FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 31, 2002

DISCIPLINARY PROCEEDING : Docket No. D 2000-1

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY: Verheggen, Chairman, and Jordan, Commissioner

This disciplinary proceeding arises under Commission Procedural Rule 80, 29 C.F.R. § 2700.80.[1] On May 17, 2000, the Commission received a disciplinary referral pursuant to Rule 80, concerning circumstances related to a discrimination proceeding. In that case, the miner had filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), but nineteen months passed before the Solicitor of Labor filed with the Commission an application for temporary reinstatement on the complaining miner's behalf.[2] For the reasons set forth below, we conclude that disciplinary proceedings are not warranted.

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[1] Commission Procedural Rule 80 provides in part:

> (a) Standards of conduct. Individuals practicing before the Commission and 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 . . . .

29 C.F.R. § 2700.80.

[2] Section 105(c)(2) of the Mine Act provides in pertinent part: "[I]f the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2).

I.

Underlying Discrimination Proceedings and Disciplinary Referral

On July 27, 1998, the miner in question filed a discrimination complaint with MSHA claiming that the operator terminated him in retaliation for his safety complaints. Specifically, the complaint alleged that, on several occasions during late June and early July 1998, the miner, who was employed as the mine's crusher foreman, complained about faulty brakes on a fuel truck, and brought the problems to the attention of the mine's maintenance supervisor. The complaint also alleged that during this period, the truck's faulty brakes were also noted in a "required maintenance form" by the driver of the truck. On July 7, after a coworker told the miner that he heard that the company had no intention of fixing the fuel truck brakes, the miner red tagged the truck, taking it out of service. Eight days later the company terminated the complainant.

Approximately nineteen months after the miner filed his discrimination complaint, the Solicitor of Labor filed with the Commission an application for temporary reinstatement on the miner's behalf. The judge hearing the Secretary's application referred to the miner's testimony that his discharge occurred eight days after his complaint to management about the brake problems on the truck, and found that the miner's claims, if found to be credible at a merits proceeding, would constitute protected activity and evidence of a discriminatory motive for the discharge. The judge therefore concluded that the miner's discrimination complaint had not been frivolously brought, and ordered him temporarily reinstated. The company appealed the judge's order to the Commission.

In an interim decision, we concluded that substantial evidence supported the judge's determination that the miner's discrimination claim was not frivolous. We also expressed concern about the Secretary's delay in applying for the miner's temporary reinstatement and her failure to explain why this delay occurred. We retained jurisdiction over the temporary reinstatement case, and ordered the Secretary to explain the circumstances surrounding the protracted delay in applying for the miner's temporary reinstatement.

In response to our order, a staff attorney in the Solicitor of Labor's Arlington, Virginia office submitted a letter stating that factors contributing to the delay included a lengthy investigation of the miner's allegations, requests for additional information by the district and the Solicitor's Office, a delay by MSHA in forwarding the case to the Solicitor's San Francisco regional office, and a delay in reviewing and filing the application for temporary reinstatement by the Solicitor's Office. The attorney also indicated the San Francisco regional office had the case for approximately seven months before filing the application for temporary reinstatement. The attorney stated that, while litigation resources in the San Francisco office were "tight," steps had been taken to ensure that such delays do not occur again.

On May 17, 2000, a disciplinary referral was filed pursuant to Commission Procedural Rule 80(c) by Commissioner Beatty,[3] based on the nineteen months that had passed between the miner filing his discrimination complaint and the Solicitor's application for temporary reinstatement of the miner. The referral suggested that if the Regional Solicitor or any attorney in the Regional Solicitor's Office contributed in any material way to that delay, such conduct would justify bringing disciplinary proceedings against such attorney or attorneys. The referral requested that the Commission conduct an inquiry to determine whether disciplinary proceedings were warranted.

II.

Disposition

Pursuant to Rule 80(c)(2), the Commission conducted an inquiry to determine whether disciplinary proceedings are warranted in this matter. This included, among other efforts, interviews with the miner, a review of the record in the underlying discrimination proceeding,

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[3] Commission Procedural Rule 80(c) provides in pertinent part:

> Disciplinary proceedings shall be subject to the following procedure: (1) Disciplinary referral. . . . [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 for action such information in the form of a written disciplinary referral. . . . (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. (3) Transmittal and hearing. Whenever, as a result of its inquiry, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, determines that the circumstances warrant a hearing, the Commission's Chief Administrative Law Judge shall assign the matter to a Judge, other than the referring Judge, for hearing and decision. . . .

29 C.F.R. § 2700.80(c).

and a meeting with then Solicitor of Labor, Henry Solano.[4] In the course of our inquiry, we uncovered a substantial amount of information concerning the factors which contributed to delay in processing the miner's complaint. We conclude that the delay was unacceptable, inexcusable, and wholly avoidable. Based on our investigation, we have determined that the lengthy delay which occurred in this case reflects a fundamental misunderstanding of the Mine Act and a systemic failure to properly implement the Act's discrimination provisions on the part of MSHA and the Solicitor's Office.

Complaints of discrimination under section 105(c) of the Mine Act are filed with MSHA, which investigates them and forwards those it believes have merit to the appropriate Regional Solicitor's Office for review, further investigation if necessary, and, when appropriate, the filing of an application for temporary reinstatement with the Commission. Our investigation and the letter we received from a staff attorney in the Solicitor's Office in response to our order establish that approximately twelve months elapsed between the filing of the miner's complaint with MSHA on July 27, 1998 and MSHA's forwarding of the case file to the San Francisco Regional Solicitor's Office in June or July 1999. An additional seven months passed between the San Francisco office's receipt of the miner's file and that office's application for temporary reinstatement on January 21, 2000.

Regarding MSHA's twelve-month delay, we have determined that, at some point in the processing of the miner's discrimination claim, MSHA initiated a section 110(c) investigation into whether the complainant miner, in his capacity as a crusher foreman, played any role in the continued use of the allegedly defective truck. Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). During our investigation, we were informed by the Solicitor of Labor that MSHA and the Solicitor's Office refuse to pursue statutorily mandated section 105(c) discrimination actions on behalf of miners against whom section 110(c) allegations have been raised, until the section 110(c) investigation is completed, and a determination is made that section 110(c) charges will not be brought. They have adopted this policy to avoid a conflict of interest between the Solicitor's prosecutorial role as the Secretary of Labor's counsel, and the Solicitor's role in representing miners under the anti-discrimination provision of the Mine Act. Thus, a very large part of the delay in MSHA's investigation of the underlying discrimination complaint here is attributable to its investigation of the miner under section 110(c).

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[4] We take general exception to our dissenting colleague's characterization of the Commission's investigation and deliberations concerning this matter. However, we will not respond to the dissent's various assertions concerning the manner in which this case has proceeded. But we do feel it necessary to specifically refute the dissent's suggestion that Commissioners or staff either initiated or received phone calls of questionable propriety. *See* slip op. at 13 n.4.

While we appreciate the conflict faced by the Solicitor's Office in such situations, we strongly disagree with the way that office has chosen to resolve it. We believe that prioritizing section 110(c) investigations over section 105(c) complaints represents a fundamental misinterpretation of the Mine Act.

Neither the text nor the legislative history of the Mine Act supports the hierarchy of priorities that MSHA and the Solicitor have chosen to follow. Indeed, such an approach contravenes both the letter and the spirit of that statute. Section 105(c)(2) of the Mine Act mandates expeditious time limits governing the processing of discrimination cases by the Secretary and the Commission. For instance, under section 105(c)(2) the Secretary must initiate an investigation into the allegations in a miner's discrimination complaint within 15 days of receiving the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending a final order on the complaint. 30 U.S.C. § 815(c)(2). Section 105(c)(2) also provides that "[i]f upon such investigation, the Secretary determines that the provisions of this [subsection] have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination . . . ." *Id.* Section 105(c)(3) provides that "[w]ithin 90 days of the receipt of a complaint . . . , the Secretary shall notify the miner . . . of his determination whether a violation has occurred." 30 U.S.C. § 815(c)(3). Congress' inclusion of these time limits evidences the importance it has placed on the speedy processing of discrimination cases.

Moreover, the Mine Act's legislative history clearly reflects Congress' considered judgment that discrimination complaints must be accorded the utmost priority. S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) ("*Legis. Hist.*") ("The bill requires the Secretary to rigorously enforce these rights with discrimination complaints receiving high priority."). In enacting the temporary reinstatement provision in section 105(c), Congress was clearly concerned about miners who are out of work while their discrimination complaints are being processed. *See* S. Rep. No. 95-181, at 37 (1977), *reprinted in Legis. Hist.*, at 625 ("[T]emporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment . . . pending the resolution of the discrimination complaint."). Miners are statutorily precluded from applying for temporary reinstatement themselves. *See* 30 U.S.C. § 815. Rather, they must rely on the Secretary of Labor in her best judgment to do so on their behalf. Because the policy of subordinating section 105(c) claims to section 110(c) investigations thwarts the statutory purpose of expediting relief for victims of discrimination, it is unsupportable.

In a practical sense, the policy of MSHA and the Solicitor invites delay of the magnitude which occurred in the underlying discrimination matter here. Such delay has serious implications for effective enforcement of the Act's protections. Under this policy, miners whose temporary reinstatement applications are delayed could conceivably go for months without a paycheck until the section 110(c) matter is resolved. In this matter, according to an affidavit submitted by an

attorney in the Solicitor's Office who worked on the miner's discrimination case, the miner, after months without a paycheck, suffered severe economic hardship. The natural effect of delaying both a miner's vindication of his rights to be free from discrimination and to obtain temporary reinstatement is that all miners will be discouraged in the future from asserting their rights under the Mine Act. It is our firm belief that the delays caused by MSHA and the Solicitor's Office mishandling of this case could discourage miners from asserting rights under the Act as much as anything a mine operator could do. Yet miner participation in securing the Act's promise of a safe and healthy workplace is a foundation of the statutory enforcement scheme. *See* S. Rep. No. 95-181, at 35, *reprinted in Legis. Hist.*, at 623 ("If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.").

Equally or more troubling than this specter of delay are the consequences in a case in which the Solicitor's office decides to proceed with a section 110(c) charge against a miner. In such a case, it is our understanding that the Solicitor will never agree to represent that miner in the temporary reinstatement or discrimination proceeding, because of the perceived conflict of interest. This policy in effect permits section 110(c) allegations to completely trump the miner's right to immediate temporary reinstatement and relief from discrimination. This is troubling because under the Mine Act, only the Secretary can apply for temporary reinstatement on a miner's behalf — the application cannot be filed by private counsel. Consequently, the Solicitor's policy could have the effect of severely limiting the temporary reinstatement provision of the Mine Act.

Because this policy eviscerates the protections of section 105(c) of the Mine Act, causing significant hardship to miners bringing discrimination claims, we urge the Solicitor to review this conflict of interest issue again and attempt to devise solutions that will permit the Secretary to carry out her responsibilities under both sections 105(c) and 110(c) of the Act.[5]

In addition to the troubling MSHA policy which clearly impeded progress in the initial investigation of the 105(c) case, we are concerned about the subsequent delay which occurred after the discrimination complaint finally arrived at the Regional Solicitor's Office.[6] Our investigation revealed that decisional paralysis on the part of the Solicitor's Office contributed substantially to the delay in processing the miner's case. While we are not certain when MSHA decided not to pursue section 110(c) charges against the miner, we can nevertheless conclude, based on the Solicitor's policy of refusing to pursue a miner's discrimination complaint before MSHA has decided whether to pursue section 110(c) charges against that miner, that the agency

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[5] Our dissenting colleague dismisses the Solicitor's conflict of interest explanation as "nothing more than a post hoc cover story." Slip op. at 15. We are mindful, however of the privacy and ethical considerations that would have been implicated had the Solicitor referred to the section 110(c) investigation in his written response to our earlier order.

[6] Attorneys employed by the Solicitor's Office, because they practice before the Commission, are, of course, subject to rules of professional responsibility pursuant to Rule 80.

had decided not to pursue section 110(c) charges by July 1999 when an attorney from the Regional Solicitor's Office finally contacted the miner. Consequently, by this time, the potential conflict between the Solicitor acting in his capacity as the Department of Labor's attorney and as an attorney acting on behalf of a complaining miner no longer existed, and thus cannot explain the complaint processing delay which followed.

While we acknowledge the assertion of the Solicitor's Office that additional investigatory work was necessary after it received the case materials from MSHA, we nevertheless conclude that its 7-month delay in filing an application for temporary reinstatement can only be characterized as a "bureaucratic meltdown." Indeed, the attorney responding to our order for an explanation of the delay stated that the filing of an application for temporary reinstatement on the miner's behalf was unnecessarily delayed in the Regional Solicitor's Office, essentially admitting that some portion of that office's 7-month delay was avoidable. Whether the delay is attributable to a dilatory initial assignment of the miner's discrimination case to an attorney in the Regional Office or inefficient processing of the case by various attorneys at agency headquarters or in several field offices later assigned to handle the matter, such mismanagement is unacceptable, particularly in situations where a miner is out of work pending action by the Solicitor's Office.[7]

Finally, during the course of our investigation into this matter we have become aware that the Solicitor of Labor believes that no attorney-client relationship exists between the Solicitor and a miner on whose behalf the Solicitor brings a section 105(c) complaint or temporary reinstatement proceeding. Rather, the Solicitor considers the Department of Labor to be its client, with complaining miners having only a derivative interest in a discrimination complaint the Secretary brings on a miner's behalf.

However, we find nothing in the manner in which the Solicitor of Labor handles section 105(c)(2) discrimination cases that indicates to miners that counsel in the Solicitor's Office are not their attorneys. Miners file discrimination complaints with MSHA. The first stage at which attorneys from the Solicitor's Office publicly represent the interests of such a complainant is in temporary reinstatement proceedings, for which *only* the Secretary may apply. If the Secretary subsequently concludes that the anti-discrimination provisions of the Act have been violated, she must prosecute a discrimination complaint, "suing on behalf of the complainant." *Eastern Assoc. Coal v. FMSHRC*, 813 F.2d 639, 644 (4th Cir. 1987); 30 U.S.C. § 815(c)(2).[8] The caption in

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[7] Solicitor Solano informed the Commission that management improvements involving personnel and resource enhancements were subsequently implemented in the regional office to ensure that temporary reinstatement cases would in the future be handled efficiently and accorded the high priority they deserve.

[8] If the Secretary determines that the Act was not violated, the complainant, with or without private counsel, may file a complaint on his or her own behalf. 30 U.S.C. § 815(c)(3). However, this section 105(c)(3) complaint may not be filed until the Secretary has made her determination of non-discrimination, which she is supposed to do within 90 days. *Id.*; Commission Procedural Rule 41(b), 29 C.F.R. § 2700.41(b).

these cases always reads "Secretary of Labor on behalf of" the miner. In addition, attorneys in the Solicitor's Office during the course of litigation of a temporary reinstatement or discrimination claim perform many of the same tasks that an attorney in such a case would perform on behalf of a client (such as acting on behalf of the miner in settlement negotiations, etc.).

In our investigation of this matter we have found nothing that would have led the miner to believe that attorneys in the Solicitor's Office litigating his case were anything other than *his* attorneys. But as stated above, we have learned that the Solicitor does not hold such a view. Insofar as the views of the Solicitor might tend to confuse complaining miners, the Solicitor of Labor is, we believe, duty bound to disabuse miners of any notion that attorneys in the Solicitor's Office handling miners' discrimination cases consider themselves to be those miners' attorneys.

In sum, we emphasize that delays of the sort that happened in this matter are unacceptable. Such delays are harmful to the very interests of miners that the Secretary of Labor is charged under the Mine Act with protecting and have a significant chilling effect on miners' willingness to lodge safety complaints. Here, however, we find no basis for referring this matter to one of our judges under Rule 80. Instead, we have discovered a significant misapplication of section 105(c), compounded by inexcusable administrative delays in the handling of the miner's case, all of which reveals not an ethical lapse by any individual attorney, but rather a failure of the *system*.

Accordingly, we do not find it appropriate to sanction individual lawyers for what is fundamentally an institutional problem, and thus conclude that assignment of this matter to an administrative law judge for further proceedings is unwarranted. This disciplinary referral is therefore terminated.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Commissioner Beatty, dissenting:

The legislative history of the Mine Act clearly reflects Congress' considered judgement that discrimination complaints *must* be accorded the utmost priority. S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) ("*Legis. Hist.*"). By the plain terms of the Mine Act, miners are *precluded* from applying for temporary reinstatement and therefore must rely on the Secretary of Labor to do so on their behalf. 30 U.S.C. § 815(c)(2). In enacting the temporary reinstatement provision in section 105(c), Congress was clearly concerned about miners who are out of work while their discrimination complaints are being processed. "[T]emporary reinstatement is an *essential protection* for complaining miners who may not be in the financial position to suffer even a short period of unemployment pending the resolution of the discrimination complaint." S. Rep. No. 95-181 at 37; *Legis. Hist.* at 625. Consequently, the Secretary is required by the Mine Act to commence her investigation of a discrimination complaint with 15 days of receiving it, and, upon the mere determination that the complaint is not frivolous, to seek a Commission order temporarily reinstating the complaining miner to his job. 30 U.S.C. § 815(c)(2); S. Rep. No. 95-181 at 36-37; *Legis. Hist.* at 624-25.

"We conclude that the delay [in processing the complainant's case] was unacceptable, inexcusable, and wholly avoidable." Slip op. at 4. "[W]e have determined that the lengthy delay which occurred in this case reflects . . . a systematic *failure* to properly implement the [Mine] Act's discrimination provisions on the part of . . . the Solicitors's Office." Slip op. at 4 (emphasis added). "Our investigation revealed that decisional paralysis on the part of the Solicitor's office *contributed substantially* to the delay in processing the miner's case." Slip op. at 6 (emphasis added). "[W]e . . . conclude that [the Solicitor's] 7-month delay in filing an application for temporary reinstatement can only be characterized as a 'bureaucratic meltdown.'" Slip op. at 7. The Solicitor's Office "essentially *admitt[ed]* that some portion of [the] . . . delay was avoidable." Slip op. at 7 (emphasis added). "Whether the delay [was] attributable to . . . an attorney in the Regional Office or . . . attorneys at agency headquarters . . . , such management is unacceptable, particularly . . . where a miner is out of work pending action by the Solicitor's Office." Slip op. at 7.

The foregoing language has been excerpted from the majority's opinion. It clearly reflects my colleagues' understanding of the temporary reinstatement provision of the Mine Act and its importance to the health and safety of our nation's miners. It further acknowledges the majority's complete understanding of the Secretary's statutory duty as the sole enforcer of this important provision. The language also lays out my colleagues' findings relating to the failure of the Solicitor's Office and MSHA to exercise their statutory obligations in this temporary reinstatement case. Given the harshness of these excerpts, one would expect the majority to fully investigate the circumstances surrounding the19-month delay in the filing of the miner's temporary reinstatement application, a delay which the majority predicts will "have a *significant chilling effect* on miners' willingness to lodge safety complaints [under the Mine Act]." Slip op. at 8 (emphasis added). The majority position, however, demonstrates that, at least in matters

involving the Secretary's obligation to obtain temporary reinstatement orders, the Commission's enforcement of its disciplinary process is all bark and no bite.

As this opinion will make clear, I believe my colleagues' decision to dismiss this case without a complete investigation will seriously erode the foundation upon which the protective purposes of section 105(c) of the Mine Act were founded. I can think of no single decision issued by this body, either past or future, that will cast a darker cloud over the protection of miners' health and safety then the one issued by the majority today. What makes today's decision troubling is that this case is not one in which we must decide between the positions espoused by Secretary and an operator, as we do in nearly all our decisions. What we are faced with here is not deciding which party is correctly interpreting a statue or regulation, or the appropriateness of a civil penalty. The instant case, instead, removes us from our normal roles and requires us to serve as investigators charged with conducting a thorough and impartial inquiry into facts that resulted in the filing of a disciplinary referral, and to serve as impartial evaluators of the evidence gathered. Then, if necessary, to make a reasoned decision as to whether the case should be referred to an administrative law judge. In my opinion, the majority's handling of this case falls far short of completing these important tasks.

To gain a complete understanding of this case, it is helpful to closely examine the facts regarding the 19 months that elapsed from the filing of the miner's section 105(c)(2) complaint with MSHA to the Secretary's filing of a temporary reinstatement application. All of these facts are either contained in the public record of the temporary reinstatement case or were obtained by Commission personnel conducting the Commission's limited investigation into this matter. On July 27, 1998, the miner in question, a supervisor,[1] filed a discrimination case against his employer alleging he was terminated earlier that month in retaliation for "safety" complaints he raised relating to his operation of a 1948 model fuel truck (hereinafter "truck 627"). According to the miner, truck 627 had a lengthy history of numerous safety problems including, but not limited to, faulty brakes. The miner had raised many maintenance requests concerning truck 627 with the operator, which, according to the miner, did not want to be bothered about the truck's problems.

In addition to raising complaints about truck 627's maintenance problems, the miner also had an argument with the operator's safety manager when the miner refused to complete MSHA training certificates indicating that he had certified new drivers. The miner's complaints about truck 627, and the operator's subsequent failure to correct the problems, culminated in the miner "red tagging" the truck and taking it out of service. According to the miner, from the day he red tagged truck 627, he faced a tense and hostile work environment. Following his discharge, MSHA inspected truck 627 and issued an unwarrantable failure citation for various defects.

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[1] As recently as the Commission's decision in *Capitol Cement Corp.*, 21 FMSHRC 883, 894 n.17 (Aug. 1999), we affirmed that the health and safety of all miners, including supervisors, "is a preeminent statutory concern" under the Mine Act.

Soon after the miner filed his discrimination complaint with MSHA, he was contacted by Steve Cain, an MSHA special investigator assigned to investigate the case. In the months that followed the miner attempted on numerous occasions to contact Mr. Cain to check on the status of his discrimination case. In November 1998, after first being told that his case file had been lost, the miner was informed that his case file had been transferred to an individual named Ethel Horton in MSHA's Arlington, Virginia headquarters.

Apparently, the miner had several conversations with Horton and also sent her letters. He indicated that during this time period he was in constant contact with MSHA, but no one ever called him back. According to our investigation, at some point in July 1999, *12 months following the filing of his discrimination complaint,* the miner was finally contacted by an attorney representing the Solicitor's Office. The attorney apparently told the miner that one of the "major hurdles" in his case was MSHA's investigation under section 110(c) of the Mine Act of the miner's alleged responsibility for the violations involving truck 627. Then, it was not until *7 more months had elapsed* that the Solicitor's Office saw fit to file an application for temporary reinstatement with the Commission in February 2000. The reinstatement case was heard that month by a Commission administrative law judge, who within 3 days ordered the miner reinstated to his job at the same rate of pay and benefits he was receiving prior to his discharge. The judge's decision was appealed by the operator and was unanimously affirmed by the Commission.

On May 17, 2000, after a lengthy review of the case, I filed a disciplinary referral pursuant to Rule 80(c), requesting that the Commission investigate whether attorneys subject to the Commission's disciplinary rules were involved in, what had been up until that time, an unheard of delay in the filing of the miner's temporary reinstatement application. The language used by the majority today vindicates that referral. Upon receipt of the disciplinary referral, Commission Procedural Rule 80(c) mandated that the Commission conduct an inquiry into the allegations raised in the referral to determine whether disciplinary proceedings were warranted. 29 C.F.R. § 2700.80(c).

The majority analyzes the Secretary's delay in filing for temporary reinstatement of the miner as composed of two separate and distinct delays. That is, a 12-month delay from the filing of the discrimination complaint until the time the Solicitor's Office claims it became involved, and an additional 7-month delay after the Solicitor's Office took the case. The majority feels that the initial delay can be attributed solely to MSHA, with the Solicitor's Office only responsible for the latter delay. Based on the Solicitor's Office own admissions, I completely disagree with the majority's conclusion that the Solicitor's Office was not involved in this case during the first 12 months of the delay. For purposes of clarity in discussing the matter, however, I will discuss the delays separately.

A. The Initial 12-Month Investigatory Delay

According to the majority, further disciplinary proceedings are not warranted here because it found

> no basis for referring this matter to one of our judges under Rule 80. Instead, we have discovered a significant misapplication of section 105(c), compounded by inexcusable administrative delays in the handling of the miner's case, all of which reveals not an ethical lapse by any individual attorney, but rather a failure of the *system*.

Slip op. at 8 (emphasis in original). In essence, the majority is arguing that the Commission's investigation failed to uncover evidence that the 12-month delay could be attributed to any individual attorney.[2] In so doing, the majority sees fit to then place the blame for the delay in bringing the miner's case for reinstatement on the *system.* Apparently, they believe that placing the blame on the system adequately explains their decision to dismiss this case without conducting a complete inquiry into the roles of the individuals involved. With all due respect to the majority, its finding of a "system failure" [3] does not withstand even superficial scrutiny once the background of the Commission's "investigation" is examined.

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[2] Interestingly, the disciplinary referral filed in this case makes reference to circumstances that may warrant disciplinary action against "individuals" practicing before the Commission. In fact, the referral names at least two of the "individuals" who had some involvement in the case. To the extent that the majority has limited its inquiry to a search for information regarding a particular individual, they have failed to investigate the disciplinary referral properly.

[3] The majority's conclusion of a system failure is indeed curious. A system, as I understand its meaning, is defined as "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." *Webster's Third New Int'l Dictionary* 2322 (1986). The system here is the Solicitor's Office, which is composed of various attorneys who provide legal representation to both MSHA and miners in 105(c) cases. Indeed, these individual attorneys within the Solicitor's Office are the "parts" that form the system the majority has examined. What puzzles me is how the majority can justify placing the blame for this delay on the system without first investigating the conduct of the *individual* attorneys who make up the system. These individuals make up part of the system the majority has chosen to admonish. By failing to investigate these individuals, the majority chastises the whole for what was clearly the fault of a few. In my view, the majority's "system failure" argument directly contravenes the "individual" responsibility envisioned by the ethical rules and regulations that govern the practice of law.

Much can be learned about the Commission's inquiry into the matter simply by considering the amount of time devoted to the investigation. The Commission's complete inquiry into the facts surrounding the entire 19-month delay encompassed a grand total of about 9 hours. With the exception of six meetings held by the Commission on this matter, the entire investigation consisted of an interview with the miner, and a meeting with former Solicitor of Labor Henry Solano and several representatives from the Solicitor's Office. Conversely, the Secretary claims that MSHA and the Solicitor's Office spent a total of 19 months investigating the matter. This gross disparity in investigation time is alarming, and in my opinion speaks volumes not only about the inquiry, but also the majority's decision to dismiss the case because of a lack of evidence.

In addition, the majority's conclusion that it could not find an ethical lapse by an individual attorney is highly questionable because the Commission never even asked the Solicitor's Office to account for, on the record, its attorneys' involvement in the case. At the outset of this proceeding, the Commission's Office of General Counsel (OGC) suggested that, because the Commission did not have sufficient facts to reach a determination whether formal disciplinary proceedings were warranted, we could order affidavits from attorneys in the Solicitor's Office. Such affidavits are contemplated by the Commission's disciplinary rules, and the Commission has, in the past, received affidavits during an inquiry into an alleged violation of the Commission's rule against ex parte communications. *See* 29 C.F.R. § 2700.80(c)(2); *Sec'y of Labor on behalf of Beavers v. Kitt Energy Corp*., 8 FMSHRC 15, 16 (Jan. 1986)); *see also UMWA on behalf of Rowe v. Peabody Coal Co.,* 7 FMSHRC 1136, 1140 (Aug. 1985).[4]

I subsequently urged my colleagues to follow past Commission practice and submit a series of questions to certain individuals in the Solicitor's Office in an attempt to gather more information about who was involved in this case and what their respective roles were during the 19-month delay. The pertinent part of the draft order containing the questions that I proposed is Appendix A to this opinion. Unfortunately, the majority did not agree that such a request of officials in the Solicitor's Office was necessary, even though it may well have exposed the very evidence they now claim is lacking that any *individual attorney* was responsible for the delay in processing the miner's temporary reinstatement. I continue to believe that to even begin to understand how the Secretary could delay filing a temporary reinstatement application for 19 months, the Commission should have submitted via order a series of questions to the Solicitor's Office.

[4] OGC also informed the entire Commission that Associate Solicitor of Labor Edward Clair had contacted the Commission by phone, apparently through then-Chairman Mary Lu Jordan's office, to suggest a meeting with the Solicitor to discuss the referral. At the time of the phone call I voiced very strong opposition to the receipt of any off-the-record information from Mr. Clair's office, because both he and his staff were within the scope of the Commission's investigation into the delay.

As part of our investigation my colleagues did agree to an interview of the miner, and from that interview we discovered a number of interesting facts. For example, we learned that during the 19-month delay the miner had interacted with at least eight different individuals employed by either MSHA or the Solicitor's Office. The miner provided the names of these individuals, along with multiple pages of typed notes that he stated were created contemporaneous to the phone conversations. This information was an excellent opportunity for us to direct particular questions to those individuals, particularly with regard to an issue the miner could not help with, which was whether anyone from the Solicitor's Office was involved with the case during the 12 months that MSHA was allegedly investigating the case. In spite of repeated efforts, however, I was unable to garner the support of the majority to submit questions to the Secretary's responsible representatives.

Further adding to the curiousness of the majority's decision to dismiss this case was the Solicitor's ever-changing explanation of how and why it took 19 months to investigate the miner's complaint and file a temporary reinstatement application. In affirming the administrative law judge's temporary reinstatement order, we requested a full explanation for the delay from the Secretary. In response, we received a letter from a staff attorney in the Solicitor's Office that provided a rather lengthy list of reasons for the 19-month delay, including: a lengthy investigation of the miner's allegations, requests for additional information by the district and the Solicitor's Office, a delay in forwarding the case to the Solicitor's Office in San Francisco, and a 7-month delay in reviewing and filing the temporary reinstatement application by the Solicitors's regional office. A majority of the Commission felt at that time that the information provided fell woefully short of what was expected, given the gravity of the situation.

The Solicitor then took another stab at curtailing the Commission's inquiry into the disciplinary referral by submitting to the Commission a letter where he took the position that, regardless how dilatory his office was in filing a temporary reinstatement application, it was an exercise of prosecutorial discretion and therefore not subject to the Commission's disciplinary rules. After that argument, not surprisingly, failed to persuade us,[5] the Solicitor and several representatives from his office eventually met with the Commission to discuss the disciplinary referrals. It was there for the first time that the Solicitor unveiled his latest explanation for the initial 12-month delay: the conflict of interest that he claimed precluded his office from pursuing temporary reinstatement for the miner during that time. According to the Solicitor, his office

[5] As the majority recognizes (slip op. at 1 n.1), the Commission's disciplinary rules mandate that "[i]ndividuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. § 2700.80(a). A common feature of the standards of conduct expected of a practicing attorney is that he or she will act with reasonable diligence and promptness in representing a client. *See, e.g.*, ABA, Model Rule of Professional Conduct 1.3 (2001). There is nothing in the concept of prosecutorial discretion which excuses attorneys from compliance with this requirement, least of all in a case where it took 19 months to file an application under a statute which contemplates that the decision to proceed will be made on an expedited basis.

made a decision to indefinitely forego pursuing temporary reinstatement for the miner because of an ongoing investigation by MSHA for possible 110(c) charges against the miner. He opined that while MSHA was investigating the miner for a potential 110(c) charge, the case presented a potential "conflict of interest" between the Solicitor's obligation to represent its client, MSHA, and their statutory obligation to pursue temporary reinstatement for the miner. Accordingly, the Solicitor's Office supposedly had a "hands-off" attitude toward the case during those 12 months, at the end of which it claims a decision was made not to file section 110(c) charges against the miner.[6]

When viewed in isolation, the Solicitor's latest explanation is more credible than the previous explanations his office provided for the delay. After all, few people would take issue with the Labor Department's top attorney ensuring that representatives of the Secretary do not have conflicts of interest in enforcing the various provisions of the Mine Act. Unlike my colleagues in the majority I am not willing to accept the Solicitor's newest explanation for the delay because I believe an objective review of several key points undermines the Solicitor's position that his office was not at all involved in the case during the first 12 months of the delay.

First, there is no getting around the fact that the conflict of interest explanation is simply the latest attempt by the Solicitor's Office to provide a reason to the Commission for the delay. It is indeed curious that the conflict of interest excuse was not offered until nearly 10 months had passed from the time the Commission first requested the Secretary to explain the delay, 5 months had elapsed after the settlement of the miner's case, and only after it had become apparent that the explanations offered in the staff attorney letter, the claim that the Commission was interfering with prosecutorial discretion, and phone calls to the Commission's headquarters failed to produce the desired result — a dismissal of the disciplinary referral.

In addition, the Solicitor did not point to a single document, public or private, which set forth the policy he advocated. MSHA makes available thousands of pages setting forth its policies under the Mine Act, yet neglects to inform the public regarding its "policy" of avoiding "conflicts" between section 110(c) cases and section 105(c) discrimination cases? As far as I am aware, the Solicitor's Office has never to this date alerted miners that even the mere investigation of a discrimination complaint by the Solicitor's Office must await the resolution of any potential section 110(c) charge. Given the circumstances, the Solicitor's tardy oral explanation to the Commission appears to be nothing more than a post hoc cover story.[7]

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[6] In spite of MSHA's claim that it determined that the miner was not liable under section 110(c), our investigation revealed that a representative of the Solicitor's Office, inexplicably, continued to cite the section 110(c) investigation to the miner as a reason why the miner should settle the case.

[7] While the Solicitor was silent on why this explanation was not initially provided to the Commission, the majority opines that the reticence was based on privacy and ethical considerations. Slip op. at 6 n.5. This does not explain, however, the failure of MSHA and the

Finally, and most importantly for future cases, to the extent the Solicitor's position regarding the subject temporary reinstatement application is the actual policy of his office, it creates an extremely troubling situation whereby *any* miner's right to temporary reinstatement can be trumped by the Solicitor's obligation to represent MSHA in section 110(c) actions. This hierarchical scheme, advanced by the Solicitor, creates an absurd result that certainly has no bases in the law.[8] On this important point, I could not agree more with my colleagues in the majority who state "the Solicitor's policy could have the effect of *severely limiting* the temporary reinstatement provisions from the Mine Act." Slip op. at 6 (emphasis added).[9] The Solicitor could not be more mistaken in his claim that the conflict in this case will be rare because it can only arise where an agent of an operator is involved. The Solicitor's position on this issue is a threat to *all* miners, and not just supervisory personnel who often become targets of MSHA's section 110(c) investigations, because the Secretary has repeatedly attempted before this Commission to expand the definition of "agency" under the Mine Act. Therefore, under the Solicitor's supposed approach, *any* miner the Secretary believes could be held to be an "agent" of

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Solicitor's Office to inform the miner why the Secretary was taking so long to act on his discrimination complaint or a temporary reinstatement application. Moreover, as the majority itself recognizes, the Solicitor's Office refuses to acknowledge that it had an attorney-client relationship with the miner in this case. Without the attorney-client relationship, the ethical obligations that govern that relationship do not attach, so the majority is not only speculating when it attempts to excuse the Solicitor's actions by reference to ethical and privacy considerations, but contradicting the Solicitor as well.

[8] The section 105(c) discrimination provisions are replete with time limits, in most cases quite severe. *See, e.g.,* 30 U.S.C. § 815(c)(2) (requiring miners to file discrimination complaints within 60 days of the alleged discrimination, the Secretary to commence investigation of the complaint within 15 days and to apply for temporary reinstatement on an expedited basis, and the Commission to order immediate reinstatement if the complaint is not frivolous); 30 U.S.C. § 815(c)(3) (requiring Secretary to notify miner within 90 days of miner's complaint whether Secretary has found the miner to have been discriminated against, and giving miner 30 days from that to file his own complaint with the Commission if the Secretary did not so find). In light of this clear Congressional intent, one simply cannot take seriously the Solicitor's position that the Secretary can sit on a discrimination complaint indefinitely while a section 110(c) investigation is conducted.

[9] The irony in the majority's observation, however, is that their decision to dismiss this case without further inquiry to determine the real cause for the delay in reinstating the miner will have the same practical impact on miners. After its decision, how many miners will be willing to raise safety complaints when their right to prompt temporary reinstatement under the Mine Act has proven to be illusory?

the operator, such as rank and file mine examiners,[10] is subject to investigation and potential charges under section 110(c). The net effect of the Solicitor's position on this issue would be, at worst, elimination of the miner's right to temporary reinstatement, and at best a financially crippling delay in the processing of temporary reinstatement cases.

I say "would be" because I hope that once the majority's decision is issued miners nationwide, and their representatives, will be alerted to the consequences the Solicitor's policy will ultimately have on the right to temporary reinstatement. Hopefully, this will force the Solicitor's Office to rethink its position (if indeed it spent any time initially thinking about the issue). If that occurs, perhaps there will be a limit to the damage inflicted on the temporary reinstatement provisions of the Mine Act by the Solicitor's imprudent attempt to mask in a cloak of ethical conduct his office's failure to properly handle a case.[11]

B. The Additional 7-Month Delay in Filing the Application

My colleagues in the majority do not feel that the points I have raised concerning the validity of the Solicitor's various explanations are serious enough to warrant additional inquiry into the individual attorneys' real role in this case during the first 12 months of the delay. Regardless of the position they take on that portion of the delay, they admit that the Solicitor's Office was fully engaged in a representative capacity for the miner during the last 7 months of his ordeal.

In fact, various admissions made by representatives of the Solicitor's Office suggest that it was actively involved in the case at least as early as July 1999.[12] For example, in the letter

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[10] Miners, either rank and file or supervisory, can also become entangled in this trap in situations arising out of sections 110(e), 110(f), 110(g), and 110(h) of the Mine Act. For example, we have held that even rank-and-file miners qualify as "agents" under the Mine Act when they perform examinations mandated by law. *See Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991); *Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991).

[11] Unfortunately, the temporary reinstatement case here is not all that unique. Existence of delays in other MSHA Western District cases, discrimination and otherwise, are evident from the Commission's reported decisions both before and after the 19-month delay in filing the miner's temporary reinstatement application. *See, e.g., Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 153-54 (Feb. 2000) (miner had filed three discrimination complaints in previous 3 years, none of which Secretary had acted upon); *United Metro Materials*, 23 FMSHRC 1085 (Sept. 2001) (ALJ) (dismissal of civil penalty proceeding in fatality case because Secretary did not issue proposed penalty assessment until December, 2000, which was 14 months after citations had issued), *rev. directed*, Oct. 26, 2001.

[12] Of course, there is no way for the majority to determine with any degree of certainty how early in the process the Solicitor's Office became involved in the case. As the majority

from the Solicitor's Office staff attorney in response to the Commission's initial request for information, the agency readily admitted that the case was in the San Francisco Regional Solicitor's Office for *7 months* prior to the filing of the temporary reinstatement, and that this caused the case to be "unnecessarily delayed." Moreover, the Solicitor himself admitted it during his January 2001 presentation to the Commission, and Commission staff verified this in their interview with the miner.

Of course, the Solicitor had an explanation for the seven month delay also — that his office needed to conduct a further investigation into the miner's claim. He claimed that during those 7 months, his office wrestled with the strength of the case, as it was a difficult case to determine whether or not to seek temporary reinstatement.

I find the majority's wholesale acceptance of the Solicitor's explanation (slip op. at 7) puzzling for several reasons. To begin with, the majority fully recognizes that when the Solicitor's Office allegedly received this case in July 1999, MSHA had just completed a *12-month* investigation into the matter to determine whether charges would be brought against the miner under section 110(c). After a year-long investigation, what on earth could possibly have been left for the Solicitor's Office to investigate? Even if we were to assume that an additional investigation was needed, how can the majority justify the Solicitor's Office taking 7 months to complete it, particularly when, as Commission staff who interviewed the miner reported, no more that four employees of the operator where involved, *including* the discriminatee himself?

Moreover, the majority must recognize the transparency of the Solicitor's claim that his office wrestled with the strength of the temporary reinstatement case. After all, they understand the Solicitor's burden in terms of bringing a case for temporary reinstatement. In fact, they recently commented on this very issue in *Bussanich*:

> "[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). . . . The Mine Act's legislative history defines the "not frivolously brought" standard as indicating that a miner's "complaint appears to have merit." S. Rep. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624.

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admits, "we are not certain when MSHA decided not to pursue section 110(c) charges against the miner." Slip op. at 6. Again, this lack of information is a direct result of the majority's refusal to pursue the investigation.

22 FMSHRC at 157.

Furthermore, before the meeting with the Solicitor the Commission was informed of facts involving this case that were exactly the opposite of what the Solicitor argued. There was no dispute regarding the existence of adverse action, as the miner was terminated. The miner had red tagged a truck and refused to certify new miners as trained because he was not qualified to do so, textbook examples of protected activity. Evidence also supported the miner's assertion that he repeatedly complained about the truck, but was met with inaction on the company's part, if not outright hostility. Based on the closeness in time between the most apparent protected act, red tagging the truck, and the miner's firing, motivation could be presumed for purposes of temporary reinstatement. The miner's complaint was therefore anything but frivolous, and I can see no reason why MSHA and the Solicitor's Office delayed moving quickly to get the miner temporarily reinstated. In addition, even if the Secretary were to later determine that the miner had not been discriminated against, the Commission's rules require a judge to dissolve a temporary reinstatement order at the Secretary's request. *See* 29 C.F.R. § 2700.45(g).

Finally, the Solicitor himself undercut his claim that closeness of the case merited a 7-month investigation by his office. He reported in his presentation to the Commission that he was not pleased with the length of time it took to seek reinstatement, and that, according to his review, there were periods of time during the 7-month "investigation" for which there was no appropriate accounting.

Against the backdrop of a previous 12-month investigation by MSHA, admissions of a failure to timely act by the Solicitor's and his staff attorneys, independent evidence regarding the strength of the miner's case, and a recognition of the minimal burden placed on the Solicitor in temporary reinstatement matters, I simply do not understand the majority's decision to dismiss this case without conducting further inquiry into the conduct of the Solicitor's Office. Perhaps my colleagues misunderstand their role under Rule 80. Our undertaking here is not to sit as a trier of fact to determine *if* there was misconduct on the part of an attorney in the Solicitor's Office. Instead, as stated earlier, our sole responsibility it is to conduct an *complete* and *impartial* inquiry into these disciplinary referrals. And, we must also complete an objective evaluation of the evidence we discover during the inquiry. Only then, if the evidence warranted, would we submit the matter to a judge to determine *if* misconduct occurred.

Do my colleagues in the majority believe that 7 months is an acceptable period of time for a miner to sit at home without income after being discharged for seeking to exercise his rights under the Mine Act? If not, they owe it to the nation's miners, whether they be rank-and-file or not, to conduct a complete investigation in this proceeding, instead of simply accepting the unsupported assertions of the Solicitor's Office.

In essence, my colleagues have elected to end this important investigation under Rule 80 and then dismiss this case because the cursory investigation did not bear fruit. In other words, the majority ran into a dead end of its own making. This decision, in my opinion, should be

viewed as a disappointment to both industry and labor. In addition to the chilling effect the majority opinion will have on miners exercising their rights under section 105(c), the decision also provides a basis upon which individuals in the private sector, who have been investigated and disciplined under Rule 80, can question our ability to objectively review the conduct of the Department of Labor's attorneys.

For the foregoing reasons, I respectfully dissent.

Robert H. Beatty, Jr., Commissioner

APPENDIX A

Commission Procedural Rule 80(c)(2) expressly authorizes the Commission to require persons to submit affidavits setting forth their knowledge of circumstances relevant to its inquiry into whether disciplinary proceedings are warranted. *See* 29 C.F.R. § 2700.80(c)(2). Pursuant to Commission Procedural Rule 80(c)(2), we direct Associate Solicitor of Labor Edward P. Clair, San Francisco Regional Solicitor Daniel W. Teehan, and San Francisco Regional Solicitor's Office attorney Christopher B. Wilkinson, each to supply a sworn affidavit fully addressing each of the items that follow.

1. Provide a detailed chronology of the facts relating to the processing of [the miner's] discrimination complaint from the time that [he] initially filed a complaint with MSHA until the application for temporary reinstatement was filed.

2. Provide a complete, detailed description of your personal involvement in connection with the processing of [the miner's] discrimination complaint in the case within the time frames you have identified in response to question 1.

3. Provide a detailed description of any and all personal contact that you had with [the miner] within the time frames you have identified in response to question 1.

4. Identify any attorney, or staff personnel to whom [the miner's] case has been assigned at any time, or who were involved in any way and for any length of time in work related to [his] discrimination complaint.

5. Identify any individuals who were in custody of materials in [the miner's] case file, or any other materials related to or stemming from [his] discrimination complaint. Describe the length of time each person possessed such materials, and the reason these materials were in the custody of each person. If these materials were not in any person's custody during certain time periods, please describe where these materials were located during such periods, how long they were in each location, the reasons why these materials were in each location, and any other circumstances surrounding their presence in each location. Provide the earliest date where communication between MSHA and members of the Solicitor of Labor's staff occurred relating to [the miner's] discrimination complaint and/or the decision to file a petition for temporary reinstatement. Please identify the individuals involved in this contact, and the substance of any discussions which occurred.

6. Describe and provide information regarding each communication between MSHA and attorneys or other members of the Solicitor of Labor's staff which in any way relates to the processing of [the miner's] discrimination complaint and/or petition for temporary reinstatement. Include the substance and outcome of any such discussions.

7. Did the investigation into [the miner's] discrimination case and/or relating to the application for temporary reinstatement differ substantially from other Mine Act discrimination cases investigated and presented to the Solicitor's Office? If so, please provide facts to support your conclusion.

8. Did the procedure involved in the processing of [the miner's] discrimination case and/or temporary reinstatement application, following the investigation, differ substantially from the procedures normally followed by the Solicitor's Office in other Mine Act discrimination cases? If so, please provide facts to support your assertion.

10. To the best of your knowledge, describe any other circumstances which contributed to the delay in the filing of a temporary reinstatement application on [the miner's] behalf.

Distribution

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