Kentucky Carbon] discharged ... Gooslin.

15. ... Gooslin asserts that he was lawfully discharging his duty as President of the local, as safety committeeman, and as a miner in seeking to inspect the mine and the claimed dangerous roof conditions.

On the basis of MSHA's preliminary investigation, the Secretary concluded that Gooslin's complaint was "not frivolously brought". Cf. Rule 44(a). Accordingly, the Secretary requested that the Commission order Kentucky Carbon to temporarily reinstate the discharged miner.

On January 22, 1980, the Commission's Chief Administrative Law Judge granted the relief requested by the Secretary and issued an order of temporary reinstatement. In the reinstatement order, the Chief Judge

~1710

stated, "[i]t does not appear from the face of the application that the Secretary's finding was arbitrarily or capriciously made." 3/ Kentucky Carbon then requested a hearing on the temporary reinstatement order as provided for by Rule 44(a), and a hearing was held on January 30, 1980 before the Chief Judge. 4/ At the reinstatement hearing, Kentucky Carbon attempted to prove that Gooslin was lawfully discharged and that, therefore, his complaint to the Secretary was frivolously brought. The Chief Judge, however, refused to receive testimony on that issue, stating:

I think you are getting into the merits of the discharge which are not before me. Was or was not Mr. Gooslin discharged in violation of section 105(c) of the Act is not an issue before me in this hearing. No complaint has been filed. The issue of whether the complaint was frivolously brought is an issue peculiarly before the Secretary.

The Commission's role in this proceeding is totally to

determine whether the Secretary's finding was arbitrary and capricious, a very limited role. I am not prepared to hear evidence on the question either of whether Mr. Gooslin was discharged in violation of section 105(c) or whether the complaint Mr. Gooslin made to the Secretary was or was not frivolous.

My issue is a very limited one as I set out in the Notice of Hearing, namely was the Secretary's finding arbitrarily or capriciously made? ... The Commission's rules provide for this kind of hearing on an expedited basis, but the issue is a very limited one.

(Tr. 56-57).

On January 31, 1980, the Chief Judge issued an order affirming his earlier order of temporary reinstatement on the ground that Kentucky Carbon had failed to establish that the Secretary acted "arbitrarily or capriciously" in determining that Gooslin's complaint was not frivolously brought. From the January 31st order of temporary reinstatement, Kentucky

3/ Rule 44(a) requires that the Secretary's application for temporary reinstatement contain a finding that the miner's complaint was "not frivolously brought".

4/ Rule 44(a) states that "[i]f the person against whom relief is sought requests a hearing on the order, a Judge shall, within 5 days after the request is filed, hold a hearing to determine whether the Secretary's finding was arbitrarily or capriciously made."

~1711

Carbon sought Commission review. On March 10, 1980, we granted Kentucky Carbon's petition and directed review of the order of temporary reinstatement. 5/

On review, Kentucky Carbon argues that the "arbitrary or capricious" scope of the Rule 44(a) temporary reinstatement hearing is so narrowly drawn as to deny it due process of law. We agree. 6/ Although the Chief Judge correctly applied existing Rule 44(a) in limiting the scope of the temporary reinstatement hearing to the question of whether the Secretary acted "arbitrarily or capriciously", our re-examination of that rule convinces us that the "arbitrary or capricious" standard, as it relates to the temporary reinstatement hearing, does not comport with the minimum requirements of the due process clause.

The due process clause contemplates more than is currently provided the operator by Rule 44(a). Due process contemplates fundamental fairness. 7/ As the Supreme Court stated in *Boddie v. Connecticut*, 401 U.S. 371 (1971):

What the Constitution does require is 'an opportunity ... granted at a meaningful time and in a meaningful

manner,' ... 'for [a] hearing appropriate to the nature of the case,' ... [401 U.S. at 378; Court's emphasis; citations omitted.]

See also, e.g., *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

5/ In our direction for review, we stated that the reinstatement order was to remain in effect pending our decision. We also stated that we were not suspending proceedings on the discrimination complaint that the Secretary had filed on behalf of Gooslin. In that complaint, filed with the Commission on February 8, 1980, the Secretary alleged that Kentucky Carbon had discharged Gooslin in violation of section 105(c)(1) of the Mine Act. Section 105(c)(1) in part provides that "[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...." The Secretary's discrimination complaint was based upon the same set of facts that prompted the Secretary to seek the interim remedy of temporary reinstatement in this case.

6/ Kentucky Carbon's petition for review also raises issues involving the contents of the Secretary's application for temporary reinstatement and the informant's privilege contained in Commission Rule 59. However, because of our disposition of this case, we need not address those issues here.

7/ In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), Justice Frankfurter, in a concurring opinion, described due process as:

Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process. [341 U.S. at 162-163.]

~1712

Because of the narrow and restrictive scope of the "arbitrary or capricious" standard of review, we believe that the Rule 44(a) temporary reinstatement hearing procedure falls short of providing the operator with elemental fairness. Rule 44(a) does not provide the operator with a sufficient opportunity to show that an order of temporary reinstatement should not be continued. Accordingly, we hold that the hearing provided by Rule 44(a) does not comport with

due process.

Because Kentucky Carbon was denied due process, we therefore, vacate the January 31, 1980 order of temporary reinstatement. Subsequent events, however, render it unnecessary to remand the case for further proceedings on the temporary reinstatement application. On March 18, 1981, a Commission judge decided the merits of the Secretary's discrimination complaint (see n. 5) in favor of Gooslin and ordered Kentucky Carbon to reinstate him permanently to his former position with full seniority rights. 8/ Kentucky Carbon did not seek review of that decision. Thus, there is no continued need for the interim relief of temporary reinstatement. 9/ Accordingly, the January 31, 1980 order of temporary reinstatement is vacated.

8/ The judge's decision is reported at 3 FMSHRC 640 (1981).

9/ Because there is no need to remand, we do not, in this decision, delineate what procedures are required to satisfy due process. Rather, we believe that rulemaking, presently underway, is the better vehicle for restructuring the scope of the Rule 44(a) temporary reinstatement hearing.

~1713

Distribution

Michael McCord, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203
C. Lynch Christian, III, Esq.
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, West Virginia 25322
Timothy M. Biddle, Esq.
Crowell & Moring
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
W. Timothy Pohl, Esq.
Carbon Industries, Inc.
Suite 1300
One Valley Square
Charleston, West Virginia 25301
Mary Lu Jordan, Esq.
United Mine Workers of America
900 15th St., N.W.
Washington, D.C. 20005
Administrative Law Judge James Laurenson
FMSHRC

5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041