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DISCIPLINARY PROCEEDING  
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.  
May 28, 1985

DISCIPLINARY PROCEEDING                      Docket No. D-84-1

BEFORE: Backley, Acting Chairman; Lastowka and Nelson,  
Commissioners

DECISION

BY THE COMMISSION:

This disciplinary proceeding arises under Commission Procedural Rule 80, 29 C.F.R. 2700.80.1/ In a decision finding Getz Coal Sales, Inc. ("Getz"), in default and assessing civil penalties for violations

1/ Rule 80 provides in pertinent part:

Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that he has engaged in unethical or unprofessional conduct, ... or that he has violated any provisions of the laws and regulations governing practice before the Commission....

(c) Procedure. ... [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...

29 C.F.R. 2700.80.

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of mandatory safety standards, a Commission administrative law judge referred to the Commission circumstances concerning the conduct of the operator and its counsel which the judge believed warranted disciplinary proceedings. 6 FMSHRC 1333 (May 1984) (ALJ). By order of July 2, 1984, the Commission accepted the referral and docketed this disciplinary proceeding. On the grounds explained below, we conclude that a cautionary warning is in order, but that no further disciplinary proceedings are necessary at this time.

Getz operates a surface coal mine located near Lisbon, Ohio. On May 16, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Getz four citations alleging violations of mandatory safety standards involving the presence of uncorrected equipment defects and a lack of required equipment on two bulldozers at the mine. Getz abated the alleged violations and did not file notices of contest with respect to the citations.

On August 15, 1983, the Secretary of Labor filed with this independent Commission a proposal for the assessment of civil penalties seeking penalty assessments of \$20 each for the four alleged violations. By letter to the Commission dated August 30, 1983, Roland A. Getz, president of Getz, "appeal[ed]" the Secretary's penalty proposal and requested "a telephone hearing." As a result of Getz's contest of the proposed penalties, this civil penalty proceeding was assigned to a Commission administrative law judge.

On January 16, 1984, the Commission's administrative law judge issued a notice scheduling a hearing for April 12, 1984, in Youngstown, Ohio, and denying the operator's request for a telephonic hearing:

Respondent [Getz] has contested the civil penalty proposals made by the petitioner [Secretary of Labor] in this case, and requests a "telephone hearing." The [Commission's] rules do not provide for telephone hearings, and respondent's request is DENIED. Respondent is entitled to a personal hearing in this matter, and is entitled to be represented by counsel of its own choosing, or by its President Roland A. Getz. Further, this is not the first time this respondent has appeared in cases docketed before this Commission, and it should be familiar with the procedures. Under the circumstances, a hearing is hereby scheduled in this matter, commencing at 9:30 a.m., Thursday, April 12, 1984, in Youngstown, Ohio, and the parties will be

further advised as to the precise hearing location in Youngstown.

The parties are advised that any proposed settlement concerning this matter shall be filed with me in writing no later than ten calendar days in advance of the scheduled hearing....

Any proposed settlements filed later than the ten day period noted above will be rejected and the parties will be expected to appear at the scheduled trial of the case.

Notice of Hearing dated January 16, 1984 (emphasis in original). The judge's notice was@ sent by certified mail to Mr. Getz, and the record in this case includes the operator's signed and returned certified mail receipt. By letter to the judge dated February 6, 1984, attorney Neal S. Tostenson advised the judge that he would be representing Getz at the scheduled hearing. On March 22, 1984, the judge issued an amended notice of hearing setting forth the specific location of the hearing site. This notice was sent by certified mail to Mr. Tostenson, and the record includes his office's signed certified mail receipt.

On the afternoon of April 11, 1984, the day before the scheduled hearing, the judge was advised by counsel for the Secretary of Labor that Getz's attorney, Mr. Tostenson, had telephoned him that morning to inform him that Getz wished to settle the case and pay the \$80 in proposed penalties. Tr. at 7, 9; Judge's Memorandum to File dated April 23, 1984. The judge requested the Secretary's counsel to telephone Mr. Tostenson and inform him that the judge intended to proceed with the hearing as scheduled. Tr. at 8, 9; Judge's Memorandum to File dated April 23, 1984. The judge informed counsel for the Secretary that if Mr. Tostenson did not appear, he would treat Getz as being in default and would consider referring the matter to the Commission for possible disciplinary action. Id. A short time later, counsel for the Secretary telephoned the judge and informed him that he had contacted Mr. Tostenson's office, but that Mr. Tostenson had already left for the day. Id. Counsel for the Secretary left instructions with Mr. Tostenson's secretary to relay the judge's message to him. Id.

Prior to convening the hearing on April 12, 1984, the judge telephoned Mr. Tostenson at his office and was advised by a receptionist and a secretary that Mr. Tostenson had received the message left for him by counsel for the Secretary. 6 FMSHRC at 1344; Tr. at 9. Mr. Tostenson was not in his office and neither of his employees could indicate whether he would enter an appearance at the hearing. Id. Mr. Tostenson failed to appear at the hearing and no

other appearance was entered on behalf of Getz.

In his final decision, the judge found Getz in default, affirmed the citations, determined that the violations were "significant and substantial," and assessed penalties higher than those proposed by the Secretary. Additionally, the judge noted that Getz had a history of being found in default by Commission judges for failing to appear at scheduled hearings. 6 FMSHRC at 1343. The judge also found that counsel

Tostenson had received notice of the hearing, and that his failure to appear constituted a "flagran[t]" disregard of the judge's notices and orders. 6 FMSHRC at 1344. Accordingly, the judge referred the matter to the Commission for consideration of disciplinary action pursuant to Commission Procedural Rule 80, 29 C.F.R. 2700.80. By order dated July 8, 1984, the Commission accepted the referral and ordered the parties to submit in writing their respective statements of position regarding the referral. The Secretary submitted his statement through counsel, as did Getz and Mr. Tostenson, who are each represented before the Commission by counsel.

Because in this proceeding Getz retained counsel to represent its interests, the focus of our attention is upon the conduct of Mr. Tostenson in failing to appear at the scheduled hearing on April 12, 1984. Although some minor factual matters may be in dispute, our disposition of this disciplinary matter does not require us to resolve them. The material facts are not in dispute. Mr. Tostenson knew that any proposed settlement of this case was subject to the judge's approval. He also received the message relayed through the Secretary's counsel on the day prior to the hearing that the judge was not going to cancel the hearing and that a failure to appear by Mr. Tostenson would subject Getz to default and could result in disciplinary proceedings. Despite this notice, Mr. Tostenson failed to appear at the hearing as scheduled or otherwise attempt personally to advise the judge of his intent.

The judge's January 16, 1984 notice of hearing stated unambiguously that any proposed settlement filed later than ten calendar days prior to the April 12, 1984 hearing would be rejected and that the parties would be expected to appear at the hearing as scheduled. Having entered his appearance on behalf of Getz on February 6, 1984, Mr. Tostenson had ample time to evaluate the case and negotiate a proposed settlement with the Secretary. Instead, he elected to wait until just before the hearing to propose a settlement. (Section 110(k) of the Mine Act mandates Commission approval before a contested penalty can be accepted). Mr. Tostenson also relied on the Secretary's counsel to submit his proposed settlement to the judge for approval the day before the hearing. The statement of position filed with us on Mr. Tostenson's behalf avers:

[Mr. Tostenson] left his law office in Cambridge, Ohio on April 9 and spent the rest of the week in Columbus on business....

He left knowing that: (1) his offer of payment of

\$80 in full settlement of the case was subject to [the judge's] approval, (2) [the Secretary's counsel] was to discuss his offer with [the judge] and (3) he had unequivocally informed [the Secretary's counsel] that he would not attend the hearing in Youngstown.

He subsequently learned that [the Secretary's counsel] did call his office to tell him that [the judge] was not going to cancel the hearing.



Thus, Mr. Tostenson decided unilaterally that he would not attend the hearing, despite the judge's prior notice that any settlement proposal submitted within 10 days of the hearing would be rejected. Mr. Tostenson also ignored the message relayed to his office by the Secretary's counsel the day prior to the hearing that the hearing would go forward as scheduled and that a failure to appear by Mr. Tostenson would subject Getz to default and could trigger disciplinary proceedings. Mr. Tostenson's failure to appear flouted the judge's orders and his authority to regulate the course of proceedings under Commission Procedural Rule 54, 29 C.F.R. 2700.54.

The Commission does not condone and will not tolerate such conduct by an attorney practicing before it. Considerable time, effort, and expense were expended in affording a forum in which the mine operator could pursue its contest of the civil penalty assessments proposed by the Secretary of Labor. Dockets had to be managed, hearing space reserved, and a court reporter provided. The Commission judge had to travel to Youngstown, Ohio, from Falls Church, Virginia, for the hearing. And, of course, the Secretary also incurred time and expense in preparing the government's case. Having entered an appearance before this independent adjudicatory agency, Mr. Tostenson, as an "officer of the court", was obliged to conduct his affairs in accordance with all applicable rules, procedures, and codes of conduct. His conduct in the present case falls short of acceptable standards. In mitigation, however, we note that to our knowledge this is the first display of such conduct by Mr. Tostenson before the Commission. Largely because of this consideration, we conclude that no disciplinary action against Mr. Tostenson is warranted presently. We must warn Mr. Tostenson, however, against any repetition of this or similar conduct.<sup>2/</sup> Further incidents will result in a disciplinary referral before this Commission and other appropriate bodies.

<sup>2/</sup> Due to the appearance entered on behalf of Getz Coal Sales by an attorney, Getz's history of defaults, described by the judge in his decision, is not squarely before us in the present proceeding. However, we also serve notice on Getz that any continuing course of conduct evincing a refusal to comply with the duly issued orders of Commission judges could subject it to injunctive sanctions instituted by the Secretary of Labor under section 108 of the Mine Act, 30 U.S.C. 818, and to the contempt provisions set forth in section 113(e) of the Act, 30 U.S.C. 823(e).

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For the reasons set forth above, this disciplinary proceeding is terminated.<sup>3/</sup>

James A.Lastowka, Commissioner

L. Clair Nelson, Commissioner

<sup>3/</sup> Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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