

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
1331 Pennsylvania Avenue, N.W., Suite 520N  
Washington, DC 20004-1710

MAR 03 2016

IN RE: DISCIPLINARY REFERRAL

Docket No. D 2016-0001

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY: Jordan, Chairman; Young, Nakamura, and Althen, Commissioners

In this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), the Complainant referred this matter for a determination of whether circumstances involving an attorney’s statements during a June 18, 2015, hearing warrant disciplinary proceedings under 29 C.F.R. § 2700.80.<sup>1</sup> The Commission

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<sup>1</sup> 29 C.F.R. § 2700.80 provides in relevant part:

(a) Standards of conduct. Individuals practicing before the Commission or before Commission Judges 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 such person has engaged in unethical or unprofessional conduct; has failed to comply with these rules or an order of the Commission or its Judges; has been disbarred or suspended by a court or administrative agency; or has been disciplined by a Judge under paragraph (e) of this section.

(c) Disciplinary proceedings shall be subject to the following procedure:

(1) Disciplinary referral. Except as provided in paragraph (e) of this section, 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 to the Commission

subsequently received a response to the referral from the attorney and the Complainant's reply to the attorney's response. For the following reasons, we conclude that disciplinary proceedings are not warranted.

In 2014, the Complainant filed a complaint, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), alleging that the operator of the mine at which he was employed had discriminated against him in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). A hearing on the discrimination complaint was ultimately scheduled for June 18, 2015.

A few days prior to the hearing, the attorney, on behalf of his law firm, filed a motion to withdraw as counsel for the operator in the discrimination proceeding. In the motion, the firm explained in part that the operator had filed for bankruptcy protection in Canada the prior year, and the Canadian proceedings had been subsequently recognized in the United States pursuant to Chapter 15 of the U.S. Bankruptcy Code. Based upon information provided by the bankruptcy monitor regarding the operator's lack of financial resources, the operator instructed the firm to perform no further work for it.

On the morning of the hearing, the attorney reiterated his firm's request to withdraw from representation. The Judge and attorney engaged in a colloquy, in which the Judge inquired about the attorney's continuing role in representing the operator or in representing the successor operator. Tr. 6-9. The attorney essentially indicated that his firm still had an ongoing attorney-client relationship with the operator, although they were in the process of winding down the relationship, and that he "hoped" that he and his firm would represent the successor-in-interest at the mine. Tr. 6-9. The Judge subsequently granted the motion to withdraw and, after receiving the Complainant's evidence, held that the operator had impermissibly discriminated against the Complainant. 37 FMSHRC 2337, 2339, 2347 (Oct. 2015) (ALJ).

On October 7, 2015, the Complainant filed the subject disciplinary referral with the Commission. In the referral, the Complainant alleged that the attorney had provided false testimony to the Judge because although the attorney stated that he "hoped" his firm would represent the successor owner of the mine, the attorney's firm was listed as a registered agent for the successor owner since June 9, 2015.

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for action such information in the form of a written disciplinary referral. Whenever the Commission receives a disciplinary referral, the matter shall be assigned a docket number.

(2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral.

On November 16, 2015, the Commission received the attorney's response to the Complainant's disciplinary referral. In the response, the attorney asserts that he never indicated that his firm did not represent the successor in any capacity at the time of the hearing, and he did not understand the Judge to be asking that question. The attorney stated that he was aware that the new ownership of the mine had already retained a different law firm to assist with the transfer of property in the event the sale of the mine and other assets out of bankruptcy closed. He noted that the only matter in which his firm was involved on behalf of the successor was in the capacity of being the Nevada registered agent.

Commission Procedural Rule 80 provides that individuals practicing before Commission Judges must conform to standards of ethical conduct required of practitioners, and that disciplinary proceedings may be instituted against anyone who is practicing before the Commission who has engaged in unethical conduct. 29 C.F.R. §2700.80(a), (b). Rule 3.3(a)(1) of the Model Rules of Professional Conduct, which has been adopted by the Nevada Rules of Professional Conduct, provides that "A lawyer shall not make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Thus, if the attorney made a false statement of fact to the Judge, disciplinary proceedings may be warranted.

The attorney's statement that he hoped that his firm would represent the successor operator when his firm was acting as the successor's registered agent does not warrant disciplinary proceedings. Acting as a registered agent is essentially an administrative action. In order to be a registered agent in Nevada, an individual must be a resident of Nevada, but need not be an attorney. *See Nev. Rev. Stat. § 77.305 (2013)* (a provision of the Model Registered Agents Act, adopted by Nevada). The purpose of a registered agent is to provide the Secretary of State with a Nevada address where process may be served and certain forms may be received. *Nev. Rev. Stat. § 77.390 (2007)*, *Nev. Rev. Stat. § 77.400 (2013)*. We accept the attorney's statement that although his firm was acting as a registered agent for the successor, his firm was not providing legal services.<sup>2</sup>

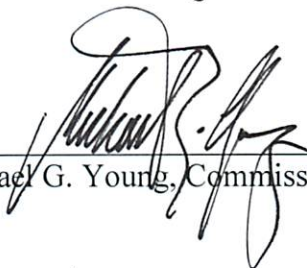
We further observe that the Complainant was not prejudiced by the firm's withdrawal as counsel to the operator. After the attorney withdrew as the operator's counsel in the proceeding, the operator was not represented at the hearing. As a result, the Complainant submitted evidence of the alleged discrimination without rebuttal by the operator.


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<sup>2</sup> We take administrative notice of the fact that pleadings filed in the discrimination proceeding since the Judge issued his decision by alleged successors to the operator have been filed by law firms other than the attorney's law firm.

Accordingly, we conclude that no disciplinary proceedings are warranted.

  
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Mary Lu Jordan, Chairman

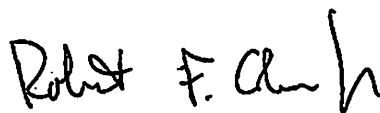
  
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Michael G. Young, Commissioner

  
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Patrick K. Nakamura, Commissioner

  
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William I. Althen, Commissioner

Commissioner Cohen, dissenting:

I dissent on the basis that I would have the Commission conduct further inquiry pursuant to 29 C.F.R. § 2700.80(c)(2).

Handwritten signature of Robert F. Cohen, Jr. in black ink.

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Robert F. Cohen, Jr., Commissioner

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