CCASE:
UMWA V. PEABODY COAL
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FMSHRC-WDC
AUG 5, 1985

UNITED MINE WORKERS	
OF AMERICA (UMWA)	Docket Nos. KENT 82-103-D
ON BEHALF OF JAMES	KENT 82-105-D
ROWE, et al., JERRY D. MOORE	KENT 82-106-D
LARRY D. KESSINGER	
v.	
PEABODY COAL COMPANY	
and	
SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH	
ADMINISTRATION (MSHA),	
ON BEHALF OF THOMAS L.	
WILLIAMS	Docket No. LAKE 83-69-D
v.	
PEABODY COAL COMPANY	

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

DECISION

BY THE COMMISSION:

An inquiry has been conducted to determine whether Commission Administrative Law Judge Joseph B. Kennedy while presiding in the captioned proceedings, acted improperly by: (1) engaging in a prohibited ex parte communication; (2) verbally abusing attorneys appearing before him; (3) threatening the Secretary's counsel; and (4) commenting publicly on a pending proceeding. In the instances and on the grounds explained below, we conclude that Judge Kennedy's conduct was improper and is cause for serious concern.

This inquiry arises in connection with discrimination complaints filed under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), against Peabody Coal Company ("Peabody") by the United Mine Workers of America ("UMWA") on behalf of James Rowe and others and by the Secretary of Labor on behalf of Thomas L. Williams. These complaints alleged that certain of Peabody's policies relating to the training and recall of laid-off miners violated the Mine Act. By order dated June 18, 1984 we severed this inquiry from the merits of these cases. The procedural events relevant to this inquiry are summarized below.

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The underlying discrimination complaints were consolidated

before Judge Kennedy and all parties cross-petitioned for summary decision. On April 24, 1984, Judge Kennedy issued an order denying the motions for summary decision. The Secretary of Labor petitioned the Commission for interlocutory review of the judge's order. Thereafter, the Commission received a letter dated May 17, 1984, from Francis X. Lilly, Solicitor of the Department of Labor. In his letter, the Solicitor asserted that on April 11, 1984, Judge Kennedy initiated an ex parte telephone conversation with a Department attorney, Linda Leasure, and that during the conversation the judge discussed the merits of the Peabody cases. The letter also complained of abusive conduct by Judge Kennedy towards the Secretary's counsel of record, Frederick W. Moncrief, and toward counsel for the UMWA and Peabody at an oral argument held before the judge on April 12 and 13, 1984. Finally, the Solicitor asserted that Judge Kennedy had threatened Mr. Moncrief in a separate incident occurring on April 19, 1984. The letter was accompanied by affidavits from Ms. Leasure and Mr. Moncrief, and by portions of the transcript of the oral argument of April 12 and 13, 1984.

By order dated May 18, 1984, the Commission deemed the Solicitor's letter and the accompanying materials to be, in part, a notification of a prohibited ex parte communication and a request for appropriate action under Commission Procedural Rule 82. 29 C.F.R. $ 2700.82. 1/ Accordingly, copies of the Solicitor's letter and the accompanying materials were placed in the record and were served on all parties and on Judge Kennedy.

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1/ 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....
29 C.F.R. $ 2700.82.
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The Commission granted the Secretary of Labor's petition for interlocutory review, vacated the judge's order of April 24, 1984, and reassigned the Peabody cases to the Commission's Chief Administrative Law Judge for disposition. The Commission stated:
We take this action to avoid either the appearance or existence of judicial bias. Apparently, [Judge Kennedy] and counsel have become involved in a controversy which is evidenced by the transcript of oral argument held before the judge on April 12 and 13, 1984, and the letter and supporting affidavits filed with the Commission by the Solicitor of Labor on May 17, 1984....
The record before us as to the relations between the judge and all counsel to the parties indicates that the rights of the parties, the expedition of the proceedings, and the policies of the Commission would be better served by a reassignment of these matters. Cf. Taylor v. Hayes, 418 U.S. 488 (1974); Offutt v. United States, 348 U.S. 11 (1954); Chocallo v. Bureau of Hearings and Appeals, 548 F. Supp. 1349, 1362 (E.D. Pa. 1982).
The Commission also severed the allegations of judicial misconduct from the merits of the proceedings and retained jurisdiction over those allegations for further consideration.
We subsequently directed Judge Kennedy to submit for inclusion in the record his affidavit concerning the telephone conversation with Ms. Leasure of April 11, 1984, and the incident involving Mr. Moncrief on April 19, 1984. We also noted that on May 27, 1984, an article appeared in the Lexington [Kentucky] Herald-Leader entitled "Mine Safety Judge Walks Controversial Path," in which the judge was quoted, inter alia as characterizing the telephone conversation with Ms. Leasure as a trivial incident and making critical comments regarding Mr. Moncrief. We stated:
Because of our concern that the Commission's judges abide by standards of proper judicial conduct, we find it appropriate to direct the judge to disclose in his sworn statement whether he discussed the Solicitor's letter to the Commission, the telephone conversation of April 11, 1984, [and] the incident of April 19, 1984, with the author of the article, Michael York, or other persons in connection with the article printed in the Lexington Herald-Leader. If such a

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discussion or such discussions took place, we further direct that the statement disclose the substance of the discussion or discussions, and whether the administrative law judge is quoted accurately in the article.

In response, Judge Kennedy moved for dismissal of this inquiry and for a stay of the order directing the filing of his affidavit. The judge asserted, inter alia that the Commission inquiry was "plainly disciplinary in nature and that the Commission was "without jurisdiction to take disciplinary action against an administrative law judge for any matter involving the exercise of [a judge's] judicial responsibilities unless it has filed a complaint with the Merit Systems Protection Board... In an order issued March 15, 1985, we denied the judge's motion. We stated:

Before this Commission undertakes to discipline, or seek discipline of, an administrative law judge it needs first to determine whether any disciplinary action is required. The Commission has followed, and will continue to follow, appropriate procedures in seeking to examine the allegations of misconduct that have been raised in this matter. If the Commission later determines that grounds exist for forwarding this matter to the Merit Systems Protection Board, it will do so. [2/]

2/ The Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), empowered the Merit Systems Protection Board ("MSPB") to hear and decide an employing agency's complaint proposing designated types of adverse action against an administrative law judge. 5 U.S.C. $ 7521 (1982). We need not decide at this time whether section 7521 preemptively reserves MSPB jurisdiction over all forms of disciplinary action against an administrative law judge. As noted in our March 15, 1985 order, however, before an agency "undertakes to discipline, or seek discipline of, an administrative law judge," it needs first to engage in an appropriate process designed to determine whether discipline is warranted. Cf. Ass'n of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1140 (D.D.C. 1984).

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Judge Kennedy's subsequently filed affidavit was placed in the record and copies were provided to the parties. 3/ We thereafter accepted for filing affidavits from Mr. Moncrief and Cynthia A. Attwood the Department of Labor's Associate Solicitor for Mine Safety and Health, responding to points raised in Judge Kennedy's affidavit. We examine separately the allegations of improper conduct.

I. Ex parte communication

While serving as the presiding administrative law judge in the Peabody litigation, Judge Kennedy, by order dated February 9, 1984, directed the Secretary of Labor to explain why he had not sought temporary reinstatement for complainant Thomas L. Williams pursuant to section 105(c)(2) of the Mine Act. 30 U.S.C. $ 815(c)(2). Counsel for the Secretary, Mr. Moncrief, filed a response explaining that it was the Secretary's position that because Mr. Williams was laid-off when the alleged discriminatory act occurred, Mr. Williams was not a "miner" entitled to temporary reinstatement. Following receipt of the Secretary's response, Judge Kennedy scheduled oral argument on the motions for summary decision for April 12, 1984.

The Solicitor asserts that on April 11, 1984, one day prior to the scheduled oral argument, Judge Kennedy telephoned Linda Leasure, an attorney on the Solicitor's appellate staff. The Solicitor states that Judge Kennedy asked Ms. Leasure detailed questions regarding the position taken in a brief she had written that had been filed by the Secretary of Labor in an appeal pending in the United States Court of Appeals for the Tenth Circuit, Emery Mining Corp. v. Secretary of Labor, etc., No. 83-2017. 4/ In describing Judge Kennedy's conversation with Ms. Leasure, the Solicitor states in his letter:

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3/ In filing his affidavit, Judge Kennedy moved for a protective order to shield his affidavit from disclosure "to anyone other than Commission members, except upon notice to the Judge of any proposed disclosure and opportunity for him to respond to any such proposed disclosure." We denied the judge's motion in an order issued on March 28, 1985, and directed that the judge's affidavit be placed in the official public record at the close of business on April 3, 1985. No response to this order was received and, accordingly, on April 3rd the judge's affidavit was placed in the record and served on the parties.

4/ This case involves review of the Commission's decision in Secretary of Labor on behalf of Bennett, etc. v. Emery Mining Corp., 5 FMSHRC 1391 (August 1983). In Emery, the Commission held that the operator's hiring policy of requiring job applicants to have 32 hours of miner training as a qualification for employment was not, per se a violation of the Mine Act but that the operator's refusal to reimburse individuals for the cost of such training after hiring them, while relying on such training to satisfy the miner training requirements of section 115 of the Mine Act, 30 U.S.C. $ 825, did violate the Act. 5 FMSHRC at 1394-97.

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The judge attempted to get ... Ms. Leasure ... to respond to hypothetical questions regarding the Secretary's position on fulfilling the Mine Safety and Health Administration's

training requirements in layoff situations. [The judge] asserted that the Solicitor had conflicting positions in the [Peabody litigation and in the Emery case in the lOth Circuit], demanded to know how Ms. Leasure planned to deal with that conflict in the Tenth Circuit and implied that [in the Peabody litigation] the Solicitor's Office had seriously misrepresented the [Secretary's] true position.

In her affidavit Ms. Leasure describes in detail the telephone conversation with Judge Kennedy. Ms. Leasure states that she received the telephone call from Judge Kennedy on April 11, 1984, and that the judge explained that he wanted to understand more fully the Secretary's position before the Tenth Circuit in Emery.

Ms. Leasure asserts that Judge Kennedy inquired about a portion of the Secretary's brief discussing the Commission's conclusion in its Emery decision that applicants for employment were not discriminated against by Emery's hiring policy. According to Ms. Leasure, Judge Kennedy asked if that portion of the brief had been reviewed and approved, and averred that he had cases before him in which the Secretary of Labor had taken an opposite position. Ms. Leasure states, "At this point in the telephone conversation the judge neither identified the specific cases in which [the Secretary] purportedly had taken contrary positions, nor named the attorneys or offices handling the cases." Ms. Leasure relates that she told the judge the Emery brief had been reviewed and approved and that she was not aware of any conflict in the Secretary's position. Ms. Leasure asserts that Judge Kennedy insisted that there was a case in which the Secretary was taking an inconsistent position, and inquired how this inconsistency would be explained to the court of appeals. Ms. Leasure states that Judge Kennedy criticized the Secretary's litigation strategy in the Emery appeal and then posed various hypothetical questions concerning what the Secretary's position would be with respect to laid-off miners if reemployment decisions were premised upon training mandated by the Mine Act. Ms. Leasure states that when she realized that Judge Kennedy's hypothetical questions resembled the case that Mr. Moncrief was scheduled to argue before the judge the next day, she asked if that was the matter to which he was referring. When he told her that it was, she terminated the conversation.

In his affidavit describing the telephone conversation Judge Kennedy states:

I ... pointed out to Ms. Leasure what I perceived to be a conflict between her position and that of Mr. Moncrief. I told her that in his

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brief before me Mr. Moncrief had sought to justify the Solicitor's refusal to temporarily reinstate

Williams on the ground that he was not a "miner,"
... because at the time he was bypassed for [rehire]
... he was not actively employed in a mine. At first
Ms. Leasure led me to believe that she had never really
thought about the conflict I perceived between her brief
and that of Mr. Moncrief. Then she said she thought they
might be distinguished factually and legally because the
question of temporary reinstatement had not come up in the
Emery case. When I pressed her ... she became flustered
and nonplussed with my questions.
* * *
I told Ms. Leasure I could not understand how the
Secretary could represent to the Tenth Circuit that an
individual with no mining experience was entitled to be
accorded the status of a "new miner" [while] an experienced
miner like Mr. Williams was not to be considered a miner at
all. At this point, if I recall correctly, Ms. Leasure
became quite defensive and accused me of attempting to open
a "pandora's box" and "prying into internal policies and
deliberations" that were really none of my business. I
thanked her for her time and attention and terminated the
conversation which had lasted about five minutes.

This version of the contents of the telephone conversation was, in general, repeated by Judge Kennedy at the oral argument held before him on April 12, 1984. Tr. I 72-73.

Commission Rule 82 (n. 1 supra) and section 557(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. $ 557(d)(1982), prohibit ex parte communications between a Commission judge and a party regarding the merits of a pending case. T.P. Mining, Inc., 7 FMSHRC (FMSHRC Docket No. LAKE 83-97-D, July 10, 1985), slip op. at 5-6; United States Steel Corp., 6 FMSHRC 1404, 1407-09 (June 1984); Knox County Stone Co., Inc , 3 FMSHRC 2478, 2482-86 (November 1981). 5/ It is clear that the

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5/ Section 551(14) of the APA, 5 U.S.C. $ 551(14) (1982), 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....

telephone conversation of April 11 between Judge Kennedy and Ms. Leasure was ex parte. The conversation involved only Judge Kennedy and an attorney employed by the Secretary of Labor, a party to the Peabody litigation. The telephone conversation was not on the

record, and was made without notice to counsel for the other parties, or even to counsel of record for the Secretary, Mr. Moncrief. Regardless of whether the conversation took place precisely as described by Ms. Leasure or by Judge Kennedy, it is clear that the communication concerned the merits of the Peabody litigation. The concept of the "merits of a case" is construed broadly and, at the very least, includes discussion of the issues in a case and how those issues should or will be argued and resolved. T.P. Mining, supra, slip op. at 5, 7; Knox County, supra, 3 FMSHRC at 2485. Moreover, any ex parte communication that might influence the substantive outcome of a proceeding pertains to the merits of a case and, thus, is prohibited. T.P. Mining, slip op. at 7, citing PATCO v. FLRA. 685 F.2d 547, 563 (D.C. Cir. 1982).

In the Peabody cases, the theory of the laid-off complainants' cause of action is that Peabody violated the Mine Act by refusing to rehire them because of their lack of training mandated by section 115 of the Act. 30 U.S.C. $ 825. Peabody's defense is that the training provisions do not set employment criteria for laid-off miners. The essence of the April 11 discussion initiated by Judge Kennedy went to the grounds of the complaint and the defense. In addition, according to his own affidavit, Judge Kennedy raised the issue of why complainant Williams was not entitled to reinstatement. The Emery case, about which Judge Kennedy so vigorously questioned Ms. Leasure, had been cited by all of the parties in their motions and supporting memoranda to the judge. Judge Kennedy was gathering off-the-record information from one of the parties that would bear on and influence his evaluation of the parties' arguments with respect to the issues of discrimination and reinstatement presented in the Peabody litigation pending before him. The conversation therefore concerned the merits of the Peabody litigation and was prohibited. The fact that Judge Kennedy initiated the conversation one day prior to the scheduled oral argument in the Peabody matter reinforces this conclusion. 6/

6/ In the Peabody litigation the only attorney to enter an appearance on behalf of the Secretary was Mr. Moncrief. By soliciting information concerning the Secretary's position from another Department of Labor attorney, with the apparent object of exploring what the judge perceived as weaknesses in the Secretary's position, the judge denied the Secretary his right to a hearing conducted in a fair and appropriate adversarial framework.

We also conclude that Judge Kennedy "knowingly and willfully" engaged in this prohibited communication. See 29 C.F.R. $ 2700.82(b)(1). The conversation was intentionally initiate by Judge Kennedy. Judge Kennedy knew what he was discussing and why he

was discussing it. Nor was this the first instance in which Judge Kennedy has engaged knowingly and willfully in a prohibited ex parte communication. T.P. Mining, slip op. at 5-8; Cf. United States Steel Corp., 6 FMSHRC 1404, 1408 (June 1984).

We also conclude that although Ms. Leasure was a party to the prohibited communication, her participation was not knowing and willful within the meaning of Commission Rule 82. Ms. Leasure was not the attorney of record in the Peabody litigation; she did not initiate the discussion; she was responding to a federal administrative law judge; and she terminated the conversation after realizing that it concerned the merits of the pending Peabody litigation. Moreover, Ms. Leasure's supervisor, the Solicitor, brought the conversation to the Commission's attention. Rather than reflecting adversely upon Ms. Leasure, the conversation presents us with yet another incident of Judge Kennedy initiating a prohibited ex parte communication. T.P. Mining, supra; see Inverness Mining Co., 5 FMSHRC 1384, 1388 n. 3 (August 1983); Knox County, 3 FMSHRC at 2482-86.

II. Abuse of attorneys

We have noted recently that, as an active participant in the adjudicatory process, a Commission judge has a duty to conduct proceedings in a orderly manner so as to elicit the truth and obtain a just result, and that in carrying out this duty a judge may be required to admonish counsel. T.P. Mining, Inc, 7 FMSHRC (FMSHRC Docket No. LAKE 83-97-D, July 2, 1985), slip op. at 5. However, such admonitions are to be couched in temperate language. Id. Patience, dignity and courtesy are not only watchwords of judicial conduct, they are essential cognates of fairness and efficiency. See ABA, Code of Judicial Conduct, Canon 3(A)(3)(1980). 7/ Here, the transcript of the oral argument before Judge Kennedy on April 12 and 13, 1984, reveals comments by the judge to the attorneys that were, at times, sarcastic and demeaning. The judge was extremely critical of all of the attorneys for not being as prepared as he deemed necessary. Tr. II at 70. Although Judge Kennedy stated that "it is time to start applying sanctions," he did not attempt to initiate sanctions by advising the Commission pursuant to Commission Procedural Rule 80, 29 C.F.R. $ 2700.80, of any professional misconduct on the part of counsel in this matter.

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7/ The ABA's Code of Judicial Conduct has been adopted by the Judicial Conference of the United States for the guidance of federal judges. See Judicial Conference of the United States, Code of Judicial Conduct for the United States Judges (1974).

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Judge Kennedy was rude and sarcastic with counsel for the UMWA.

At one point in the hearing he repeatedly called upon her to answer a question that he posed. When she did not respond immediately, he asked her, "Do you want a recess and rest? Is it too much of an intellectual strain for you to answer the question?" He added, "Maybe we should get another lawyer over here from the union that can answer my questions." Tr. I at 200-01. When Judge Kennedy and counsel for the UMWA disagreed about which facts were relevant to the UMWA's position, the judge stated, "I think you do your client a disservice when you choose to ignore salient facts that help on the equities." Tr. I at 73. The judge added that he was "a little shocked" to hear what counsel regarded as "relevant." Tr. I at 75. Judge Kennedy was also impatient with and critical of counsel for Peabody. When counsel stated that he did not have a copy of the brief filed by the Secretary in the Emery litigation (to which Peabody was not a party), the judge replied, "I'm getting sick of this. Act like a lawyer, will you?" Tr. I at 170.

Judge Kennedy was also highly critical of counsel for the Secretary, Mr. Moncrief. Mr. Moncrief argued that the judge lacked jurisdiction to inquire into the Secretary's determination not to seek temporary reinstatement for claimant Williams. The judge termed the argument "the most specious [he] had ever heard." Mr. Moncrief responded, "Oh, I'm sure you have heard worse", and the judge replied, "Well, seldom, and you can usually top any one. ... I do wish the Solicitor would send people over here with a little more competence." Tr. II at 72. In addition, Judge Kennedy termed Mr. Moncrief's argument an "intellectually dishonest interpretation of the law," and asserted that the Secretary's decision not to seek reinstatement was "rather outrageous." Tr. I at 115.

The Peabody litigation was complicated, and portions of the record indicate that Judge Kennedy attempted to clarify the issues in order to better manage the forthcoming trial. A judge has "considerable leeway ... in regulating the course of a hearing and in developing a complete and adequate record." Canterbury Coal Co., 1 FMSHRC 335, 336 (May 1979). However, a judge's discretion in this regard is not unlimited. The APA requires that a judge must perform his adjudicative functions "in an impartial manner." 5 U.S.C. $ 556(b)(1982). Canon 3(A)(3) of the Code of Judicial Conduct requires that a judge be "patient, dignified and courteous to litigants, ... witnesses, lawyers and others with whom he deals in his official capacity." As the Supreme Court recently observed in In re Snyder, U.S. , 53 U.S.L.W. 4833, 4837 (June 25, 1985): "All persons involved in the judicial process -- judges, litigants, witnesses, and court officers -- owe a duty of courtesy to all other participants." Based on the transcript of the oral argument, we conclude that Judge Kennedy's undue impatience, sarcasm, and lack of

courtesy toward counsel violated these standards. Judge Kennedy has on more than one occasion, and by more than one tribunal, been found lacking in judicial restraint and temperament. Grundy Mining Co., Inc., v.
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Secretary of Labor, Mine Safety and Health Administration, 636 F.2d 1217 (6th Cir. 1981)(unpublished order); Canterbury Coal Co., 1 FMSHRC 1311, 1314 (September 1979). Counsel who appear before this Commission are entitled to be treated in a considerate manner. This Commission is entitled to be represented by a patient, dignified, and courteous judge. See In Re Chocallo, 2 MSPB 28, 62-63 (1980), aff'd mem. sub. nom. Chocallo v. Prokop, Civil Action No. 80-1053 (D.D.C., October 10, 1980), aff'd mem., 673 F.2d 551 (D.C. Cir. 1982). Judge Kennedy's conduct in the present case once again stands in stark contrast to these requirements.

III. Incident of April 19, 1984

The Solicitor states that on April 19, 1984, following the April 12-13 oral argument, a confrontation involving Judge Kennedy and Mr. Moncrief occurred at the Commission's Office of Administrative Law Judges in Falls Church, Virginia. This confrontation involved a dispute over the availability of the transcript of the oral argument. Near the close of the oral argument the judge stated: "I have asked to have the transcript of this argument expedited. And it will be available to the parties next Thursday, April 19." Tr. II at 76. On April 16, 1984, Mr. Moncrief wrote the Commission's Executive Director and requested a copy of the transcript. This letter is in the record. In his affidavit, Judge Kennedy maintains that Mr. Moncrief, in his letter to the Executive Director, misrepresented the judge's instructions regarding the transcript. Judge Kennedy also maintains that Mr. Moncrief persuaded the Executive Director to order the judge's secretary to make a copy of the transcript for Mr. Moncrief. Both Mr. Moncrief and Judge Kennedy agree that Mr. Moncrief came to the Commission's office on April 19 in order to obtain the copy of the transcript. Their sworn accounts as to what then transpired diverge. Mr. Moncrief states that when he entered the Commission's office, the judge yelled at him and accused him of misleading the Commission with regard to the matter of the transcript. According to Moncrief, the judge exclaimed: "By God now you've done it. You've really done it now boy. You wrote a misleading letter to the Commission and told them I said you could have my copy of the transcript Mr. Moncrief states that when he left the office, Judge Kennedy followed him to the elevator and shouted at him: "[W]atch your step. You're in my sights!", to which he replied "Keep 'em clear, Judge!" Judge Kennedy states that prior to seeing Mr. Moncrief on April 19, he was "seriously disturbed by Mr. Moncrief's duplicity"

in the matter of the transcript. Judge Kennedy asserts that when Mr. Moncrief appeared he asked him to explain his actions. According to Judge Kennedy, Moncrief "stepped back and stood mute with a contemptuous smirk on his face and when I pursued the matter he turned on his heel and walked out." The judge states that he followed Mr. Moncrief in order to pursue the matter and that Mr. Moncrief stated: "What the hell do you think you can do
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about it. You know damn well MSHA and the Commission are out to get you and I intend to do everything I can to help them." Judge Kennedy concludes, "I did not threaten [Mr. Moncrief]. I cautioned him against further provocations and told him ... I would keep an eye on him."

Our examination of Mr. Moncrief's letter to the Commission's Executive Director and the judge's transcribed statement at the oral argument concerning the availability of the transcript reveals no "duplicity" or misrepresentation on the part of Mr. Moncrief. Rather, the record reveals that he followed the Commission's established procedures concerning the Secretary of Labor's procurement of copies of documents, including transcripts, contained in official, public records maintained by the Commission. The fact that the judge may disagree with these procedures, or finds them inconvenient, provides no basis for venting his personal displeasure at the expense of a litigant who properly requests a copy of a document then in the judge's possession. Thus, regardless of whether Judge Kennedy was "seriously disturbed" (as he stated) or was angry (as Mr. Moncrief's affidavit suggests) his negative actions towards Mr. Moncrief were unwarranted.

Apart from this conclusion, we are unable to conclusively resolve in this forum the precise content of the exchange between the two men at the conclusion of their conversation. Although each affidavit contains statements that, if true, are cause for serious concern, our major concern here is over what transpired, both on and off the record, in connection with the merits of the underlying litigation.

We reemphasize, however, that the standards required to be observed by Commission judges mandate dignified and courteous relationships in order to assure the orderliness of proceedings and to protect the rights of all parties. Similar standards are required of those who practice before the Commission. Commission Procedural Rule 80(a), 29 C.F.R. $ 2700.80(a). These standards of conduct are not mere social niceties. They serve an important purpose by promoting the rational resolution of legal conflicts by curbing emotional excesses that litigation may engender. When these standards are disregarded, the underpinnings of the judicial system are eroded.

IV. The newspaper article

In directing that Judge Kennedy file a sworn statement regarding the newspaper article of May 27, 1984, published in the Lexington [Kentucky] Herald-Leader, we noted that the judge was quoted as characterizing his telephone conversation with Ms. Leasure as trivial and as being critical of Mr. Moncrief. 8/ In his affidavit, Judge Kennedy

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8/ The article states that the judge described his telephone conversation with Ms. Leasure as "absolutely, completely trivial" and that he said of Mr. Moncrief: "He is a lazy lawyer and I'm not surprised that he has nothing better to do than to bring this sort of complaint, I've been in cases in which he is totally unprepared and even argued positions that hurt his own case." York, "Mine Safety Judge Walks Controversial Path," Lexington [Kentucky] Herald-Leader, May 27, 1984, at A-1.

states that he was contacted by several reporters, including Michael York the author of the article, regarding the Solicitor's letter of May 17, 1984. The judge asserts that when Mr. York asked him for comment he said that he believed the charges in the letter were "trumped up"; that he thought the charges with regard to Ms. Leasure and Mr. Moncrief were lacking in substance; and that his official view on the question of Mr. Moncrief's competence was reflected in the record of the oral argument in the Peabody litigation and in his order of April 25, 1984 issued in T.P. Mining, Inc., FMSHRC Docket No. LAKE 83-97-D. 9/ Judge Kennedy also states that he is unable to confirm or deny the accuracy of the quotations.

Canon 3(A)(6), Code of Judicial Conduct, states in part:

A judge shall abstain from public comment about a pending ... proceeding in any court ....

The judge was well aware that the Solicitor's letter and our resulting inquiry arose out of incidents related to the pending Peabody litigation. At the time the article was published Judge Kennedy was the presiding trial judge in the matter. Judge Kennedy's comments concerned that pending litigation in that they related to the judge's ex parte telephone conversation and upon the competence of the Secretary's counsel of record. Moreover, public comment upon the competence of counsel in a proceeding amounts to commenting upon the proceeding itself. Counsel is an indisputable component of any proceeding in which he or she appears. T.P. Mining, supra, slip op. at 7.

The judge states that he told Mr. York that he, the judge, believed the Solicitor's letter represented an attempt "to silence [his] free criticism of the administration's cooperative enforcement

policy." Judge Kennedy's motive for granting the interview is irrelevant. The comments concerned a pending proceeding and they were forbidden. Public expressions by judges regarding cases and counsel before them can only mar the judicial body's appearance of impartiality and subject the integrity of its proceedings to question. Kennecott Copper Corp. v. F.T.C., 467 F.2d 67, 80 (lOth Cir. 1972).

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9/ We granted the Secretary of Labor's petition for discretionary review of the referenced order. We have held that the judge's critical comments regarding Mr. Moncrief lacked record support, and the comments were struck. T.P. Mining, Inc., 7 FMSHRC (FMSHRC Docket No. LAKE 83-97-D, July 2, 1984), slip op. at 3-6.

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The purpose of this inquiry has been to determine whether Judge Kennedy acted improperly in connection with the captioned proceeding. As discussed above we find several instances of improper conduct which are of grave concern. We reserve for further consideration the question of the necessary response to his actions. 10/

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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10/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission. Acting Chairman Backley has fully considered the motion of April 3, 1985, filed by Judge Kennedy, wherein the question of "appearance of bias on the part of the Acting Chairman in favor of Mr. Moncrief" is raised. The basis for this motion is a letter written by Acting Chairman Backley on behalf of Mr. Moncrief in his efforts to be certified as an administrative law judge. The letter, addressed to the Office of Personnel Management, is dated July 26, 1982. Acting Chairman Backley has concluded that the letter neither creates a bias nor appearance of bias in favor of Mr. Moncrief so as to warrant his refusal.

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