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FMSHRC-WDC
JULY 2, 1985

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of JAMES M. CLARKE Docket No. LAKE 83-97-D

v.

T.P. MINING, INC.

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

DECISION

BY THE COMMISSION:

This proceeding arises in connection with a discrimination complaint filed under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982)("Mine Act"), by the Secretary of Labor on behalf of James M. Clarke against T.P. Mining, Inc. ("T.P. Mining"). We granted the Secretary's petition for discretionary review of an order issued by Commission Administrative Law Judge Joseph B. Kennedy. In this order dated April 25, 1984, the judge affirmed his previous severance of the civil penalty aspects of the case from the merits of the discrimination complaint and also commented critically upon the professional competence and ethical conduct of the Secretary's counsel, Frederick W. Moncrief. 1/ The Secretary asserts that the judge's critical comments regarding Mr. Moncrief are without foundation and should be struck. We agree.

The Secretary's complaint initiating this proceeding, which was filed under section 105(c)(2) of the Mine Act, 30 U.S.C. $ 815(c)(2), alleged that T.P. Mining had discriminatorily discharged Mr. Clarke.

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1/ In a subsequent order, dated May 10, 1984, the judge affirmed the April 25, 1984 order and dismissed the case "for want of prosecution."

The complaint requested, among other things, that Mr. Clarke be reinstated with back pay and benefits, and that a civil penalty of $5,000 be assessed against T.P. Mining for the alleged violation of section 105(c)(1) of the Act. 30 U.S.C. $ 815(c)(1). Following negotiations, the parties were able to agree on a settlement satisfactory to Mr. Clarke. On April 12, 1984, the Secretary, through Mr. Moncrief, filed a motion with Judge Kennedy requesting that the discrimination complaint be dismissed. The Secretary's motion stated that, if successful, Mr. Clarke would have been entitled to $7,405.48 in back pay plus interest and that T.P. Mining had paid "$5,000 in compromise settlement of [Mr. Clarke's] claim." Mr. Moncrief attached to the motion a letter signed by Mr. Clarke that stated, "My discrimination case has been settled to my satisfaction." The motion did not refer to the civil penalty aspects of the case.

In an order dated April 3, 1984, the judge dismissed the charge of wrongful discharge contained in the complaint. The judge, however, severed the Secretary's civil penalty proposal from the complaint on the grounds that the dismissal motion provided "no basis ... for approval of a settlement of the Secretary's penalty proposal." The judge retained jurisdiction over the penalty portion of the case "pending receipt of the information on section 110(i) criteria necessary to approve settlement of the civil penalty aspect of the complaint."

In a letter to the judge dated April 18, 1984, Mr. Moncrief stated that the parties intended that the settlement of Mr. Clarke's back pay claim would resolve the case completely. The letter stated that the motion to dismiss might not have made clear that in settlement of the case the Secretary had agreed to forego seeking a civil penalty. Mr. Moncrief asserted, however, that the Secretary's determination to forsake a civil penalty had been an "important ingredient of the money settlement to Mr. Clarke." Mr. Moncrief cautioned that T.P. Mining might cancel the entire settlement unless the civil penalty aspects of the case were likewise dismissed. Mr. Moncrief added:

> The Secretary is concerned that these matters be resolved as quickly as possible. Mr. Clarke, who played an actual role in the settlement terms, is aware of the culmination of our efforts and is anxious to receive his money. [T.P. Mining] has made that payment on the assumption that it will end the matter. I am reluctant to authorize Mr. Clarke to cash his check, under the circumstances, even though technically it has been approved.

In response to Mr. Moncrief's letter, Judge Kennedy issued his order of April 25, 1984. In the order the judge affirmed his prior dismissal of the discrimination charge contained in the complaint and his severance of the civil penalty aspects of the case. The judge

stated that the Secretary's failure to disclose in the dismissal motion that one of the considerations leading to the settlement was the Secretary's agreement to forsake the civil penalty was evidence of Mr. Moncrief's "professional ineptitude." The judge characterized Mr. Moncrief's reluctance to authorize Mr. Clarke's cashing of the settlement check a "threat" which the judge termed both "unprofessional and ethically improper." The judge asserted, "The Solicitor has no right to hold complainant's settlement check hostage to his own intransigence and incompetence." He further stated that he found Mr. Moncrief's "irresponsible attempt to coerce the trial judge to [dismiss the civil penalty aspects of the case] .. reprehensible." Finally, the judge claimed, "In the past counsel have been careful to include a provision for payment of a reduced penalty in settlement of the penalty case even where the operator denied liability. Never in my experience has the Solicitor previously asserted a right to abandon or waive, without consideration or justification, the public's claim to a civil penalty in a discrimination case." Order at 2.

Having reviewed carefully the record in this matter, we conclude that the judge's comments with regard to Mr. Moncrief are unfounded and unwarranted. Mr. Moncrief appears to have provoked the ire of the judge by failing to address specifically the civil penalty aspects of the discrimination complaint in his motion to dismiss. This omission did not justify the judge's highly critical comments.

In general, it is clear that a civil penalty must be assessed for a violation of section 105(c)(1) of the Mine Act. Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2046 (December 1983). However, it is at least debatable whether, consistent with the Mine Act, a penalty may be forsaken in a discrimination case when the complainant requests that in settlement of the case his complaint be withdrawn before it has been determined on the merits that a violation of section 105(c)(1) has occurred. We need not resolve that issue here. Suffice it to say that there have been other cases before the Commission in which the complainant has requested that the complaint be withdrawn before liability is determined and where, despite the fact that neither the settlement agreement nor the motion to dismiss referenced the civil penalty aspects of the complaint, Commission judges nevertheless have dismissed the proceedings entirely. See, e.g., Secretary of Labor on behalf of Arnott v. Mettiki Coal Corp., FMSHRC Docket No. YORK 82-20-D (May 27, 1982)(ALJ).

Judge Kennedy's assertion in his order of April 25, 1984, that in the past counsel for the Secretary have always included in their

motions to dismiss or their settlement agreements a provision for payment of a reduced penalty in settlement of the penalty case, even where the operator has denied liability, is simply not true. In fact, the judge himself has dismissed discrimination complaints in cases where neither the settlement agreement nor the motion to withdraw the complaint has

referenced a civil penalty and where it has been agreed in effect that settlement did not constitute an admission by the operator of a violation of the Act. Secretary of Labor on behalf of Taylor v. Buck Garden Coal Co., 6 FMSHRC 919 (April 1984)(ALJ); Secretary of Labor on behalf of Litz v. Shale Hill Coal Co., FMSHRC Docket No. PENN 83-162-D (January 12, 1984)(ALJ). The judge has also dismissed a discrimination complaint in a case where the settlement agreement expressly stated that the Secretary would not seek a civil penalty assessment for the violation of section 105(c) and that nothing contained in the settlement agreement would be deemed an admission by the operator of a violation of the Act. Secretary of Labor on behalf of Swann v. Chestnut Ridge Fuel Co., FMSHRC Docket No. VA 82-52-D (December 8, 1982)(ALJ).

Therefore, to the extent that the judge based his assertion that Mr. Moncrief's performance as a lawyer was "incompetent," "irresponsible," and "reprehensible," on his own inaccurate perception concerning the Secretary's past practice, his condemnations are unfounded and unwarranted. However, to avoid any repetition of the kind of procedural problem that developed in this case, we will require that, henceforth, when seeking dismissal of a discrimination complaint in settlement of the case, the Secretary shall include in both the dismissal motion and underlying settlement an express reference to the parties' agreement concerning the civil penalty. As noted above, we leave for another day resolution of the consequences, if any, of an attempted waiver of a penalty in such circumstances.

We can find no record support for the judge's assertions that Mr. Moncrief was "professionally inept," "irresponsible," or "incompetent." Rather, the record reveals that Mr. Moncrief ably represented Mr. Clarke. Mr. Moncrief filed the appropriate pleadings to initiate the action; he opposed what he believed would be a premature dismissal of the complaint harmful to Mr. Clarke's interests; he advocated and defended the Secretary's position; and he negotiated a settlement that satisfied Mr. Clarke. These were not the actions of one demonstrating the lack of ability to perform the legal functions required of him.

Judge Kennedy asserted that Mr. Moncrief's reluctance to authorize Mr. Clarke's cashing of the settlement check resulted in Mr. Moncrief "hold[ing] complainant's settlement check hostage to his own intransigence and incompetence." The judge described Mr. Moncrief's reluctance as "unprofessional," "ethically improper," and as a "threat." A review of the record does not support. these characterizations. Mr. Moncrief's reluctance to advise Mr. Clarke to

cash the check represented sound litigation judgment--an attempt to preserve the status quo until the dispute over the civil penalty was settled, based upon a legitimate concern over T.P. Mining's reaction to the severance of the civil penalty aspect of the case. Although one could read into Mr. Moncrief's statement an attempt to exert some "pressure" on the judge to approve the settlement promptly, we do not believe that a jurist acting reasonably and responsibly would find Mr. Moncrief's statements to amount to an ethically improper "threat" Rather, we regard the statements as well within the zone of permissible advocacy on behalf of a client.

In concluding that the judge's criticism of Mr. Moncrief was unwarranted, we do not imply that the Commission's judges must remain mute in the face of actual incompetence, unprofessional conduct, or unethical behavior. A judge is not a cipher who perceives without comment all that passes before him. Rather, a judge is an active participant in the adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result. See. e.g., Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir. 1956), cert. denied, 352 U.S. 892 (1956). Among a judge's specific obligations in this regard is a duty to admonish counsel, when necessary, during the course of proceedings--although such admonitions are to be couched in temperate language. Cromling v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142, 152 (3rd Cir. 1963). Here, however, the judge's criticism of counsel was unnecessary and the language used was intemperate. Words such as "incompetence," "unprofessional," "ineptitude," "ethically improper," "reprehensible," and "irresponsible," when published without support and broadcast to the public, not only wound the advocate personally--they damage professionally. In unjustly maligning one who appears before him, a judge not only demeans himself, but dishonors this Commission. Such unwarranted rebukes can only lessen public confidence in this independent agency's ability to serve its statutory role as a temperate and evenhanded decision maker.

The Commission demands that those who practice before it conform to the standards of ethical conduct required of practitioners in the courts of the United States. 29 C.F.R. $ 2700.80(a). Where such standards have been violated, the Commission's procedural rules provide an orderly and fair means of correction. Commission Procedural Rule 80(b) mandates that disciplinary proceedings be instituted when one practicing before the Commission has engaged in unethical or unprofessional conduct. 29 C.F.R. $ 2700.80(b). In order to ensure due process to those charged, Commission Procedural Rule 80(c) provides that those accused be afforded notice of the charges and the right to a hearing. 29 C.F.R. $ 2700.80(c). Specifically, Rule 80(c) requires that a judge "having knowledge of circumstances that may warrant disciplinary proceedings ... shall forward such information, in writing, to the Commission for action." 29 C.F.R. $ 2700.80(c).

Judge Kennedy's comments with regard to Mr. Moncrief contain assertions of unethical and unprofessional conduct which, had they been well founded, would have been grounds for a disciplinary proceeding. We have previously cautioned Judge Kennedy that such allegations made in the course of a proceeding, without the required

disciplinary referral, deprive the accused of elementary procedural safeguards. Canterbury Coal Co., 1 FMSHRC 335, 336 (May 1979). By now, Judge Kennedy should know how to make a disciplinary referral. Canterbury Coal Co., 1 FMSHRC at 336; James Oliver and Wayne Seal, 1 FMSHRC 23, (March 27, 1979); In re Kale, 1 BNA MSHC 1699 (FMSHRC Docket No. D-78-1, November 15, 1978). In this case, Judge Kennedy's demonstrated insensitivity to the legitimate interests and rights of those appearing before the Commission, and his disregard of the Commission's rules and our prior warnings on this subject, warrant our gravest concern.

Accordingly, we conclude that the judge's critical comments were unfounded and unjustified. Based on the record, even if the judge had followed the proper procedural course for making a disciplinary referral, we would have vacated the referral as being unfounded. Therefore, all but the last paragraph of the order of April 25, 1984, is struck, as is the phrase "for want of prosecution" in the judge's final order of dismissal. 2/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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2/ 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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