CCASE:
SOL (MSHA) V. US STEEL
DDATE:
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TTEXT:
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
JUNE 14, 1984

SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. WEST 80-386-RM WEST 81-58-M
v.	WEST 80-160-M
UNITED STATES STEEL CORPORATION	
and	
SECRETARY OF LABOR,	Docket Nos. LAKE 81-116-M
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	LAKE 81-77-RM
v.	
UNITED STATES STEEL CORPORATION	

ORDER

In these cases arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1982), United States Steel Corporation ("U.S. Steel") has filed a motion requesting the Commission's recusal from these proceedings. The motion is based on U.S. Steel's concern regarding the effect on our decisional process of certain ex parte communications engaged in by an employee of this independent Commission with employees of the Department of Labor's Mine Safety and Health Administration ("MSHA") while these cases were pending on review before us. We have filed in the formal records of the cases a memorandum and an affidavit from the participants regarding the communications. These documents satisfy us that the ex parte communications proceeded from innocent motives. While we believe the communications would not prevent us from deciding the cases objectively and fairly solely on the basis of the records developed before the administrative law judges below, we seek to insure that not even an appearance of impropriety or unfairness taints proceedings before this Commission. Accordingly, for the reasons discussed below, we grant the recusal motion and vacate our directions for review.

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We first briefly summarize the factual background of the cases and the facts surrounding the ex parte communications. The cases involve citations issued to U.S. Steel by MSHA alleging violations of 30 C.F.R. • 55.12-14 at two different U.S. Steel mines.

This mandatory safety standard, which guards against shock and electrocution hazards, in relevant part requires that when power cables energized to potentials in excess of 150 volts "are moved manually, insulated hooks, tongs, ropes, or slings shall be used unless suitable protection for persons is provided by other means." The essential question in dispute between the parties is whether a ground fault protection system used by U.S. Steel constituted "suitable protection" within the meaning of the standard. After U.S. Steel contested the citations issued by MSHA, the cases separately proceeded to hearings before two administrative law judges of this independent Commission.

Each administrative law judge issued a decision finding that U.S. Steel's ground fault protection system was not "suitable protection" within the meaning of the cited standard. Both judges concluded that U.S. Steel had violated the standard and assessed civil penalties. 4 FMSHRC 954 (May 1982) (Docket Nos. LAKE 81-116-M, et al.)(ALJ); 4 FMSHRC 814 (April 1982)(Docket Nos. WEST 80-386-R, et al.)(ALJ). We granted U.S. Steel's petitions for discretionary review of the judges' decisions.

After an administrative law judge's decision has been directed for review by the Commission, the Commission's Office of General Counsel normally prepares a "decisional memorandum" to assist the Commission in its deliberations. Decisional memoranda are drafted by attorneys working under the supervision of the Commission's General Counsel. A decisional memorandum describes the record evidence, the decision below, the issues on review, and the parties' contentions concerning the issues. The memorandum also presents analysis and normally a recommended resolution of the issues. Thus, the memoranda play a role in our decisional process, but are purely advisory and do not purport to, nor do they, control in any way the resolution of cases before the Commission.

On June 1, 1983, while preparing a decisional memorandum in Docket No. WEST 80-386-R, et al., an attorney in the General Counsel's office initiated three telephone calls to two MSHA offices, and engaged in conversations with two MSHA electrical engineering specialists. The specific contents of these conversations are related in the memorandum and affidavit that have been filed in the records of these cases. Briefly, the Commission staff attorney posed questions seeking information of a general nature pertaining to electrical principles and technology relevant to ground fault protection systems. The information obtained from the MSHA engineers was of a general nature and duplicative of information already contained in the official records in these cases. The staff attorney states in her memorandum regarding the conversations that she personally believed that the conversations were general discussions not pertaining to the

merits of the cases under review. No other employee of the Commission was aware that the conversations had occurred.
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The Commission's Office of the General Counsel subsequently circulated to the Commissioners a decisional memorandum in Docket No. WEST 80-386-R, et al., prepared by the staff attorney in question. This case was scheduled to be considered at a public Commission meeting on June 15, 1983. On June 13, 1983, counsel for the Secretary of Labor sent to the Commission, and served on the operator, a letter and affidavit concerning two of the telephone conversations. The affidavit was given by one of the MSHA electrical engineers with whom the staff attorney had spoken. Counsel for the Secretary stated that the conversations were ex parte communications prohibited by Commission Procedural Rule 82, 29 C.F.R. • 2700.82. 1/ Counsel did not seek disqualification or recusal of the Commission, but requested that the Commission make the letter and affidavit part of the public record. The scheduled meeting was postponed by the Commission. On June 15, 1983, the staff attorney involved prepared a memorandum setting forth her recollection of the details of the conversations. Copies of this memorandum were served on the parties and placed in the records of the cases. On July 12, 1983, counsel for U.S. Steel filed a motion requesting that the Commission recuse itself from decision in these cases because of the communications. Counsel for the Secretary of Labor filed a response stating that the Commission would be required to determine whether the communications had tainted irrevocably the Commission's decisional process.

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1/ Commission Procedural Rule 82 states:
(a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.
(b) Procedure in case of violation.
(1) In the event an ex parte communication in violation of this section occurs, the Commission or the Judge may make such orders or take such action as fairness requires. Upon notice and hearing, the Commission may take disciplinary action against any person who knowingly and willfully makes or causes to be made a prohibited ex parte communication.
(2) All ex parte communications in violation of this section shall be placed on the public record of the proceeding. (c) Inquiries. Any inquiries concerning filing requirements, the status of cases before the Commissioners, or docket information shall be directed

to the Office of the Executive Director of the Commission.
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We have previously addressed the subject of ex parte communications. Knox County Stone Co., Inc., 3 FMSHRC 2478, 2482-86 (November 1981). The principles that we enunciated in that decision guide our course in this matter. In Knox County, in addressing ex parte communications at the hearing level before our judges, we held that Commission Rule 82 and section 557(d) of the Administrative Procedure Act, 5 U.S.C. • 557(d) ("the APA"), prohibit ex parte communications between members of the Commission, its judges, other employees and interested persons outside the Commission regarding the merits of pending cases, and also require that any such communications be placed on the public record. 3 FMSHRC at 2483-85. 2/ We stated:
The rules against ex parte communications serve important goals essential to the integrity and fairness of Commission proceedings. As Congress explained in enacting section 557(d):
The purpose of the provisions in the bill prohibiting ex parte communications is to insure that agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.
In order to ensure both fairness and soundness to adjudication ..., the ... [APA] require[s] a hearing and decision on the record. Such hearings give all parties an opportunity to participate and to rebut each other's presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decision-maker in private and others are denied the opportunity to respond.

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2/ As we noted, although our procedural rules do not expressly define ex parte communications, section 551(14) of the APA defines the term as follows:
"[E]x parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding ....
As we further stated, Congress intended the phrase, "merits of the proceeding," in section 551(14) and 557(d) to be broadly construed. See H.R. Rep. No. 880, Parts I & II, 94th Cong., 2d Sess. 20 (Part I), 20 (Part II)(1976), reprinted in 1976 [3] U.S. Code Cong. & Ad. News 2202, 2229 ["1976 U.S. Code Legis. Hist."].
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1976 U.S. Code Legis. Hist. 2184, 2227. See also Raz Inland Navigation Co., Inc. v. ICC 625 F.2d 258, 260 (9th Cir. 1980).

The implications of the purposes mentioned by Congress are obvious: improper ex parte contacts may deny a party "his due process right to a disinterested and impartial tribunal." Rinehart v. Brewer, 561 F.2d 126, 132 (8th Cir. 1977). Diminishing public confidence in the affected tribunal is the likely and unacceptable result.

We recognize that innocent or de minimis ex parte communications can, and do, occur. When ex parte communications occur, however, they shall be placed on the public record in accordance with appropriate procedure.

In short, ... we expect that the rules on ex parte communications will be respected in both letter and spirit and that judges and lawyers will avoid even the appearance of impropriety in these matters.

3 FMSHRC at 2485-86 (footnote omitted). See also PATCO v. FLRA. 685 F.2d 547, 561-65 (D.C. Cir. 1982).

In the present cases, communications of a Commission staff attorney with one of the parties in the cases were conducted. The communications were off the public record without notice to the opposing party. The conversations involved substantive matters at issue in these cases. The conversations were prohibited ex parte communications under Commission Rule 82 and section 557(d) of the APA. As required, the ex parte communications have been placed on the public record. In the exercise of our discretion, we may make such orders or take such further action as fairness requires, including disciplinary action against persons who "knowingly and willfully" engage in such communications. 29 C.F.R. • 2700.82(b)(1).

The record indicates to our satisfaction that the staff attorney engaged in a good faith, but misguided, attempt to obtain a better general understanding of technical data as background to these cases. In our view, this attorney did not "knowingly and willfully" cause the communication to be made within the meaning of Rule 82. The communication was a first time occurrence for the attorney involved. Therefore, we conclude that disciplinary measures are not warranted. Nevertheless, we also conclude that the Commission's recusal from further consideration of these cases is an appropriate resolution.

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The stringent policies we announced in Knox County with reference to proceedings before our judges apply equally, of course, to ourselves and Commission staff at the review stage of litigation before this Commission. Public trust in the integrity and fairness of this independent adjudicatory agency is a vital resource that we are deeply committed to protect. Therefore, although we are convinced that we could, in fact, proceed to resolve the cases before us without having the substance of our staff attorney's conversations affect our

independent deliberations, we wish to avoid even the appearance of impropriety in these proceedings. For this reason, and because by filing a petition for review in an appropriate court of appeals, the parties may, if they so desire, obtain further review of the decisions of our administrative law judges (30 U.S.C. • 816(a) and 823(d)), we conclude that vacation of our orders granting review and reinstatement of the judges' decisions as the Commission's final orders in these proceedings are appropriate.

For the foregoing reasons, we recuse ourselves from further consideration and decision in these cases. Accordingly, our directions for review in these dockets are vacated. The administrative law judges' decisions are reinstated as the final orders of this Commission.

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