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DISCIPLINARY PROCEEDING
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FMSHRC-WDC
MAY 27, 1986

DISCIPLINARY PROCEEDING D 86-2

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This inquiry is to determine whether disciplinary proceedings arising under Commission Procedural Rule 80, 29 C.F.R. § 2700.80, are warranted. 1/ On January 22, 1986, Commission Administrative Law Judge Joseph B. Kennedy referred to the Commission circumstances involving an operator's counsel that he believed warranted discipline. The circumstances arose during the contest of a civil penalty proceeding, and the judge included the disciplinary referral in his decision on the merits

1/ Rule 80 states in part:

Standards of conduct; disciplinary proceedings.

(a) Standards of conduct. Individuals practicing before the Commission 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 he has engaged in unethical or unprofessional conduct, ... or that he has violated any provisions of the laws and regulations governing practice before the Commission....

(c) Procedure. [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 such information, in writing, to the Commission for action. Whenever in the discretion of the Commission, by a majority vote of the members present and voting, the Commission determines that the circumstances reported to it warrant disciplinary proceedings, the Commission shall either hold a hearing and issue a decision or refer the matter to a Judge for hearing and decision....

29 C.F.R. § 2700.80.

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of the penalty case. *Youghiogheny and Ohio Coal Co.*, 8 FMSHRC 121, 138-141 (January 1986)(ALJ). Subsequently, the Commission granted *Youghiogheny & Ohio Coal Company's* ("Y&O") petition for discretionary review of the penalty aspects of the judge's decision and severed the disciplinary referral from the rest of the case. Our only concern here is with the disciplinary referral.

The substance of the disciplinary referral concerns the conduct of counsel for Y&O in the penalty case. The judge asserts that counsel violated applicable standards of professional conduct by failing to file post-hearing findings of fact, conclusions of law, and supporting arguments. The judge also asserts that counsel abused the Commission's legal process by raising frivolous arguments, ignoring applicable precedents, and by persistently badgering the witnesses and the judge. On the grounds explained below, we conclude that disciplinary proceedings are not warranted.

The procedural background of the underlying penalty case serves as a backdrop for the disciplinary referral. In assessing proposed penalties for the two alleged violations at issue in the penalty proceeding, the Department of Labor's Mine Safety and Health Administration ("MSHA") elected to waive its regular penalty assessment formula contained in 30 C.F.R. § 100.3 and conduct special penalty assessments pursuant to 30 C.F.R. § 100.5. As a result of the special assessments, the Secretary of Labor filed with the Commission a proposal for civil penalties of \$850 and \$900. Y&O answered by asserting, among other things, "The citations do not meet the criteria required in 30 C.F.R. [§] 100.5 to allow for a special assessment." Y&O requested that the citations be "properly assessed" under section 100.3. Y&O maintained this position throughout the proceeding.

At the close of the hearing, the judge delivered a tentative bench decision in which he found that the two violations had occurred and that penalties in the amounts of \$1,000 and \$950 were warranted. The judge advised the parties that after the transcript of the hearing was received, he would issue an order requiring the parties to show cause why the bench decision should not be adopted as a final decision. Following this procedure, the judge subsequently adopted the bench decision and ordered Y&O to pay the penalties that he had assessed.

Y&O sought review of the judge's decision. On review, the Commission concluded that the judge's decision was procedurally deficient because it violated Commission Procedural Rule 65(a), 29 C.F.R. § 2700.65(a). 2/

2/ Rule 65(a) states in part:

The [Judge's] decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them.... If a decision is announced orally from the bench, it shall be reduced to writing....

29 C.F.R. § 2700.65(a).

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The Commission vacated the decision and remanded the matter to the judge to enter a new decision in accordance with the Commission's rules. *Youghiogheny & Ohio Coal Co.*, 7 FMSHRC 1335 (September 1985). On remand, citing Commission Procedural Rule 62, the judge ordered the parties to file proposed findings of fact, conclusions of law, and arguments in support thereof in order for the judge to "determine the adequacy or inadequacy of ... [the] findings [in the bench decision] and make whatever additions ... appear necessary to meet the Commission's rules." 3/

The Commission denied Y&O's petition for interlocutory review of this order. Nevertheless, Y&O did not submit any proposed findings, conclusions, or arguments. The judge then ordered Y&O to show cause why it should not be deemed in default. Y&O did not respond. The judge thereafter adopted his prior decision, made supplemental findings of fact and conclusions of law regarding the civil penalty aspects of the case and referred to the Commission the question of whether the conduct of Y&O's counsel warranted disciplinary action. 8 FMSHRC at 123, 138-141.

We first examine the charge that counsel failed to respond to the judge's order to provide findings of fact, conclusions of law, and arguments in support thereof. Y&O requested relief from the order, but the Commission denied Y&O's request. Y&O did not file the materials with the judge nor did it respond to the order to show cause.

In defense of counsel's failure to respond to the order to submit materials, Y&O argues that the proposed findings, conclusions, and arguments would have served no useful purpose in that the judge previously had decided the case adversely to Y&O. This argument is not well taken. Commission Procedural Rule 62 provides that a judge "may require the submission" of materials such as those that the judge ordered Y&O to file. Belief that an order is erroneous, unwise, or serves no useful purpose does not excuse compliance by counsel. The proper course of action, unless and until an order is stayed or invalidated on appeal, is for counsel to obey. *Chapman v. Pacific Telephone and Telegraph Co.*, 613 F.2d 193, 197 (9th Cir. 1979). Counsel cannot choose selectively the orders with which he will comply. Once Y&O's request for interlocutory review of the judge's order was denied, counsel was obliged to respond.

This said, we also conclude that counsel's failure to respond in the particular circumstances obtaining here was not so egregious as to warrant the institution of disciplinary proceedings. Y&O and

its counsel have asserted that counsel meant no disrespect for, or contumacy toward the judge and have apologized for counsel's conduct. Moreover, counsel frequently has appeared before the Commission and the failure to respond here was apparently a first time occurrence. Therefore, we deem it sufficient to caution counsel against ignoring orders issued by the Commission or its judges in the future.

3/ Rule 62, 29 C.F.R. § 2700.62, states in part:

The judge may require the submission of proposed findings of fact, conclusions of law, and orders, together with supporting briefs.

Concerning the judge's further assertions that counsel engaged in unprofessional conduct by ignoring applicable precedents and persistently raising frivolous arguments, we note that the essence of the judge's complaint is that counsel refused to recognize that "the Commission and its trial judges exercise their independent judgment in applying the six [statutory penalty] criteria and are in no way bound by the determinations made by MSHA." 8 FMSHRC at 125. As the judge correctly states, the Commission has held that once a penalty is contested and Commission jurisdiction attaches, a judge's determination of the amount of the penalty is de novo based upon the statutory penalty criteria and the record information developed in the course of the adjudication. *Sellersburg Stone Co.*, 5 FMSHRC 287 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984); *United States Steel Mining Co., Inc.*, 6 FMSHRC 1148 (May 1984). We, however, find that counsel's argument did not stand in opposition to this well-settled principle. Rather, it was premised upon the theory that in certain circumstances a Commission judge has the authority to remand a proposed penalty assessment to MSHA for reassessment under appropriate MSHA penalty regulations. As both the judge and counsel appear to have recognized, this issue has not yet been specifically ruled upon by the Commission. We cannot conclude that counsel's argument constituted frivolous advocacy.

We further conclude that counsel did not "[persist] in badgering the witnesses and the trial judge." Our review of the record reveals that counsel was properly insistent and assertive in his questioning, but was not discourteous or abusive. Similarly, we have considered and rejected the additional asserted bases for referral urged by the judge.

For the foregoing reasons, we conclude that disciplinary proceedings in this matter are not warranted. Accordingly, this inquiry is terminated.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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