

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 9, 1998

DISCIPLINARY PROCEEDING : Docket No. D 98-1

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This disciplinary proceeding arises under Rule 80 of the Commission's Procedural Rules, 29 C.F.R. § 2700.80.¹ On August 19, 1998, a Commission administrative law judge referred to

¹ Commission Procedural Rule 80 provides in pertinent 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; 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. . . . [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

the Commission a matter which the judge believed may warrant disciplinary proceedings. The substance of the referral concerned guilty pleas entered by the representative of an operator in civil penalty proceedings to criminal violations of mandatory safety and health standards as well as to provisions of Title 18 of the United States Code. On the grounds explained below, we conclude that disciplinary proceedings are not warranted at this time and we dismiss without prejudice the disciplinary referral.

This matter arises in connection with a civil penalty proceeding, *Durbin Coal, Inc.*, Docket No. WEVA 98-65, that is currently pending before Administrative Law Judge William Fauver. In that proceeding, the operator contested various aspects of three MSHA civil penalty assessments on March 26, 1998. Contest of Civil Penalties, Ex. A. On May 5, the Secretary filed a Petition for Assessment of Civil Penalty as well as discovery. On June 1, an Answer to Discovery Request and Answer to Petition for Assessment of Penalty were filed on behalf of Durbin Coal, Inc. (ADurbin@) by Connie J. Prater, AConsultant,@ on the letterhead of APra-Mac Enterprises Inc. @

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.

On June 15, 1998, the Secretary filed a Motion to Strike and Motion for Default, in which the Secretary asked the judge to strike the answers filed by Prater and to then find Durbin in default, or in the alternative for an order requiring Prater to explain the manner by which she has satisfied the requirements of 29 C.F.R. ' 2700.3.² S. Mot. to Strike and Mot. for Default at 3. By filings dated June 22 and June 29, 1998, the Secretary supplemented and amended her motion. Attached to the motion, as amended and supplemented, was a copy of a criminal information filed on January 12, 1995, by the United States Attorney in the United States District Court for the Eastern District of Kentucky. S. Mot. to Suspend Discovery and Mot. to Supplement, Addendum to Ex. B. The information alleged that Prater willfully violated 30 C.F.R. ' ' 70.201, 70.207 and 70.208, as well as Mine Act section 110(d),³ 30 U.S.C. ' 820(d), the criminal penalty provision of the Mine Act, by submitting to MSHA on behalf of various mines respirable dust samples that were fabricated outside of the mines or were otherwise not taken in accordance with the requirements of the Mine Safety Act. @ *Id.* at 1-2. Exhibit B to the Secretary's motion to strike was a judgment in *United States v. Prater*, Case No. 95-2-1 (E.D. Ky.), entered against Prater on April 19, 1995, for violation of 30 U.S.C. ' 820(d) based on her plea of guilty to the information. Also attached to the motion was a copy of a judgment in *United States v. Pra-Mac Enterprises*, Case No. 94-26-S-1 (E.D. Ky.), entered against Pra-Mac Enterprises (APra-Mac@) on April 18, 1995, for violation of 18 U.S.C. ' ' 2 and 1001 based on its pleas of guilty to Account two of superseding indictment. @ S. Mot. to Strike and Mot. for Default, Ex. A. The indictment was not attached, but the offense is described in the judgment as AWillfully & knowingly falsify, conceal, & cover up & cause to be falsified [sic], concealed & covered up,

² Commission Procedural Rule 3, entitled AWho may practice,@ provides in pertinent part:

(a) Attorneys. Attorneys admitted to practice before the highest court of any State, Territory, District, Commonwealth or possession of the United States are permitted to practice before the Commission.

(b) Other persons. A person who is not authorized to practice before the Commission as an attorney under paragraph (a) of this section may practice before the Commission as a representative of a party if he is:

- (1) A party;
- (2) A representative of miners;
- (3) An owner, partner, officer or employee of a party when the party is a labor organization, an association, a partnership, a corporation, other business entity, or a political subdivision; or
- (4) Any other person *with the permission of the presiding judge or the Commission*.

29 C.F.R. ' 2700.3 (emphasis supplied).

³ Section 110(d) subjects to criminal punishment A[a]ny operator who willfully violates a mandatory health or safety standard . . . @ 30 U.S.C. ' 820(d).

material facts by submitting fraudulent respirable dust samples to [MSHA]; Aiding and Abetting[.]⁴

In her motion, the Secretary complained that Durbin had failed to comply with Rule 3 of the Commission's Procedural Rules. S. Mot. to Strike and Mot. for Default at 1. The Secretary asserted that Prater is not an attorney admitted to practice in Kentucky or West Virginia, and that she is not otherwise authorized to practice before the Commission under Rule 3. *Id.* at 1-2. The Secretary noted the guilty pleas of Prater and Pra-Mac and suggested that the judge withhold permission for Connie Prater to represent Respondent or any other party before the Commission. S. Amend~~t~~ to Mot. to Strike and Mot. for Default at 1-2. She also argued that permission for Prater to represent Durbin should be denied because Pra-Mac Enterprises Inc., the representative of Durbin Coal Incorporated through Prater . . . , pled guilty to a crime of moral turpitude implicating its tendency for truthfulness, and, thus, the judge and the Secretary have reason to question the reliability of any assertions in its pleadings. *Id.* at 2. In addition, the Secretary contended that, given Rule 80's authorization of disciplinary proceedings against an individual who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct, the judge should not permit Prater to enter her appearance pursuant to Rule 3. *Id.* at 2 n.1*.

The firm of Patton Boggs, L.L.P. entered its appearance on behalf of respondent Durbin, and on July 1, 1998, filed Durbin's opposition to the Secretary's motion. Durbin asserted that it authorized Prater in writing to act as its agent in filings with MSHA and that she has submitted dozens of plans and other documents to MSHA on behalf of Durbin. D. Opp~~n~~ at 3. Durbin stressed that the guilty pleas of Prater and Pra-Mac were the result of a plea bargain. *Id.* at 4, 6. It denied that either defendant was guilty of a crime of moral turpitude. *Id.* In explanation of

⁴ 18 U.S.C. § 1001 states:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

Prater's failure to seek permission to practice before the Commission, Durbin stated that she was told by MSHA officials that she did not need to obtain counsel to contest citations on behalf of her clients. *Id.* at 4-5. Durbin also asserted that Prater entered appearances in the past by filing Answers before the Commission in exactly the same way she did in this case, and those appearances have been routinely accepted without comment. *Id.* at 5. Durbin argued that the Commission has routinely accepted the appearance of non-attorneys under Rule 3, and that an investigation of the background of applicants under that rule would be inappropriate. *Id.* at 6. Durbin also contended that any inappropriate conduct may only be examined pursuant to a disciplinary referral under Rule 80. *Id.* at 7. In this connection, Durbin suggested that the judge consider referring to the Commission under Rule 80 alleged misconduct of the Solicitor, consisting of his asserted misreading of the law, and other unsubstantiated or wrong claims, as well as his alleged failure to check[] his facts and his purported slander[of Prater's] reputation and integrity. *Id.* at 7-9. Durbin asserted that, under Rule 80, only misconduct occurring in the litigation before the Commission, and not a representative's past conduct, has been a basis for a disciplinary proceeding before the Commission. *Id.* at 8. Durbin requested that Prater be allowed to represent it in the civil penalty proceeding. *Id.*

To date, the judge has not ruled on the Secretary's motion to strike or Durbin's motion under Rule 3 to permit Prater to represent it. On August 18, 1998, the judge made the instant disciplinary referral, attaching the criminal information and judgments submitted by the Secretary in the civil penalty proceeding. According to the judge, those documents contain information that may warrant disciplinary proceedings against Connie Prater, who practices before this Commission. Disc. Referral at 1.

In our view, this disciplinary referral is premature. Because the referral was made before the completion of the underlying proceeding, the civil penalty docket continues before the judge. Under Rule 3(b)(4), non-attorneys and individuals not described in subsections (b)(1) through (b)(3) are required to obtain permission from the presiding judge or the Commission to practice before this agency. The judge has yet to rule on Durbin's request under Rule 3 that Prater be allowed to represent it. Thus, it has yet to be determined whether Prater will be practicing before the Commission in the matter that gave rise to this referral. Depending on the outcome of Durbin's request to permit Prater to practice, the Rule 80 proceeding may become moot. In any event, we conclude it is unwise for the disciplinary proceeding to continue while the Rule 3 question is still pending, given the possibly overlapping nature of the two matters.

Accordingly, we terminate this disciplinary referral without prejudice, and express no opinion on whether Prater's guilty pleas warrant disciplinary proceedings under Rule 80.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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