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MSHA V. KITT ENERGY & UMWA
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FMSHRC-WDC
JAN 30, 1986

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. WEVA 85-73-D
on behalf of
RONNIE D. BEAVERS, et al.
v.

KITT ENERGY CORPORATION,

and

UNITED MINE WORKERS OF AMERICA

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

Decision

BY THE COMMISSION:

This inquiry has been conducted to determine whether Commission Administrative Law Judge Roy J. Maurer, the presiding judge in the above-captioned case, and Frederick W. Moncrief, counsel for the Secretary of Labor, engaged in prohibited ex parte communications in violation of Commission Procedural Rule 82, 29 C.F.R. $ 2700.82. 1/

l/ 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 of 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.

This matter was brought before the Commission on October 30, 1985, when Commission Administrative Law Judge Joseph B. Kennedy filed with the Commission a memorandum asserting that ex parte telephone conversations between Judge Maurer and Mr. Moncrief occurred on May 2, 1985, and October 1 and 2, 1985, during the course of pre-trial proceedings in this case. (Judge Kennedy attached to his memorandum copies of letters in the record of this case from Moncrief to Judge Maurer memorializing the telephone conversations in question.) Judge Kennedy requested the Commission to conduct an inquiry to determine whether the telephone conversations were in violation of Rule 82. The Commission solicited and received from Judge Maurer and Moncrief statements making a full and complete disclosure of the circumstances and content of the communications. In addition, the Commission severed this Rule 82 inquiry from the merits of the case and stayed further proceedings before Judge Maurer.

The case on the merits involves a discrimination complaint filed on January 9, 1985, by the Secretary of Labor on behalf of Ronnie D. Beavers and twenty-seven other miners pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) The complaint alleges that Kitt Energy Corporation ("Kitt Energy) laid off the complainants because they lacked the underground safety and health training specified in section 115 of the Mine Act, 30 U.S.C. $ 825. The complaint also states that although Kitt Energy subsequently provided the training and recalled the complainants to work, it refused to compensate them for their training. The Secretary asserts that the layoff of the miners and the refusal to compensate them after the recall violated section 105(c)(1) of the Mine Act, 30 U.S.C. $ 815(c)(1). Kitt Energy denied the allegations of illegal discrimination, and the United Mine Workers of America ("UMWA") intervened.

Frederick Moncrief represented the Secretary, Bronius Taoras represented Kitt Energy, and Earl Pfeffer represented the UMWA. The case was assigned first to Commission Administrative Law Judge James A. Broderick. On April 5, 1985, Judge Broderick issued a prehearing order directing counsel to file stipulations concerning those factual matters not in dispute and to specify witnesses and exhibits to be offered concerning disputed factual issues. On April 25, 1985, after Judge Broderick's prehearing order was issued, but before the specified dates for compliance with the order, the matter was reassigned to Judge Maurer.

Prior to the reassignment of the case, the Commission heard oral argument in two cases posing the issue of whether an operator

violated section 105(c)(1) of the Mine Act when it bypassed for rehire laid-off individuals because they had not obtained relevant training referred to in section 115 of the Act. UMWA on behalf of Rowe, et al. v. Peabody Coal Co., etc., 7 FMSHRC 1357 (September 1985), pets. for review filed, Nos. 85-1714 & 85-1717 (D.C. Cir. October 29 & 30, 1985); Secretary on behalf of I.B. Acton. et al., etc. v. Jim Walter Resources, Inc., 7 FMSHRC 1348 (September 1985), pets. for review filed, Nos. 86-1002 & 86-1027 (D.C; Cir. January 3 & 10, 1986). In these cases, the Commission concluded

that an operator could bypass laid-off individuals who lacked training but that if it recalled individuals who had obtained the training, it had to reimburse them for their training costs. In large part, the Commission rested its decisions on Secretary on behalf of Bennett, et al. v. Emery Mining Corp., 5 FMSHRC 1391 (August 1983), pet. for review filed, No. 83-2017 (lOth Cir. August 17, 1983), in which the Commission held that although a mine operator may require that job applicants obtain requisite training prior to hire, it must reimburse newly hired miners who had obtained such training.

For the reasons that follow, we conclude that Judge Maurer and Moncrief did not engage in ex parte communications in violation of Rule 82. The stay is dissolved and the matter is returned to Judge Maurer for further proceedings on the merits.

Based upon the consistent and uncontested statements that Judge Maurer and Moncrief submitted to the Commission pursuant to this inquiry, and upon other aspects of the record in this matter, we find that the following events pertinent to this inquiry occurred following the reassignment of this case. On May 2, 1985, Moncrief telephoned Judge Maurer. Moncrief told the judge that he was calling on behalf of both himself and Kitt Energy's counsel, Mr. Taoras. Moncrief requested relief for the parties from the various filing requirements of Judge Broderick's previously issued prehearing order. Judge Maurer reminded Moncrief that the UMWA had intervened. Moncrief stated that he had contacted the UMWA's counsel, who had agreed with the Secretary and Kitt Energy to seek relief from the prehearing order. As the basis for the request, Moncrief told Judge Maurer that he and Taoras had agreed that the case largely involved legal questions. He advised Judge Maurer that the Peabody and Jim Walter cases, supra, had been argued before the Commission and that Emery, supra, was pending in the Tenth Circuit. Moncrief stated that these cases probably would be dispositive of the issues at hand. In response, Judge Maurer told Moncrief to submit a letter on behalf of the parties requesting the relief that they wanted. Judge Maurer also stated that if he were to conclude that Peabody and Jim Walter had a potentially decisive bearing on the issues of the case, he would stay the matter but not past September 1985.

As the requested follow-up to the May 2 conversation, on May 8, 1985, Moncrief wrote to Judge Maurer. In the letter, Moncrief requested relief from the pre-hearing order "on behalf of ... Mr. Taoras, and myself." The letter asserted that the Peabody, Jim Walter, and Emery cases were likely to resolve the issues in

Kitt Energy, or at least provide considerable guidance in their resolution. Accordingly, Moncrief requested a continuance pending the Commission's decisions in Peabody and Jim Walter, but stated that he had advised the other counsel of Judge Maurer's desire not to continue the matter beyond September. Moncrief ended his letter, "I trust that this effectively summarizes our conversation." Copies of the letter were sent to Taoras and Mr. Pfeffer, and the letter was placed in the official file of the case. Subsequently. by order dated May 10, 1985, Judge Maurer granted the parties relief from the requirements of Judge Broderick's pre-hearing order and notified the parties that the matter would be set for hearing in September 1985.

On September 5, 1985, Judge Maurer scheduled a hearing for October 9, 1985, in Morgantown, West Virginia. On September 30, 1985, the Commission issued its decisions in Peabody and Jim Walter. On October 1, 1985, Judge Maurer received a copy of a letter written by Taoras to counsel for the Secretary and the UMWA, which stated that the parties were attempting to stipulate to the relevant facts in Kitt Energy. On October 1, about the same time that Judge Maurer received the copy of the Taoras letter, Moncrief again telephoned the judge. Moncrief stated that he was calling on behalf of all of the parties and that he was seeking a continuance of the scheduled October 9 hearing. Moncrief stated that the previous day's issuance of the Commission's decisions in Peabody and Jim Walter probably would obviate the need for an evidentiary hearing. Moncrief also stated that the parties were working on stipulations to submit to the judge. Judge Maurer told Moncrief that he would continue the hearing if Moncrief and Taoras would agree to certain other conditions with respect to future hearings.

On October 2, 1985, Moncrief called Judge Maurer and informed him that Taoras had agreed to the other conditions. Judge Maurer asked Moncrief to advise all of the parties that the judge would issue an order continuing the hearing. Moncrief complied with this request and on October 3, 1985, wrote the judge a letter in which he "confirm[ed] [the] telephone calls of October 1 and 2." Copies of the letter were sent to counsel for Kitt Energy and the UMWA, and the letter was placed in the record. On October 4, 1985, the judge made an order continuing indefinitely the previously scheduled Morgantown hearing.

Commission Procedural 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. UMWA on behalf of Rowe, et al. v. Peabody. Coal Co., etc., 7 FMSHRC 1136, 1142 (August 1985); Secretary on behalf of Clarke v. T.P. Mining, Inc., 7 FMSHRC 1010, 1014 (July 1985); United States Steel Corp., 6 FMSHRC 1404, 1407@09 (June 1984); Knox County Stone Co., Inc., 3 FMSHRC 2478, 2482@86 (November 1981). The term, "ex parte communication," is defined in the APA 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) (1982). The three telephone conversations between Judge Maurer and Moncrief were not ex parte communications within the meaning of our rule and the APA. The record reflects that reasonable prior notice of the conversations was given to all of the parties. Moncrief asserts that when he spoke with Judge Maurer, "it was after discussion with and by agreement of [Kitt Energy's] and [the UMWA's] counsel." Judge Maurer's statement and the record confirm Moncrief's assertion. We note also that Moncrief's letters memorializing these conversations were placed promptly in the record and served on the parties.

Judge Maurer states that in the first conversation on May 2, 1985, Moncrief informed him that he was calling on behalf of himself and Kitt Energy and that he had been in touch with counsel for the UMWA. Judge Maurer's contemporaneous handwritten notes on the conversation, which are in the record, state, "Moncrief calling on behalf of both." (Emphasis in original.) With respect to the telephone conversation of October 1, 1985, Judge Maurer states that Moncrief also informed him that he was calling on behalf of all of the parties. It is clear from the statements of Moncrief and Judge Maurer that Moncrief contacted Taoras and the UMWA's counsel regarding the substance of the May 2 and October 1 conversations prior to calling Judge Maurer. (The October 2 conversation was merely a follow-up to the October 1 conversation.) Moreover, copies of Moncrief's letters of May 8 and October 3, 1985, in which Moncrief indicated to the judge that counsel for the parties had been contacted previously concerning the subjects of the conversations, were sent to both counsel. Importantly, neither counsel for Kitt Energy nor counsel for the UMWA has disputed the contents of Moncrief's letters, nor have they objected to the contacts reflected in the letters. If Moncrief had not been speaking for all of the parties and with their prior notice when he contacted the judge, it is logical to assume that some objection from the other parties to the litigation would have been lodged.

Thus, we find that prior to the telephone conversations Moncrief advised the parties that he would converse with the judge, and we find further that the parties were aware of the subject matter that Moncrief would raise with the judge in those conversations. It is not impermissible for a party to contact a judge on behalf of all the parties concerning essentially procedural matters, where the conversation remains within the scope of the procedural subjects previously authorized by the parties to be raised with the judge. Because we find that Moncrief was acting with authorization on behalf of all parties and that "reasonable prior notice" had been given to other parties regarding the conversations, we conclude that the conversations at issue were not "ex parte communications" within the meaning of Rule 82 and the APA.

Even were we to conclude that the communications were ex parte, we would not find them "prohibited ex parte communications." Rule 82 prohibits communications "with respect to the merits of any case." The conversations of Judge Maurer and Moncrief were procedural in nature and did not concern the merits of the Kitt Energy litigation. It is true, as the Commission has stated, that the concept of the "merits of a case" is to be construed broadly and,

at the very least, includes discussion of issues in a case and how those issues should or will be resolved. Peabody Coal Co., supra, 7 FMSHRC at 1014; T.P. Mining, supra 7 FMSHRC at 1143. For example, a judge may not suggest to counsel in an off-the-record, ex parte conversation that counsel obtain a potential piece of evidence from opposing counsel. T.P. Mining, 7 FMSHRC at 1015-16. Nor may a judge solicit substantive, off-the-record information from one counsel concerning the position a party has taken in other pending litigation when that position might influence the outcome of the case. Peabody Coal Co., 7 FMSHRC at 1143. However, when counsel merely

advises a judge of the existence of pending decisions that may obviate the need for an evidentiary hearing, as was done here in the conversations of May 2 and October 1, 1985, the conversation is procedural and does not pertain to the merits of the case.

It is one thing to discuss the substance of the issues in a case; it is quite another to advise a judge -- on behalf of all of the parties --that decisions are forthcoming or already exist that may simplify the procedural tasks of the judge and the litigants in the pending case. To do the former is to influence the substance of the decision in a pending case outside of the formal, public proceeding. See, e.g., Patco v. Federal Labor Relations Authority, 685 F.2d 547, 570 (D.C. Cir. 1982). To do the latter is to facilitate the procedural process by which the decision is reached. The prohibition against ex parte communications was not intended to erect meaningless procedural barriers to effective agency action. Patco supra, 685 F.2d at 563-64.

Further, that portion of the conversation of October 1, 1985, in which Moncrief advised Judge Maurer that the parties were drafting factual stipulations to submit to the judge was in the nature of a status report to the judge. This type of conversation is permissible. T.P. Mining, 7 FMSHRC at 1015. Similarly, the conversation of October 2, 1985, in which Moncrief advised the judge that Taoras had agreed to the other conditions that the judge wished to impose with respect to future hearings and in which the judge asked Moncrief to advise the parties that he was continuing the hearing also concerned the status of the case and did not violate Rule 82.

Thus, there is nothing in this record that in any way reflects discredit on the conduct of Judge Maurer or Moncrief. Indeed, they conducted themselves in an able and efficient manner. Their conduct in handling the litigation was procedurally proper and in accordance with accepted standards. We therefore conclude that the referral by Judge Kennedy is without merit. 2/

2/ Because of the unusual manner in which this inquiry arose, the Commission directed Judge Kennedy to make a full and complete disclosure of the circumstances by which he became aware of the assert.d ex parte communications. In doing so, Judge Kennedy also moved the Commission to strike certain portions of Judge Maurer's statement. Because o. our resolution of this matter, we have determined that the question of how the Moncrief letters were obtained need not be addressed further in the present proceeding. Accordingly, the motion to strike is denied.

For the foregoing reasons, this inquiry is closed and the case on the merits may proceed. 3/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

3/ Chairman Ford assumed office after this case had been considered at Commission decisional meeting and took no part in the decision.

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