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DISCIPLINARY PROCEEDING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, DC
June 25, 1985

DISCIPLINARY PROCEEDING Docket No. D-85-1

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/ On November 1, 1984, a Commission administrative law judge referred to the Commission circumstances which the judge believed warranted disciplinary proceedings. The substance of the referral concerned the conduct of counsel for the Secretary of Labor

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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in resisting compliance with subpoenas issued by the judge to a federal mine inspector. By order dated November 7, 1984, we requested statements of position from counsel for the Secretary, the complainant, and the operator. On the grounds explained below, we conclude that disciplinary proceedings are not warranted and we vacate the judge's order of referral.

This matter arose in connection with a discrimination proceeding, *Roger A. Hutchinson v. Ida Carbon Corporation*, FMSHRC Docket No. KENT 84-120-D, brought pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982). Mr. Hutchinson originally filed with the Secretary of Labor a complaint of discrimination against Ida Carbon Corporation ("Ida"). After investigation, the Secretary determined administratively that discrimination had not occurred and, in accordance with the relevant provisions of section 105(c)(2) of the Mine Act, declined to file a complaint on Mr. Hutchinson's behalf. 30 U.S.C. 815(c)(2). Mr. Hutchinson then brought the underlying action against Ida pursuant to section 105(c)(3) of the Act. 30 U.S.C. 815(c)(3). On July 10, 1984, a subpoena ad testificandum, which was issued on behalf of the complainant by the Commission administrative law judge hearing the Hutchinson case, was served upon Butch Cure, an inspector employed by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The subpoena directed Inspector Cure to testify at the hearing set for July 19, 1984, in the Hutchinson case.

On July 18, 1984, the day before the scheduled hearing, counsel for the Secretary of Labor, Ralph D. York, Senior Trial Attorney, advised the judge's secretary by telephone that the Secretary would be entering a special appearance on Inspector Cure's behalf and also would be filing a motion to quash the subpoena. The judge proceeded with the scheduled hearing on July 19, 1984, but continued the case at the close of testimony and ordered the record held open for the possible receipt of depositions. The Secretary's notice of special appearance and motion to quash, dated July 19, 1984, were received on July 23, 1984. These papers were signed by Mr. York on behalf of Carl W. Gerig, Jr., Associate Regional Solicitor.

The Secretary's motion to quash asserted that the official policy of the Department of Labor, as set forth in the Department's regulations at 29 C.F.R. Part 2, Subpart C, prohibits employees from testifying under subpoena in cases where the Department is not a party unless a waiver is granted by the appropriate Deputy Solicitor of Labor pursuant to the provisions of 29 C.F.R. 2.22. 2/ The motion further stated that

2/ Section 2.22 provides:

Production or disclosure prohibited unless approved
by the appropriate Deputy Solicitor of Labor.

In terms of instructing an employee or former
employee of the manner in which to respond to a demand,
the Associate Solicitor, Regional Solicitor, or Associate
Regional Solicitor, whichever is applicable, shall follow
the instructions of the

(footnote 2 continued)

29 C.F.R. 2.23 required counsel for the Secretary to request the body issuing the subpoena to stay its demand pending the employee's receipt of instructions from the appropriate Deputy Solicitor. The motion also recited an offer to make available to Mr. Hutchinson's counsel all nonprivileged portions of MSHA's investigative file regarding Mr. Hutchinson's case.

By letter dated July 26, 1984, a representative of the Deputy Solicitor of Labor for Regional Operations informed Inspector Cure that he would not be permitted to testify in the Hutchinson discrimination proceeding. On August 22, 1984, the judge issued an order denying the Secretary's motion to quash and issued a new subpoena for the purpose of taking the deposition of Inspector Cure by September 21, 1984. Counsel for the Secretary responded by filing a motion requesting the judge to reconsider the motion to quash and his order of August 22, 1984. The motion stated that a certified copy of the Secretary's investigation file had been provided to counsel for the complainant and that any testimony regarding matters not addressed in the file would be irrelevant to the discrimination proceeding. The motion also asserted that if complainant's purpose was to obtain the history of the operator's non-compliance with the Mine Act's requirements, the appropriate source would be MSHA's official enforcement records.

The second subpoena was served on Inspector Cure on or about September 10, 1984, and directed him to appear for a deposition on September 18, 1984. On that date, counsel for Mr. Hutchinson, counsel for Ida, and a court reporter were present to take the deposition of Inspector Cure. Inspector Cure did not appear. On September 21, 1984, the judge entered an order denying the Secretary's motion for reconsideration, and ordered that the record be held open until October 31, 1984, for the purpose of receiving depositions.

On October 29, 1984, counsel for the complainant filed a motion to compel Frank A. White, the Deputy Solicitor of Labor for National Operations, and Carl W. Gerig, the Associate Regional Solicitor, to allow Inspector Cure to be deposed. On November 1, 1984, before the Secretary had adequate opportunity to respond to the motion to compel, the judge certified the

Footnote 2 end.

appropriate Deputy Solicitor of Labor. No employee or former employee of the Department of Labor shall, in response to a demand of a court or other authority, produce

any material contained in the files of the Department or disclose any information relating to material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without approval of the appropriate Deputy Solicitor of Labor.

29 C.F.R. 2.22.

record in the discrimination proceeding to the Commission with a request for the institution of disciplinary proceedings pursuant to Commission Procedural Rule 80. Specifically named in the judge's referral were Frank A. White, Deputy Solicitor of Labor, Carl W. Gerig, Associate Regional Solicitor, and Ralph D. York, Senior Trial Attorney. 3/ According to the judge, these attorneys had violated the standards of ethical conduct required of attorneys practicing before the Commission by ignoring his order denying the motion to quash and by counseling Inspector Cure to ignore the subpoenas.

We disagree. The judge's disciplinary referral calls into question the ethical conduct of government attorneys in failing to counsel compliance with the subpoenas the judge had issued on behalf of the complainant. The judge clearly was empowered to issue subpoenas authorized by law, and to rule on the merits of the Secretary's motions to quash. See 30 U.S.C. 823(e); Commission Procedural Rules 54 & 58, 29 C.F.R. 2700.5@ & 2700.58. However, a lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a judicial ruling. See ABA, Code of Professional Responsibility, Canon 7 & EC 7-1, 7-2, 7-19 & 7-22 (1979). Cf. ABA, Model Rules of Professional Conduct, Rules 3.1, 3.3 & Comments (1983). 4/ In this instance, we cannot conclude that counsel for the Secretary acted unethically.

3/ Mr. White is the Deputy Solicitor of Labor for National Operations and, as such, was not involved in the Department's decision directing Inspector Cure not to testify. Rather, pursuant to the applicable Departmental regulations, that decision was made by the office of Ronald G. Whiting, the Deputy Solicitor of Labor for Regional Operations. See 29 C.F.R. 2.20(c)(1), 2.22 & 2.23. Thus, Mr. White had no connection with the decision to resist the subpoenas and his name should not have been included in the judge's referral.

4/ Canon 7 states:

A lawyer should represent a client zealously within the bounds of the law.

Ethical Consideration 7-22 provides:

Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

Ethical Consideration 7-25 provides in relevant part:

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them.

The record in this case shows that counsel for the Secretary proceeded in good faith under a colorable legal prohibition against compliance with the subpoenas, and did not take any action outside the appropriate legal framework for testing the validity of a Commission subpoena. The regulations upon which the Secretary relied prohibit compulsory testimony by an employee of the Department of Labor, absent a waiver by appropriate departmental officials, in proceedings to which the Department is not a party. See 29 C.F.R.

2.20 & 2.25. Although it is not our task in the present proceeding to resolve the merits of the Secretary's position in resisting compliance with the subject subpoenas, we note that similar positions taken by the Secretary based on the same regulations have been upheld by federal courts in analogous contexts. See e.g., *Smith v. C.R.C. Builders Co., Inc., etc.*, 11 BNA OSHC 1685, 1686-87 (D. Colo. 1983); *Reynolds Metals Co v. Crowther*, 572 F. Supp. 288, 290-91 (D. Mass. 1982). This consideration supports the conclusion that counsel for the Secretary proceeded in good faith upon a plausible legal claim. In this regard, Mr. York entered a special appearance in the case and filed two motions and a legal memorandum supporting the Secretary's position. In making these filings, Mr. York acted on behalf of his superior, Mr. Gerig. The measures challenging the subpoenas were taken in support of the decision of Ronald G. Whiting, Deputy Solicitor of Labor for Regional Operations, not to waive application of the subject regulations in this instance. These steps were taken within the framework of 29 C.F.R. 2.20-2.25 and, hence, of the law, as permitted by the Canons.

Further, the Secretary's counsel did not resist compliance with the subpoenas outside the appropriate legal framework established by the Mine Act and our procedural rules. Section 113(e) of the Mine Act, 30 U.S.C. 823(e), empowers the Commission and its judges to issue subpoenas. If there is a refusal to obey the subpoena, that section of the Act states:

In case of contumacy, failure, or refusal of any person to obey a subpoena or order of the Commission or an administrative law judge, respectively, to appear, to testify, or to produce documentary or physical evidence, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides, or transacts business, shall, upon the application of the Commission, or the administrative law judge, respectively, have jurisdiction to issue to such person an order requiring such person to appear, to testify, or to produce evidence as ordered by the

Commission or the administrative law judge, respectively, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

30 U.S.C. 823 (e). Our rules of procedure mirror this statutory scheme, while adding an additional caveat. Rule 58(e) provides:

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Failure to comply. Upon the failure of any person to comply with an order to testify or a subpoena directed or issued by the Commission or a Judge, the Commission or the Judge, respectively, may apply to the appropriate district court [for] enforcement of the order or subpoena. Neither the Commission nor the Judge shall be deemed thereby to have assumed responsibility for the effective prosecution of the failure to obey the subpoena or order.

29 C.F.R. 2700.58(e). These provisions make clear that when a legal impasse is reached on the question of whether an individual must comply with a Commission subpoena, the issue becomes one for the federal courts to decide.

Accordingly, the underlying discrimination case is returned to the judge for disposition. The Secretary shall be afforded the opportunity to submit a reply, if any, to the complainant's motion to compel the deposition of Inspector Cure. In light of our decision, the judge should carefully weigh the relative positions and needs of the parties before seeking enforcement of the subpoena in court. In particular, consideration should be given to the fact that the Secretary has turned over to the complainant the investigative file in this matter. For the reasons set forth above, the judge's order requesting the institution of disciplinary proceedings against each of the individuals named therein was improper and must be vacated. This disciplinary proceeding is terminated. 5/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ 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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