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JUL 10, 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 inquiry has been conducted to determine whether Commission Administrative Law Judge Joseph B. Kennedy and John J. Malik, counsel for respondent T.P. Mining, Inc. ("T.P. Mining"), engaged in a prohibited ex parte communication in violation of Commission Procedural Rule 82, 29 C.F.R. § 2700.82, in the course of pretrial proceedings in the above-captioned matter. 1/ The Commission solicited and received

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1/ Rule 82, entitled "Ex parte communications," provides:

(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....

29 C.F.R. § 2700.82.

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affidavits from the relevant parties. For the reasons that follow, we conclude that Judge Kennedy and Mr. Malik did engage in a prohibited ex parte communication. Judge Kennedy's violation of Rule 82, in the face of explicit prior warnings to him on this subject, is particularly egregious.

This inquiry arises in connection with a discrimination complaint filed by the Secretary of Labor on behalf of miner James M. Clarke pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). The complaint alleged that T.P. Mining had discharged Mr. Clarke in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), and requested 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 violation. T.P. Mining denied that Mr. Clarke had been wrongfully discharged, and the case was assigned to Judge Kennedy.

In an order issued on November 3, 1983, Judge Kennedy directed the Secretary to furnish him and Mr. Malik with a copy of the report of the investigation into Mr. Clarke's complaint conducted by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The judge's order stated that the MSHA report was needed "[i]n order to facilitate the trial judge and the operator's understanding of the issues." The report was not produced. Rather, the Secretary requested a stay of the order on the grounds that Mr. Clarke had been reinstated by T.P. Mining and that a settlement of his back pay claim was expected. On February 22, 1984, the judge ordered the Secretary to show cause why the discrimination complaint should not be dismissed "subject to reinstatement when the parties were prepared to file their motion to approve settlement." On March 1, 1984, the Secretary responded to the show cause order, opposing dismissal of the complaint because "[d]espite frequent discussions of the matter of [Mr.] Clarke's lost income ... no basis for settlement has resulted Judge Kennedy then ordered the Secretary to furnish the MSHA investigative report by March 23, 1984.

On March 20, 1984, the Secretary's counsel, Frederick W. Moncrief, wrote to the judge that Mr. Clarke's discrimination claim had been settled to Mr. Clarke's satisfaction. Eight days later, on March 28, 1984, T.P. Mining's counsel, Mr. Malik, wrote the judge a letter that began, "Pursuant to your telephone request this morning, I will advise you of our proposed settlement." Mr. Malik stated that he and Mr. Moncrief had agreed that T.P. Mining would pay Mr. Clarke \$5,500, and that the check be transmitted to Mr. Moncrief to retain until Mr. Clarke had signed the "necessary papers." Mr. Malik stated

that the check had been mailed on March 26, 1984, and that the check was "payment in full for a discrimination case filed by [Mr.] Clarke for full back pay and employment benefits ... and for interest." On April 2, 1984, the Secretary moved that the case be dismissed.

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In an order dated April 3, 1984, Judge Kennedy dismissed the wrongful discharge aspect of the complaint. However, he severed the Secretary's civil penalty proposal. The judge stated that the Secretary's 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 complaint "pending receipt of the information ... necessary to approve settlement of the civil penalty aspect of the complaint." On April 18, 1984, Mr. Moncrief wrote to the judge that the parties intended that the resolution of Mr. Clarke's back pay claim totally resolve the case and that the Secretary's agreement to forsake seeking a civil penalty had been an "important ingredient of the money settlement to [Mr.] Clarke."

In response to Mr. Moncrief's letter, Judge Kennedy issued an order on April 25, 1984, affirming the severance of the civil penalty aspect of the case and ordering the Secretary to furnish forthwith the MSHA investigation report in order to support the Secretary's request to forsake the civil penalty. On May 10, 1984, the judge dismissed the severed penalty proposal for "want of prosecution," due to the failure to produce the investigative report. On May 16, 1984, the Secretary filed with the Commission a petition for discretionary review of the April 25 order.

On May 23, 1984, we granted the Secretary's petition for discretionary review. On May 31, 1984, Judge Kennedy sent the Commission a letter concerning the Secretary's petition. In his letter, Judge Kennedy asserted that the record supported his decision. The judge also maintained that he had appropriately severed the penalty aspect of the case from the discrimination complaint and stated that Mr. Malik had recognized that the penalty proposal would require separate consideration. Judge Kennedy stated: "This was because the basis for the settlement was fully disclosed in a discussion between counsel for the operator and the trial judge to which Mr. Moncrief was not a party." Because we concluded that the judge's letter, on its face, indicated that an ex parte conversation had occurred between Judge Kennedy and Mr. Malik, we did not return it to the judge as an unauthorized submission. We directed the judge and Mr. Malik to submit sworn statements that disclosed fully the substance of the telephone conversation. 6 FMSHRC 1401 (June 1984).

The first sworn statement received by the Commission was from Mr. Malik. Mr. Malik stated that on March 28, 1984, he had received a telephone call from Judge Kennedy inquiring about the settlement negotiations. Mr. Malik further stated that he "informed the judge that the matter had been basically settled but there were a few small

details to be worked out between [Mr.] Moncrief and myself." Although Mr. Malik asserted that he did not discuss the settlement in detail, he added that "the money settlement ... had been resolved and I may have related that to the judges Mr. Malik concluded his affidavit by stating that following the telephone call from Judge Kennedy he called Mr. Moncrief and related the conversation.

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The second sworn statement received was the affidavit of Judge Kennedy, accompanied by a brief in the form of a letter from counsel retained by the judge. In his affidavit, Judge Kennedy stated that his telephone conversation with Mr. Malik on March 28, 1984, lasted "no more than one or two minutes," and was confined to a single inquiry--namely, whether the check in payment of Mr. Clarke's claim for back pay had been sent to Mr. Moncrief. The judge stated that Mr. Malik had told him that he was certain the check had been sent but that "he would double check the matter with [T.P. Mining] and inform [the judge] by letter of the exact status both of the payment and of the parties' settlement negotiations Judge Kennedy added, "My recollection of the conversation closely coincides with that of Mr. Malik as set forth in his [affidavit]."

Judge Kennedy also noted Mr. Malik's statement in his letter of March 28, 1984, to the judge that "[p]ursuant to your telephone request this morning, I will advise you of our proposed settlement which I am aware is subject to your approval." Judge Kennedy asserted that this statement confirmed his recollection that he did not inquire, Mr. Malik did not volunteer, and neither of them discussed any details of the settlement, because at the time of the telephone call the details of the settlement had not been finally resolved. The judge stated that Mr. Malik's March 28 letter was composed after Mr. Malik had spoken with Mr. Moncrief later that day and had worked out the settlement details. The judge asserted that it was Mr. Malik's March 28 letter, not the earlier telephone conversation with Mr. Malik on that date, which "informed me of the basis of the settlement." Judge Kennedy stated that when he wrote in his May 31, 1984 letter to the Commission that "the basis for the settlement was fully disclosed in a discussion between counsel for the operator and the trial judge to which [Mr.] Moncrief was not a party," his reference to a "discussion" included Mr. Malik's letter of March 28, 1984.

The third sworn statement received by the Commission was the affidavit of Michael A. McCord, the Secretary's Counsel for Appellate Litigation. Mr. McCord moved the Commission for leave to file the affidavit, asserting that it contained information directly bearing on the inquiry, and the motion was granted. In his affidavit, Mr. McCord stated that he had several telephone conversations with Mr. Malik in April and May 1984, while trying to obtain background information for a possible appeal of the judge's orders. According to Mr. McCord, Mr. Malik stated that the judge had called him on March 28, 1984, and that Mr. Moncrief had not been involved in the conversation. Mr. McCord stated that Mr. Malik informed him that

the following subjects had been discussed during the conversation:

(1) The judge repeatedly complained to Mr. Malik about alleged misconduct by Mr. Moncrief; (2) the judge asked whether Mr. Malik intended to demand that the Secretary turn over a copy of his official investigative files and suggested that this might be helpful; (3) Mr. Malik told the judge that he did not intend to seek the file because the case might be settled; and (4) Mr. Malik gave the judge a brief status report of the case but did not fully disclose the basis for the settlement.



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After a review of these affidavits, together with the judge's letter of May 31, 1984, the Commission issued an order on August 21, 1984, in which we stated that the record contained "apparent discrepancies and omissions." We therefore ordered Mr. Malik to file a "complete and detailed" affidavit to resolve the discrepancies.

On September 20, 1984, Mr. Malik filed his second affidavit. In the affidavit, Mr. Malik stated that on at least two separate occasions during his March 28 telephone conversation with Judge Kennedy, the judge complained about the manner in which Mr. Moncrief was handling the case. Mr. Malik stated that he did not recall the specifics of Judge Kennedy's comments "but there was no question that they were of a derogatory nature." Mr. Malik also stated, "The judge and I did discuss the investigative file in this matter. I told him that I had not reviewed it and he suggested that it might be helpful. I then informed him that I did not intend to seek the file at that time because of the way our negotiations were going."

Both Commission Rule 82 (n. 1 supra) and section 557(d) of the Administrative Procedure Act, 5 U.S.C. § 557(d)(1982)("APA"), prohibit ex parte communications between a Commission judge and a party regarding the merits of pending cases. Knox County Stone Co., Inc., 3 FMSHRC 2478, 2483-86 (November 1981). 2/ We have held that the concept of the "merits" of a case is to be broadly construed, and that the purpose of prohibiting ex parte communications with respect to the merits of a Commission case is to foster the integrity and the fairness of Commission adjudicative proceedings. Knox County, supra, 3 FMSHRC at 2485-86; United States Steel Corp., 6 FMSHRC 1404, 1407 n. 2 (June 1984). 3/ Ex parte communications also are prohibited in the Code of Judicial Conduct. Knox County, 3 FMSHRC at 2485-86.

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2/ The APA defines "ex parte communication" as:

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....

5 U.S.C. § 551(14).

3/ We stated in Knox County:

As Congress explained in enacting section 557(d):

The purpose of the provisions ... 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

(Footnote continued)

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To be prohibited, a communication must not only be ex parte but also must bear on the merits of a case. To warrant discipline, the communication must be knowingly and willfully made. It is clear that the telephone conversation of March 28, 1984, between Judge Kennedy and Mr. Malik was initiated by Judge Kennedy, involved only one party to the pending litigation, was not on the public record, and was without prior notice to the other party, the Secretary of Labor. In short, the conversation was ex parte. Therefore, we must next determine, on the basis of the record developed in this inquiry, whether the communication was prohibited in that it concerned the merits of the case.

Based upon the affidavits in this record, we conclude that the following substantive matters were discussed during the conversation: (1) the state of the settlement negotiations; (2) the MSHA investigative report; and (3) the judge's opinion of Mr. Moncrief. We are not troubled by the portion of the conversation that concerned the status of settlement negotiations. The discussion involved the question of whether the case had been settled and whether the settlement check had been sent. As such, it was a permissible status inquiry by the presiding judge.

On the other hand, those portions of the conversation that dealt with the MSHA investigative report referenced the merits of the case and were prohibited. Mr. Malik states that he and Judge Kennedy discussed the MSHA investigation file, and that Judge Kennedy suggested that "it might be helpful" if Mr. Malik received the file. Judge Kennedy had every reason to believe that the MSHA investigative report contained subject matter relating to the grounds of the Secretary's discrimination complaint, and therefore was relevant to potential defenses as well. At the time of the ex parte conversation, the case had not been settled and the report was a potential piece of evidence. In communicating about the report, in an off-the-record and ex parte manner, Judge Kennedy discussed an aspect of the merits of the case. Judge Kennedy had previously ordered the Secretary to produce the report, and it may be that he urged Mr. Malik to seek the report in order to pressure the Secretary to comply with the order. However, if Judge Kennedy believed that production of the report was necessary to a resolution of the case he should have sought to compel compliance with his order by proper judicial process. An ex parte and off-the-record suggestion to counsel for one of the parties is no substitute for orderly and valid legal procedure.

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Fn. 3 continued

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.

[H.R. Rep. No. 880, Parts I & II, 94th Cong., 2d Sess. 2 (Part I), 18 (Part II)(1976), reprinted in 1976 [3] U.S. Code Cong. & Ad. News, 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.  
3 FMSHRC at 2485.

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Moreover, an ex parte, off-the-record suggestion by a judge that a party seek a particular piece of evidence is incompatible with the requirements of the Mine Act and the APA that adjudicative records in Commission proceedings be developed through the adversarial system. When the development of evidence is influenced by such a judicial "suggestion" to one party, the integrity of the record and, consequently, of the Commission may be compromised. See, e.g., *U.S. Lines v. FMC*, 584 F.2d 519, 537-43 (D.C. Cir. 1978); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51-59 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1977).

We also conclude that those portions of the conversation in which Judge Kennedy criticized Mr. Moncrief were prohibited. In his affidavit, Mr. Malik stated that the judge "complained about the manner in which [Mr. Moncrief] was handling the case," and that the complaints were derogatory. The merits of a case include not only the grounds of a proceeding or a defense to it but also any communication that may indirectly or subtly influence the outcome of a proceeding. *PATCO v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982). A judge's off-the-record, derogatory comments about counsel for one party made to opposing counsel could influence the behavior, tactics, and arguments of opposing counsel and, thus, affect the substantive outcome of the proceeding.

We turn to the question of whether Judge Kennedy and Mr. Malik "knowingly and willfully" engaged in the prohibited aspects of their discussion. Judge Kennedy initiated and pursued the conversation with regard to the investigative report and Mr. Moncrief. Judge Kennedy knew what he was saying. He raised the subjects intentionally. His participation was knowing and willful. The judge's participation in the conversation was not an innocent, albeit misguided, first-time occurrence. Cf. *United States Steel Corp.*, supra, 6 FMSHRC at 1408-09. Judge Kennedy has been warned previously that the prohibitions against ex parte communications are vital to the integrity of the Commission's process. *Knox County*, 3 FMSHRC at 2483, 2486; *Inverness Mining Co.*, 5 FMSHRC 1384, 1388 n. 3 (August 1983) (both cases involving our review of proceedings presided over by Judge Kennedy). To be fully aware of the prohibitions, and nevertheless to initiate and participate in a prohibited ex parte communication is unacceptable.

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We recognize that any conversation requires two parties. Mr. Malik also knew that the conversation was ex parte. Although we conclude that his participation was knowing, there are mitigating circumstances with regard to willfulness. Mr. Malik was responding to the presiding judge, who initiated the contact and raised the prohibited subject. Further, Mr. Malik advised the Secretary's counsel following the conversation that the conversation had occurred. Moreover, Mr. Malik stated that this was the first time that he had been contacted in such an ex parte fashion by a judge. We credit Mr. Malik's assertion that he was surprised by the call and that he was a reluctant participant. Thus, although we conclude that his participation in the prohibited ex parte conversation violated Commission Rule 82, we are persuaded that his lesser role in this affair warrants no more than a cautionary warning that the Commission should have been notified on the record of the communication and that prohibited communications are to be strictly avoided in the future.

The judge, on the other hand, has no excuse. We expect Commission judges, regardless of personal opinions, to abide by the law. As we have stressed, Judge Kennedy previously has been reminded expressly of the necessity of complying with the letter and the spirit of Commission Rule 82. His actions in this case demonstrate an intransigent disregard of applicable procedures. They impugn this independent agency's credibility and undermine its status as an impartial adjudicative body. We condemn Judge Kennedy's actions in the strongest terms and retain, for further consideration, the question of appropriate discipline. 4/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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4/ 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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