

ASSIGNMENT MEMO

TO: Summer Clerk
FROM: Career Clerk
RE: Administrative Process Issues in Consolidated Mining Cases

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Next month, the court will hold a motion hearing in consolidated litigation concerning the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.* (“the Act”) and claims associated with several actions taken by the Department of Labor’s Mine Safety and Health Administration (“the Administration”). Consolidation means the court has joined these related cases for efficiency because there are common questions of law or fact. Here, a rulemaking challenge is relevant to the outcome of an adjudication appeal.

There is a pending motion by the government to dismiss all claims and the petitioning parties object to that motion. The judge has asked for a bench memo that analyzes the issues in the case and whether the motion should be granted. I am assigning the bench memo to you and have included a summary of the facts and law below.

The Parties

The defendants are the Secretary of the Department of Labor (“the Secretary”), who oversees the Mine Safety and Health Administration (“the Administration”), and the Federal Mine Safety and Health Review Commission (“the Commission”). Congress created a split- enforcement regime under the Act. The Secretary and the Administration are responsible for rulemaking. The Commission is responsible for reviewing decisions of the administrative law judges (“ALJ” or “ALJs”). For the past decade, the Administration’s Chief ALJ has appointed the agency’s ALJs who decide the cases that may then be appealed to the Commission. Congress created this split-enforcement arrangement to assure fairness to mines, particularly in the review of enforcement actions.

Because this is consolidated litigation, there are two petitioners. The first is the Federated Mine Association (“the Association”). The Association has over 100 member mines and its purpose is to provide advocacy and general lobbying services to those mines. The Association is governed by a Board that includes ten of the member mines executives. The Association has actively advocated for its members for over 25 years. The Association filed an action against the Secretary and the Administration challenging a 2013 rulemaking.

The second petitioner is the Buffalo Mine Corporation (“the Mine”). The Mine is also a member of the Association, but it has been subject to specific enforcement action by the Administration as explained below. The Mine is challenging the decision of the Commission in an adjudication that was based on the 2013 rulemaking.

There is one intervenor: The Mine Workers Federated Union (“the Union”). The Union represents the interests of mine workers. The Union intervened in the Mine hearing to advocate for its workers. The Union seeks to have the Commission’s decision upheld.

Regulatory and Enforcement Background

Congress passed the Act in 1977 for the purpose of assuring the safety of mines and the people who work in them. Mining is one of the most hazardous occupations in the U.S. and has high rates of worker injury and chronic illness. Congress granted the Secretary the specific authority under the Act to “(1) establish health and safety standards by rule; (2) inspect mines at least annually; and (3) issue citations for violations of the rules found during inspection or following a mining accident causing death or significant injury to workers.” 30 U.S.C. §802.

There are two levels of violations that have different consequences. At issue in this case is the highest level of violation, known as an “S&S” violation. These are violations that are “of such a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards.” 30 U.S.C. §814(e). If a mine has a “pattern of violations” (“POV”), the Administration issues a notice to the mine. The notice triggers a 30-day period in which the mine will be inspected. If during the inspection there are additional S&S violations the mine is shut down, workers are removed, and the mine is responsible for payment to the workers while it remediates the violations. The mine must then be re-inspected before it can re-open.

Congress did not define the term “pattern of violations” and instead required the Secretary to “make such rules as he deems necessary to establish criteria for determining when a pattern of violations . . . exists.” 30 U.S.C. §814(e)(4). The original POV rules were promulgated in 1990. Those rules first gave mines a “pre-enforcement notice” that they would likely be issued a POV notice unless they successfully appealed the underlying violation(s) or cured the S&S violation(s). Under the 1990 rules, the Administration never sanctioned a mine because all mines that received pre-enforcement notices either successfully challenged the violations or cured them.

In 2012, following several serious mining accidents, a government report highlighted that there had never been an enforcement action and mine shut-down under the Act. The report also questioned whether the Act was effectively protecting mine workers from injury and illness. Finally, the report suggested that the 1990 POV rule and its enforcement was much more limited than Congress intended. The report was well-researched and reviewed in a Congressional hearing that the Secretary attended.

Because of the report and in response to Congressional concerns, in 2013, the Secretary revised the POV rule. Notice of the rule was published in the Federal Register. Substantively, the 2013 rule eliminated the 1990 pre-enforcement notice system and replaced it with a system that permits POV notices to issue based on non-final underlying violations. It also expanded the list of S&S violations. Finally, the rule included a provision stating the Administration would post the specific POV criteria on its website.

The 2013 rule represented a significant change in the Act’s administration and the Association submitted lengthy comments and data concerning S&S violations (discussed below). Three

months after the adoption of the rule, the Administration released a guidance document on its web page that set out the POV criteria and created a “Corrective Action Program” (“the Program”). The Program set out a process mines could adopt (but were not required to) that would allow delay of a POV notice if certain steps were taken to address S&S violations.

The POV criteria was a formula that considered all violations (final and non-final) of the prior three years, weighting S&S violations most heavily; the injury and illness rate at the mine over five years; and its financial condition as reported to the Administration annually. If the POV formula as applied to each mine produced the requisite threshold number for a POV notice, the Administration would issue one. The Program then allowed the subject mine to challenge any non-final violations. It did not permit “cure” (fixing the S&S violations) as was the practice from 1990-2012.

Agency Actions

Rulemaking

The Administration’s actions (discussed above) included the adoption of the rules in 2013 and the publication of the POV criteria on its website. The website referred to the POV criteria and the Corrective Action Program as ‘guidance documents’ intended to implement the newly adopted rules. The rulemaking record in this case included the extensive government study showing that the 1990 rule excluded several violation types that should be reclassified as “S&S” violations because the violations were linked to higher injury and illness rates. The record also includes comments by the Association, independent mines, and mine workers advocating for the retention of the 1990 rules with no changes.

As part of its extensive comments, the Association submitted a study conducted by a Colorado School of Mines professor that showed the 1990 and proposed 2013 S&S violation list was over-inclusive when matched with injury or illness rates, particularly with respect to violations related to the use of certain explosives materials. The professor’s study recommended that these violations be excluded from the S&S list. The Association also submitted comments in support of the 1990 notice and cure process noting that its members had created their own safety monitoring programs based on the 1990 rules, hired compliance officers to ensure a greater level of safety, and worked well with inspectors to cure issues in a timely and effective manner, as illustrated by the lack of mine closings due to S&S violations.

In the adoption preamble to the final rule, the Secretary noted:

Though the Association and other mines have argued the 1990 rules are sufficient to protect mine workers, there were several serious mining accidents that caused this Administration to propose the new rules. Congress intended for the federal government to protect the life and safety of mine workers and while it is laudable that mines have developed robust safety programs, they have not presented compelling evidence that the new list of S&S violations is unwarranted or that this nation’s mine safety record is adequate under the Act and the 1990 regulations. The Administration will post new POV criteria and develop a new violation correction plan as guidance for industry, as specified in the Notice of Rulemaking. That guidance should mitigate any concerns of the

mines that the change in policy will hurt their businesses. By adopting new standards and processes, the Administration believes it is creating enhanced mine safety, which in turn will protect workers as Congress intended. Simpler processes and clarity concerning S&S violations will improve regulatory efficiency and compliance.

Upon final adoption of the 2013 rules and the issuance of the guidance documents, the Association brought an action under the APA challenging the agency's actions.

Adjudication

The Administration's first POV notice under the 2013 rules was against the Buffalo Mine Corporation, which requested an immediate hearing under the Administration's rules. The Mine argued that (1) the alleged violations were improperly classified S&S violations, (2) the inspection following POV notice improperly found additional S&S violations, and (3) the POV criteria included violations from before the 2013 rule was adopted (the 3-year period in the formula), making the shut-down order improper. It also challenged the validity of the 2013 rules and related guidance documents. At hearing, the Mine claimed to have shown it cured all violations and sought to be reopened immediately and without re-inspection. The shut-down costs the mine close to \$100,000 a day in lost profits, given that there is no mining activity and workers must still be paid. The ALJ upheld the mine closure notice and the Mine appealed to the Commission.

The Mine has an extensive history of violations, many of them S&S violations. However, the Mine had always either cured or successfully appealed the violations under the 1990 rules. The Mine injury and illness rate was moderate and its financial condition healthy. Yet, the Administration's latest annual inspection report included six S&S violations focused on the storage and handling of explosives. Following notice after application of the 2013 POV criteria, re-inspection found two more S&S violations, causing the shut-down order to issue. At least three of the S&S violations were identified by the Colorado School of Mines study as not being dangerous to workers, a position rejected in the final rule.

In its appeal to the Commission the Mine alleged that the ALJ: misinterpreted the statute and the regulations; wrongfully gave the guidance for industry the force of law (the POV violation criteria and the Program); wrongfully deprived the company of profits by permitting shut-down to continue; and should have dismissed the S&S violations based on testimony that they had been cured.

The ALJ included the following findings of fact and rulings of law (the decision is very lengthy, so I've just given you the relevant ones here):

1. The Mine has eight pending S&S violations. Prior to the hearing, the Mine attempted to cure the deficiencies and present such evidence of compliance at the hearing. This is no longer the Administration's process. Guidance for industry clearly states that a mine closure will occur based on non-final S&S violations. The Mine can challenge the violations, but the Administration's rules no longer offer the opportunity to cure. In this case the Mine did not adequately challenge the violations, therefore I uphold the notice and find it complies with applicable law, rules, and guidance for industry.

2. The Mine had adequate notice of the S&S violations, even though they were not final. This hearing process made them final. While the 1990 rules would have permitted the Mine to first appeal their finality, that is no longer the process. The Mine had a clear understanding of the allegations against it and this decision to uphold the mine's closure notice is the appropriate remedy under the Act and the 2013 rules. Finally, I did not consider the Mine's argument that the S&S violations did not meet the Act's standard for a threat to worker safety as that issue was resolved in the agency's 2013 final rule as further addressed in (4), below.
3. Even if the Mine had the option to cure under the 1990 rules, its evidence was not compelling. The safety officer simply read from the Mine's explosives storage and handling manual to explain its safety protocols. The officer did not provide specific evidence that, following inspection, the Mine had reviewed the storage area and fixed the alleged issues. The officer did not discuss the S&S violations in detail or how they were cured. Upon cross-examination, the officer appeared unfamiliar with the configuration of the storage areas, the specific steps taken to ensure proper explosives storage, or the dates and times cure was made along with its costs. Therefore, I do not find the officer's testimony credible evidence that the Mine addressed the S&S violations. I did find credible the Union's two witnesses who work at the Mine. They presented identical photos of the explosives storage area 'before' and 'after' the cure work had allegedly been completed. The evidence and testimony leads to the logical inference that the Mine did not cure the S&S violations.
4. At the hearing, the Mine argued that the 2013 rules were invalid and that guidance for industry was flawed in light of the Act and the Administrative Procedure Act. This ALJ will not entertain those arguments as the Administration's rulemaking and subsequent guidance documents properly interpreted the Act and followed the Administrative Procedure Act.
5. Finally, the Mine argued that the Administration's ALJs were not appointed consistent with the U.S. Constitution and therefore lacked the authority to rule in this case. Such an argument is beyond the scope my authority. My jurisdiction is limited to applying the Act, the related regulations, and guidance documents to the facts before me. Therefore, this decision does not address the issue.

The Commission affirmed the ALJ's decision in a 'paper review' (no oral argument permitted under agency appeal rules). The Commission complied with its appeal rules and issued a timely notice of its decision to all parties. This appeal by the Mine followed and the case was consolidated with an APA challenge to the Administration's 2013 rulemaking and guidance documents brought by the Association.

Your Assignment

As you prepare your bench memo please apply the U.S. Constitution, the APA, related case law, and the mining law ("the Act") to the facts provided herein. More specifically, your bench memo should include analysis of the following:

- 1) Identify the possible legal arguments the petitioners may make with respect to the 2013 rulemaking process and subsequent guidance for industry. Address whether they are sufficient to either vacate the rules or remand to the agency for compliance with the APA. Here, please specifically identify the agency's actions, how they did or did not meet the relevant legal standards, and what standard(s) for judicial review is applicable to the court's review of agency action.
- 2) Identify the possible legal arguments the petitioners may make in challenging the Commission's decision to uphold the ALJ's decision. As with 1) above, please include the applicable law (statute, cases, etc.) that the Court will apply to determine whether to vacate the Commission's decision. Make sure to specifically address the relevant standard(s) for judicial review.
- 3) Whether the issues identified above in 1) and 2) are reviewable by the court. You should analyze the Association, the Mine, and the Union to determine whether there are different reviewability outcomes for different parts of the case.
- 4) In light of the above, please conclude with a one paragraph preliminary recommendation to our judge of whether the motion to dismiss should be granted or denied, based on the issues you've identified. In this paragraph, you can also identify any additional information the judge should elicit at the upcoming hearing.

Your memo should not exceed 1200 words.