UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. C. N. STEMPER COMPANY, INC., Respondent.	OSHRC DOCKET NO. 13815

June 23, 1976

ORDER VACATING DIRECTION FOR REVIEW

BEFORE BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

BY THE COMMISSION:

The order for review issued in the above-captioned case(s) is hereby vacated for the reasons assigned in Francisco Tower Service, BNA 3, O.S.H.C. 1952, CCH E.S.H.G. para. 20,401 (No. 4845, 1976).

FOR THE COMMISSION:

William S. McLaughlin
Executive Secretary
Dated: JUN 23, 1976

MORAN, Commissioner, Dissenting:

The foregoing 'order' is deficient in three ways: (1) it is illegal, (2) it does not comport with the Occupational Safety and Health Act of 1970[1] and (3) it is ineffective.

(1) The Order is Illegal

The merits of the issues in dispute between the two parties to this case (the Secretary of Labor and the employer) have not been considered by either Mr. Barnako or Mr. Cleary. The 'order' has been issued by the Executive Secretary as the result of a May 21, 1976 Memorandum

[1] 29 U.S.C. § 651 et. seq., hereafter referred to as the Act.

which is attached hereto as Annex II. That Memorandum directs the Executive Secretary to vacate the direction for review filed in some 64 cases which are identified only by docket numbers contained upon a hand-written attachment thereto. In KFC National Management Corp. v. NLRB, 497 F.2d 298, 306 (2d Cir. 1974) it was held that fundamental concepts of administrative due process were violated where the merits of an NLRB case were not considered by the members of that Board in rendering its disposition of the case.

The order which has been issued in this case does not even pretend to address the merits of the issues in dispute. This fact, plus the attached Memorandum which states the manner in which the order issued and indicates the total lack of consideration it received from the members of this Commission, makes it clear that this order violates 'fundamental concepts of administrative due process.'

(2) The Order Does Not Comport With The Act

The order is also illegal because it deprives one of the members of this Commission of the express statutory authority to cause a decision of one of the Commission's Administrative Law Judges (ALJ) to be reviewed by the Commission members.

The Act confers upon each of the three members of the Commission the power to cause a decision made by one of its ALJs to be reviewed by the three-member tribunal. This is made clear by the wording of 29 U.S.C. § 661(i) providing that the report of the ALJ 'shall become the final order of the Commission within thirty days after such report . . . unless within such period any Commission member has directed that such report shall be reviewed by the Commission.' (Emphasis supplied.)

The plain meaning of the phrase 'such report shall be reviewed' manifests a clear Congressional intent that the Commission members would thereupon reexamine judicially the ALJ's findings of fact and conclusions of law. Use of the word 'any' unmistakably signifies a Congressional intent to confer authority upon each of the three members acting individually. This provision is included in the same section of the Act which specifies that 'two members of the Commission shall constitute a quorum' and that

> '. . . official action can be taken only on the affirmative vote of at least two members.' 29 U.S.C. § 661(e).

From the choice of words in these two subsections, it can be logically concluded that Congress intended to grant to each of the three members the power to place an ALJ's decision

before the tribunal for disposition—but that a disposition thereon would only be authorized by the vote of a majority of the members.

Thus, each of the three members has a statutory grant of authority. The order in this case, however, is an effort by two of the members to deprive the third member of that statutory authority. To permit such a result would be to thwart the very purpose which Congress sought to realize by definitely fixing the power in any single member.

Section 661(a), which establishes the Review Commission, states that it

> 'shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act.'

This section of the Act has been held to have significance to reviewing courts. Brennan v. OSAHRC and Republic Creosoting Co., 501 F.2d 1196, 1198 (7th Cir. 1974); Brennan v. Gilles & Cotting, 504 F.2d 1255, 1262 (4th Cir. 1974). The structure of the Commission's membership after the fashion of a tripartite labor arbitration tribunal with one 'labor,' one 'management' and one 'neutral' member is discussed at pp. viii-ix of Annex I of this opinion. See infra.

Thus, the general purposes of creating a three-member tribunal of experts, the language of the Act itself, and the action of the President in structuring it as he did, all combine to demonstrate the intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of Executive authority except in its selection with each member free to exercise his judgment without the leave or hindrance of any other official or any department of the government.

It is quite evident that one member of a collegial tribunal whose judgment cannot be exercised when it contravenes the will of the other members cannot be depended upon to maintain an attitude of independence against the latter's will. Such a result places a premium on conformity, reduces independence of thought, and defeats the very purpose of a multi-member tribunal representing varying backgrounds and experience.

The Commission itself has taken the position that each of its members has the statutory right to direct review of an ALJ's decision. In Secretary v. Thorleif Larsen and Son, Inc., 12 OSAHRC 313, 314 (1974) the Commission was faced with a case where a member who had directed review of an ALJ decision within the § 661(i) thirty-day period subsequently filed a

notice withdrawing the same after that period had expired. The decision held that this could not be done because it 'would have the effect of denying the other members of the Commission an opportunity to act on the case.' That, of course, is exactly what has been done in the matter presently before this body—except that it has happened to one member rather than 'other members.' That same decision further stated:

> It is the statutory right of each member of the Commission to direct review of any case. (Emphasis supplied.)

(3) The Order is Ineffective

Not only does this order violate fundamental concepts of administrative due process and illegally deprive a member of this Commission of a statutory right, but it has no force or effect upon the parties to this case since it neither affirms, modifies nor vacates the matters placed in issue by respondent's notice of contest. Consequently, there is no final order as to those contested issues and they continue to pend before the Commission undecided.

When duly contested, there is no requirement that an alleged violation be abated nor can the Secretary of Labor collect any monetary penalties—or rely on this case to prove a prior violation—until a final order is issued. 29 U.S.C. § 659(c).

I discussed these matters at greater length, including the reasons why my colleagues are proceeding in this unusual manner, in Secretary v. Francisco Tower Service, OSAHRC Docket No. 4845, February 6, 1976, which I attach hereto as Annex I and incorporate by reference herein. The instant case differs from Francisco Tower in the wording of the direction for review. The full text in this case provides that:

> 'Pursuant to 29 U.S.C. § 661(i), I hereby direct that the decision of the Administrative Law Judge in the above-entitled case shall be reviewed by the Commission.'

However, this does not alter what I said in Francisco Tower concerning the illegality of the vacation order.

The orders of three different appellate courts support the proposition that this 'Order Vacating Direction for Review' is ineffective. In Gurney Industries, Inc. v. OSAHRC, No. 73–1818 (4th Cir., November 28, 1973), it was held that a Commission order of remand to an ALJ could not be the subject of a petition for review because:

> 'The Commission's order . . . does not affirm, modify or vacate the Secretary's citation or proposed penalty nor does it direct 'other appropriate relief.' It is

> therefore, not the type of order which automatically becomes final within thirty days under 29 U.S.C.A. § 659(c).'

That order cited Chicago Bridge & Iron Company v. OSAHRC, No. 73–1181 (7th Cir., May 31, 1973), which held that:

> 'Unless and until petitioner is aggrieved, or adversely affected, by an order requiring it to abate certain practices, or granting other relief against it, appeal to this court is improper.'

Even stronger support for the position taken herein is found in Armor Elevator Company, Inc. v. OSAHRC, No. 72–1996 (6th Cir., February 1, 1973), which stated:

> '[I]t appearing to the Court that because within thirty days of the filing of the hearing examiner's report a member of the respondent Commission directed that said report be reviewed by the Commission, it is concluded that the report of the hearing examiner did not become a final order of the Commission (29 U.S.C. § 661(i)). It is therefore concluded that the order from which this appeal was sought to be perfected was not a final order and that the respondent's motion to dismiss should be sustained . . ..'

Finally, I must again point out that my colleagues do not practice what they preach. In Secretary v. P & Z Co., Inc., OSAHRC Docket No. 14822, May 21, 1976, Messrs. Barnako and Cleary stated without any reservations that:

> '[T]he Commission and its administrative law judges are mandated by the Act to state findings of fact, conclusions of law, and the reasons or basis therefor in all decisions and reports.' (Emphasis added.)

Their order in this case does not comply with any of these requirements. In P & Z they remanded the case to the Judge because he did 'not state reasons or basis for his conclusions to vacate the citations.' Here, however, they disregard their own rule. As I have indicated in many decisions, the Barnako-Cleary 'rules' are applied only when they serve my colleagues' purpose. In those cases where their rules do not serve their purpose, they seem to develop a temporary case of judicial myopia.

[Text of Annex I follows]

MORAN, Commissioner, Dissenting:

With this 'order' Messrs. Barnako and Cleary continue their illegal scheme of depriving a duly appointed and qualified member of this Commission from exercising his statutory right to

cause decisions of Administrative Law Judges to be reviewed. 29 U.S.C. § 661(i). They do this by adoption of this 'Order Vacating Direction For Review.'

Not only does this order illegally deprive a member of this Commission of a statutory right but it has no force or effect upon the parties to this case since it neither affirms, modifies nor vacates the matters placed in issue by respondent's notice of contest. Consequently, there is no final order as to those contested issues and they continue to pend before the Commission undecided.

When duly contested, there is no requirement that an alleged violation be abated nor can the Secretary of Labor collect any monetary penalties—or rely on this case to prove a prior violation—until a final order is issued. 29 U.S.C. § 659(c).

I discussed these matters at greater length, including the reasons why my colleagues are proceeding in this unusual manner, in Secretary v. Francisco Tower Service, OSAHRC Docket No. 4845, February 6, 1976, which I attach hereto as Annex I and incorporate by reference herein.

[Text of Annex I follows]

MORAN, Commissioner, Dissenting:

This order is without force or effect since it neither affirms, modifies nor vacates the citation or proposed penalty. Consequently, there is no final order, and the issues in dispute in this case continue to pend before the Commission undecided. Until a final order has issued, there is no requirement that an alleged violation be abated nor can the Secretary of Labor collect any monetary penalties.

29 U.S.C. § 659(c) establishes the procedure for adjudicating alleged violations of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq., hereafter the Act) when a cited employer contests the citation or penalty proposal, as the respondent in this case has done. Once the employer, within the time period prescribed, 'notifies the Secretary that he intends to contest,' the Commission 'shall afford an opportunity for a hearing.' That has been done in this case. However, the statute goes on to provide as follows:

> 'The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance.' (Emphasis supplied.)

That has not been done in this case. No final action has been taken on the citations or proposed penalties.

The above-cited provision of law is the only statutory authorization for the issuance of orders giving final disposition to a citation or proposed penalty which has been contested in accordance with § 659. Since the respondent in this case did contest this enforcement action under that section of law—and the Commission has not yet acted upon the Secretary's citation—the matters raised by respondent's notice of contest remain undecided.

Section 666(d) specifies that a respondent shall not be required to abate the alleged violation until the Commission acts on the citation. It provides that the period for correcting a violation 'shall not begin to run until the date of the final order of the Commission.' (Emphasis supplied.)

Penalties, of course, cannot be collected by the Secretary of Labor unless he can demonstrate that any dispute over their amount has been adjudicated in accordance with law. Where an order such as this takes no action on the 'Secretary's citation or proposed penalties,' a respondent will be legally entitled to decline any request by the Secretary for payment. Should that happen and the Secretary then proceed in court to collect payment he would be unable to prevail since he could not show any disposition of the 'Secretary's citation or proposed penalties.'

Another section of the Act is even more specific in this regard. § 660(b) allows the Secretary of Labor to obtain enforcement of any 'final order' of the Commission if he files a petition therefor in the appropriate court of appeals provided that no adversely affected party has filed a petition for review within 60 days of the Commission's § 659(c) order. This section goes on to provide that 'the Commission's finding of fact and order shall be conclusive in connection with any [such] petition for enforcement.' Here, since the Commission has made no findings of fact itself—and has not adopted the Judge's findings of fact—no petition for enforcement would lie even if this 'Order Vacating Direction for Review' could qualify as a § 659(c) final order.

Nor is any appeal of this 'order' permitted. The only Commission order which can be appealed is '. . . an order of the Commission issued under subsection (c) of section 659 . . ..' 29 U.S.C. § 660(a).

Furthermore, in appeals as well as enforcement petitions, the Act provides that there must be Commission findings of fact. In this regard § 660(a) provides that

> 'The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.'

Messrs. Barnako and Cleary have here declined to make any findings with respect to questions of fact—nor have they adopted the findings with respect to questions of fact which were made by the Judge below. Consequently, this 'Order Vacating Direction for Review' prevents both the Secretary of Labor from filing an appeal or a petition for enforcement and any other 'adversely affected or aggrieved' party from obtaining a review in the Court of Appeals because of two reasons: (1) there is no § 659(c) order, and (2) there are no findings of fact.

A case for disposition by this Commission arises when a cited employer contests the complainant's enforcement action within the time prescribed. 29 U.S.C. § 659. A trial is held on the issues raised by the parties at a subsequent date before one of this Commission's Administrative Law Judges (a position which, at the time this statute was enacted, was known as 'hearing examiner'). 29 U.S.C. § 661(i). That section of the law then goes on to provide that:

> 'The report of the hearing examiner shall become the final order of the Commission within thirty days after such report . . . unless within such period any Commission member has directed that such report shall be reviewed by the Commission.' (Emphasis supplied.)

This is the only statutory provision giving finality to an Administrative Law Judge's decision.[1] Such a decision cannot 'become the final order of the Commission' if any Commission member directs that 'such report shall be reviewed by the Commission' within the time prescribed. See Secretary v. Gurney Industries, Inc., 6 OSAHRC 634, 637–641 (1973).

There is no dispute over the fact that one member of the Commission, acting pursuant to the above-stated statutory provision, directed that the Commission review the Judge's decision in this case. The Commission, however, has failed to act upon that decision. It has not reviewed the Judge's report. This 'order' does not address itself to the Judge's findings in any way. It simply purports to vacate the direction for review. Furthermore, the majority neither asserts, suggests, nor implies that the 'order' herewith entered has the effect of adopting the decision below.

---

[1]There is a parallel provision in the Administrative Procedure Act. 5 U.S.C. § 557(b) provides, in part, that '. . . the presiding employee . . . shall initially decide the case . . .. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is . . . review on motion of the agency within time provided by rule.' (Emphasis supplied.) [Footnote numbering taken from original.]

The full text of the direction for review is stated in the Commission order except for the first paragraph thereof which provides the following:

> 'Pursuant to the authority contained in 29 U.S.C. § 661(i), the undersigned hereby directs review of the decision of the Judge in the above-entitled case.'

My colleagues, in effect, find that this direction for review is ineffective because of vagueness. It does not, they say, present an 'issue' for adjudication by the Commission under the Act. A simple reading of the above-quoted first paragraph thereof, however, disproves that assertion. Review is directed 'of the decision of the Judge.' The direction puts the Judge's decision in issue. It is not limited to any portion thereof, nor indeed is there any statute, regulation, rule, practice or decision which requires a member of this Commission to specify particular 'issues' in such directions or to prevent a member from directing review of the entire decision of the Judge if that be his disposition. However, even if the direction for review specified particular 'issues,' the Commission's review of the Judge's decision in such a case would not be limited to the issues so specified in the direction for review. This point was made clear in Accu-namics, Inc. v. OSAHRC, 515 F.2d 828, 834 (5th Cir. 1975).[2]

The action taken by Messrs. Barnako and Cleary in this case is nothing less than an unabashed attempt to deprive a member of this Commission of a statutory right to have a particular decision reviewed.

Congress created this agency for the single purpose of 'carrying out adjudicatory functions under the Act.' 29 U.S.C. § 651(b)(3). It provided that it should operate as a bi-level tribunal consisting of Administrative Law Judges who preside at trials and make the initial decisions, with review thereof by the three members of the Commission sitting as a panel to review such decisions and issue final orders. 29 U.S.C. §§ 659(c), 661(a), 661(d), and 661(i). It further provided that each of the three members

> '. . . shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act.' 29 U.S.C. § 661(a).

§ 661(b) provides that the 'terms of members of the Commission shall be six years . . ..'

---

[2] The pertinent APA provision is 5 U.S.C. § 557(b): 'On . . . review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.'

The Act makes only one exception to the provision that the Commission members shall operate as a collegial tribunal in carrying out its adjudicatory functions under the Act. In § 661(i) it clearly grants to 'any' single member the power to require that an Administrative Law Judge's decision shall be reviewed by the tribunal.

With this order, however, Messrs. Barnako and Cleary have combined to deprive a duly appointed and qualified member of the Commission of this statutory grant of authority. They have abrogated to themselves the authority which the Act gave to someone else. They have done this to impede the free flow of ideas which inevitably springs from the collegial process. Nevertheless, even if their purpose could be truthfully regarded as sound public policy, it could not be legally accomplished because rulings articulated in Commission decisions—no matter how beneficial—cannot rise beyond the Congressional delegation in the enabling legislation. The fixing of a definite power in a statute—that of an individual member to cause the Judge's decision to be reviewed by the members of the Commission—is enough to establish the legislative intent that the power is not to be curtailed or restricted. What Congress has given cannot be taken away by members of this Commission. The Supreme Court stated it this way in Humphrey's Executor v. U. S., 295 U.S. 602 (1935):

> 'The sound application of a principle which makes one master in his own house precludes him from imposing his control in the house of another who is master there.'

In the Justinian Code, this rule was expressed more succinctly: 'Delegata potestas non potest delegari,' which Henry Campbell Black translates as 'a delegated power cannot be delegated.'[3] This longstanding rule of law, however, has not deterred Mr. Barnako and Mr. Cleary from delegating to themselves what Congress has delegated to me.

Congress deliberately chose to establish this Commission with three members, and the President, by his selection of persons of diverse backgrounds to constitute the original membership, fully implemented that collegial purpose.[4] It was generally assumed that the

---

[3] Black's Law Dictionary 512 (rev. 4th ed. 1968).

A March 19, 1971 announcement from the Office of the White House Press Secretary included the following:

> 'The President today announced his intention to nominate Robert D. Moran, James F. Van Namee, and Alan F. Burch to be members of the Occupational Safety and Health Review Commission . . ..'
>
> The announcement went on to describe these nominees in these terms:

tribunal would be truly impartial if its decisions included input from persons whose past experience had been in the business and organized labor communities with an additional member who came from neither—much in the same manner as a tripartite labor arbitration panel. It was not intended—not even contemplated—that two of the members would combine to impose a gag rule on the remaining member—thereby frustrating the purpose of having three different in-puts into all Commission decisions. Certainly from the language of the Act cited supra, the establishment of a three member tribunal, and the President's action in constituting it as he did, it can fairly be concluded that each member was to be free to exercise his individual judgment without the leave or hindrance of any other member or any combination of other members.

I asserted earlier that the reason for this deprivation of my statutory right to cause the Commission to review a decision of an Administrative Law Judge was to 'impede the free flow of ideas.' At this point I will undertake to relate some reasons which lead me to this conclusion.

The action taken by my colleagues in this case is a continuation of a policy which began shortly after Mr. Barnako took office on August 1, 1975. It has been detailed in the public press. See, for example, The Washington Star, November 27, 1975 article entitled 'Press Releases on Failures Helped Demote Chief of Health Unit,' a copy of which is attached hereto as Appendix A. The matter was summarized by the St. Louis Labor Tribune in a January 22, 1976 editorial entitled '(Don't) Let The Sunshine In' which is quoted herewith without elaboration:

> 'An OSHA official's attempts to let a little sunshine in on his record led to his replacement as captain of the Administration's Review Commission and eventually to virtual exclusion from the business conducted by his fellow commissioners.
>
> Robert D. Moran is still on the team (his term runs until 1977), but in the meantime he isn't even invited into the huddles anymore.
>
> Appointed first chairman of the commission in April 1971, Moran established a practice of publishing news releases (about five a week) on the wins and losses of his Review Commission on 'significant cases.'
>
> This pristine innocence was not acceptable to his bosses at the Labor Department who cautioned him to keep his mouth shut in late '73, nor to the superchief over at the White House, who last August 5, replaced him as Chairman of the Commission.
>
> He was replaced by a man called Frank R. Barnako, a lawyer for Bethlehem Steel, who immediately discontinued the news releases and reduced the dissemination of

information about the Commission's activities to a bare minimum.

But, Moran, his mind sated with the ideals of the 'Freedom of Information Act,' stubbornly persisted in his attempts to keep the public informed on the disposition of cases which came before the Review Commission.

This, in turn, led Barnako, et. al., to illegally exclude Moran from the deliberations of the Commission and to conduct business without permitting him to participate. Moran filed suit citing 16 cases in which the Commission denied a review of an administrative law judge's decision on an OSHA complaint without informing Moran of its action.

Foul, cried Moran and marched off to the United States District Court in Washington, D.C. declaring his rights as a public official have been abrogated and demanding that they be restored by the courts and appropriate damages be assessed against the defendants.

The Labor Tribune applauds Robert D. Moran, a man who won't be muffled, and wishes him well in his litigation.'

The Hartford Courant took a somewhat similar view in a December 4, 1975 editorial 'OSHA Needs More Light' quoted in part as follows:[13a][13a]

> 'When it enacted the Occupational Safety and Health Act of 1970, Congress enacted a law with which it is uncommonly difficult to comply. The OSHA hierarchy is making it more difficult, even as Congress tries to correct its mistakes.
>
> * * * Frank R. Barnako, newly-appointed chairman of the OSHA Review Commission, has directed that commission decisions will no longer be published either as news releases or formal reports—both have been done in the past.
>
> The Review Commission is the 'supreme court' of a vast quasi-judicial system established to interpret OSHA regulations. Publication of its precedent-setting

[13a] The full text of this editorial appears at page S.673 of the Congressional Record for January 28, 1976 with accompanying comments by Senator Lowell Weicker, quoted partially as follows: '. . . the decision of the Occupational Safety and Health Review Commission to cease publication of their rulings . . . cannot but adversely effect the fair administration of the law.'

> decisions, usually in business and technical journals, can offer useful guidance to confused employers.
>
> Mr. Barnako should reverse his no-news decision . . ..'

A December 4, 1975, editorial in the Honolulu Star-Bulletin entitled 'Too Much Openness' concluded with this statement:

> 'To most people, the OSHRC decisions will hardly make exciting reading, but they ought to be available to those who may be interested.'

The fact that this policy of impeding the free flow of ideas is directed only at the views of one member in particular can be amply demonstrated by the unresolved cases on the dockets of this Commission. During the period June 1, 1974, through November 30, 1975, there were directions for review filed by the three members in a total of 593 cases (most of them by Mr. Cleary). In 268 of these there was no petition for review by any party.

In none of these cases (except those directions issued by me) has either Mr. Barnako or Mr. Cleary proposed an order vacating the direction for review. Nor has either of them—with respect to such directions for review—taken the position that they do here:

> 'If there is some appropriate reason for directing review sua sponte, the reason should be stated so the Commission may benefit from the parties' briefs on the issue.'

With respect to the instant case, the majority opinion states that '. . . it has not been, nor is it now, before us on its merits.' But, by their double-standard reasoning, all the directions for review filed by Mr. Cleary and former Commissioner VanNamee where no party has petitioned for review are before us on their merits.

It would be impossible to list the text of all the review-directed cases currently pending before the Commission. However three of those filed by Mr. Cleary in cases where no petition

[6]In excess of 45% of all directions for review were issued in cases where no party petitioned for review. Contrast this actual experience with the assertion in the majority opinion that directions for review are 'largely' in response to petitions for discretionary review filed by the parties.

for review was filed by any party are herewith noted. In Secretary v. Alfred S. Austin Construction Co., OSAHRC Docket No. 4809, and Secretary v. Fisk Oesco Joint Venture, OSAHRC Docket No. 4654, the direction for review asked only '[w]hether the Administrative Law Judge committed reversible error.' In Secretary v. John T. Clark & Son of Boston, Inc., OSAHRC Docket No. 10554, the direction for review asked only whether the Administrative Law Judge erred in vacating the citation alleging non-compliance with the standard at 29 C.F.R. 1918.105(a).' There is, of course, no difference whatsoever between a sua sponte direction for review questioning whether the judge erred in his decision and one like that here under consideration which simply directed the judge's decision for review so that its findings of fact and conclusions of law could be reviewed by the members.

Another indication that this action of Messrs. Barnako and Cleary is part of a continuing attempt to prevent the views of this member from being included in Commission decisions is the 16 previous cases in which they issued an 'Order Vacating Direction for Review.' As mentioned in The Washington Star article (attached as an exhibit hereto) and the above-quoted editorial in the St. Louis Labor Tribune, all 16 of those 'orders' were issued by my colleagues without any notice to me that they were under consideration. After they had been typed, and signed by my fellow Commission members, they were not circulated to me prior to their release to the parties so that my views could be appended thereto—a total departure from the practice which has been in effect for every decision ever issued by this Commission prior to the day Mr. Barnako became the Commission's Chairman.[7] It is my belief that a similar 'procedure' would have been employed in many additional cases were it not for my initiation on November 25, 1975—the day I learned of these 'orders'—of a Petition in the U.S. District Court for the District of Columbia to put a stop to it. This matter is also mentioned in the newspaper articles referred to supra.

The very fact that the majority is proceeding in this case in this most unusual manner—vacating the direction for review rather than affirming the decision of the judge—is additional evidence that their purpose is to prevent my views on the issues arising in this case from being included in the Commission's decision. They apparently would prefer to have no

[7] In order to insure that I would be kept in the dark about the issuance of these orders a written notice had to be given to the Executive Secretary from Mr. Barnako (who is his immediate superior) because the Executive Secretary would not otherwise have mailed the orders to the parties until he saw that all three members had participated in these decisions. That written notice specified that I was not to be allowed to participate in those 16 decisions.

decision—to have this and similar cases pend in limbo for infinity—rather than to have a decision in which I could participate.

I note the following language in the majority opinion:

> '. . . if Commissioner Moran's orders for review were permitted to stand, it would act as a stay of abatement and, in those instances where the Secretary's citation has been affirmed, would permit a hazardous condition to continue unabated—a result clearly contrary to the purposes of the Act.'

As noted at the outset of this dissenting opinion, this 'Order Vacating Direction for Review' does exactly what they say would happen if my 'order for review were permitted to stand.' But, let's further examine this quoted assertion! Where are those 'instances where the Secretary's citation has been affirmed?' Who has 'affirmed' them? Surely the Commission members have not done so. If it was their disposition to affirm, they would have said so. On the other hand, the Act makes it crystal clear that a Judge's decision could not affirm the Secretary's citation if—as has happened in the case now before us—a Commission member has directed review thereof within thirty days of its issuance. 29 U.S.C. § 661(i). So, in their desperate attempt to prevent one member of the Commission from exercising his statutory rights, Messrs. Barnako and Cleary have created the very monster they claim will result from my direction for review—they 'permit a hazardous condition to continue unabated.'

Of course there is a very simple and quick way to avoid this from happening. They can adopt a one-sentence order affirming the decision of the Administrative Law Judge. This would avoid their concern about 'an unnecessary delay of the proceedings' and indeed could be done quite quickly and simply—a rubber stamp would serve this purpose rather nicely. Certainly they will concede that this procedure I suggest could be accomplished much more rapidly than the adoption of this 'Order Vacating Direction for Review' and it would avoid all the problems I've mentioned in this opinion which result from the absence of a final disposition of the merits of this case.

It would be remiss of me, however, if I failed to note the hollow ring that surrounds my colleagues' assertion that they will 'continue' to reject any 'unnecessary delay of the proceedings.'[8] I had occasion to respond to a question on this Commission's backlog which was

[8] In this connection see my dissenting opinion in Secretary v. Trustees of Penn Central Transport Co., OSAHRC Docket No. 5796, December 22, 1975 for a specific instance where a Commission member delayed the issuance of a decision for reasons totally unrelated to the

addressed to me during hearings conducted by the Senate Committee on Appropriations on June 25, 1974. I answered with the following words:

> 'The members of the Commission have about 400 undecided cases backed up. The reason for this is that the members are not deciding cases expeditiously and are directing cases for review at about three times their rate of disposition. During the first four months of 1974, the Commission members decided a total of 39 cases. During that same period they directed 140 cases for review.
>
> At the time former Commissioner Alan Burch's term expired in April 1973, there was a backlog of 228 undecided cases. His replacement announced that his No. 1 priority was a reduction in that backlog. However, in April 1974 there had been an increase in the backlog of more than 60 percent—making a total of 367 undecided cases. The number has gone up since then.
>
> At the time Commissioner Cleary announced that backlog-reduction was his top priority. I asked him to join me in a rule which would automatically affirm a Judge's decision if it had been called for review but had remained before the Commission for three months or more without action. He declined. I cannot get either of the other members to put such a rule into effect or set any time limit for action by the members of the Commission. Consequently, the backlog continues to grow and cases are sitting before us for one and a half to two years without final decision.
>
> In all honesty, I see no prospect for reducing this backlog during fiscal year 1975 unless there are membership or legislative changes. On the contrary, I fully expect to see it increase. At this time next year it will exceed 600 cases if the existing situation continues.' Senate Hearings Before the Committee on Appropriations, Departments of Labor, Health, Education, and Welfare, and Related Agencies Appropriations, H.R. 15580, 93d Congress, 2d Session, at pages 4571–4572.

There was, of course, a subsequent membership change when Mr. Barnako became a member in place of Mr. Van Namee whose term expired on April 27, 1975. At the time Mr. Barnako was sworn into office on August 1, 1975, the backlog stood at 454 cases. Five months later—on December 31, 1975—it had grown to 540 cases. My first act upon swearing him into office was to hand him a written proposal that he join me in a rules change which would set a time limit on actions by Commission members on review-directed cases. Mr. Cleary was given a copy of that proposal on the same day. No response to that proposal has yet been made—nor has

any counter proposal been offered.

I submit that the above discussion indicates how quick my colleagues have been in the recent past to reject the 'unnecessary delay of the proceedings' of this Commission.

Candor enjoins me to concede that part of the reason for the recent increase in the backlog results from the high number of Judge's decisions which I have directed for review in the past few months. It is obvious from the comments in the majority opinion that my colleagues do not agree with me that many of those cases ought to be reviewed by the Commission. They are, of course, perfectly within their rights in taking this view. However, that being so, there is no reason why these cases should remain in the backlog. They could affirm any Judge's decision I directed for review within thirty days of my action.[9] Neither these cases—nor any other cases—should be permitted to languish interminably without decision. I continue to urge the adoption of a rule of procedure setting a time-limit on actions by this Commission on review-directed cases.[10]

There are other matters in the majority opinion which also merit further discussion.

After delivering their lecture on the evils of sua sponte directions for review, Messrs. Barnako and Cleary later state:

> '. . . our action here should not be interpreted as barring sua sponte orders of review by members of the Commission.'

The clear import of this is that when Mr. Moran directs review in such a manner it is 'improvident' and 'detrimental' but when Mr. Barnako and Mr. Cleary does so, it is 'in the public interest.' Somehow this brings to mind H. L. Mencken's definition of a Judge as 'a law student who marks his own examination papers.'

The majority opinion also contains a rather amusing attempt at 'bootstrapping' in the

---

[9] When a Judge's decision is directed for review the Administrative Procedure Act requires that parties to the case be given a 'reasonable opportunity' to submit briefs, exceptions, and proposed findings and conclusions to the Commission members before the members make their decision. 5 U.S.C. § 557(c).

[10] If either Mr. Cleary or Mr. Barnako wishes to add meaning to the lip-service they pay to the need for 'speed of adjudication' (see their citations to Senator Javits' comments and to 5 U.S.C. § 555(b) in their majority opinion in this case), they could do so by joining me in setting a deadline for the resolution of all review-directed cases. Currently, the average time for disposition of review-directed cases exceeds two years from the date an employer contests a citation to the date of the § 659(c) final order. It is rapidly creeping toward the three-year mark.

discussion equating directions for review with a writ of certiorari. They quote one 'commentator' (William Fauver, a Department of Interior Administrative Law Judge) as noting that petitions (not directions) for 'discretionary review' are 'quite similar' to the procedure at law known as certiorari. They then go on—discarding the 'quite similar' nomenclature in the process—to find that since the direction for review does not meet the criteria for issuance of a writ of certiorari, it is 'not authorized by law.' This kind of 'logic' could equally be used to prove that Messrs. Barnako and Cleary are really justices of the United States Supreme Court or members of the Holy Trinity.

However, it is clear that William Fauver is neither an authority on certiorari nor does he pretend to be and not even he—or anyone else—said that the statutory right of a member of this Commission to cause a decision by one of this agency's Administrative Law Judges to be reviewed by this three-member tribunal was conditioned upon the presence of the same criteria as that which constrains a higher court in the exercise of its power to cause a lower court to send up its decisions for examination. If anyone were to attempt to establish this principle I submit that they would find it impossible to equate with the common law writ of certiorari what the majority in this case concedes to be a 'short clause, fewer than twenty words . . . [containing] the only mention of this statutory power in the entire Act.'

I must confess to being mystified by the reference in the majority opinion to 'section 8(a) of the APA' and the assertion that the direction for review issued in this case 'is contrary to the intent' of that section. The Administrative Procedure Act was codified as part of Title 5, United States Code, some ten years ago (see public law 89–554, 80 Stat. 378) so the provision of law to which reference is made is 5 U.S.C. § 557(b). I took cognizance of this provision in note 11 supra and the accompanying text. Briefly, this provision of law merely provides that when a direction for review of a Judge's initial decision has been issued the Commission then has the same power to act as did the Judge—except where the authority ordering the review specifically limits the scope thereof. The exception, of course, has no application in the matter now before us because the entire decision below was directed to be reviewed.

The concluding portion of the majority opinion in this case contains another instance where Messrs. Barnako and Cleary assume power never given to them. I quote them as follows:

> 'Indeed, the Courts have kept us mindful of our responsibility in the public interest to provide 'active and affirmative protection' to the working men and women of the nation and to perform a policymaking function in the application of

the Act as intended by Congress. Brennan v. O.S.H.R.C. and John J. Gordon Co., 492 F.2d 1027, 1032 (2d Cir. 1974); Brennan v. Gilles & Cotting, Inc. and O.S.H.R.C., 504 F.2d 1255, 1262 (4th Cir. 1974).'

Neither of these cases support the broad assertion for which they are cited. They don't even come close. In the latter-cited case, at page 1262, the Court noted that the Secretary of Labor was seeking to overturn a ruling of this Commission that a prime contractor was not jointly liable with one of its subcontractors for a safety infraction. The Secretary argued that the Commission had no right to determine this issue for the issue concerned only enforcement-policy on joint contractor liability, a matter which 'should be committed to his discretion, not that of the Commission.' The Court rejected that argument with the following statement:

'To accept the Secretary's position would mean that the Commission would be little more than a specialized jury charged only with fact finding. But, as we read the statute, the Commission was designed to have a policy role and its discretion therefore includes some questions of law.'

'. . . Congress intended that this agency would have the normal complement of adjudicatory powers possessed by traditional administrative agencies . . ..'

There is nothing in this case which supports the quotation from the Barnako-Cleary opinion for which it is cited.

In the other cited authority, the Gordon case, the Court was concerned with a decision of this Commission which barred an Administrative Law Judge from reopening a hearing on his own motion in order to take evidence on jurisdiction under the Commerce Clause. The Court reversed the Commission and held that the Judge acted properly. It then added the following comments concerning the reopening action of the Judge (at 1032):

'The action of the Administrative Law Judge was in line with Judge Hays' well-known admonition to the Federal Power Commission that its role [the FPC's role] as representative of the public interest . . ..' (Emphasis supplied.)

The Court then quotes what Judge Hays said about the Federal Power Commission in Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608, 620 (2d Cir., 1965). Picking up where I left off in the Gordon case, the Court continues that the Federal Power Commission's role as representative of the public interest

'. . . does not permit it to act as an umpire blandly calling balls and strikes for

> adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the [Federal Power] Commission.'

Surely the majority is not claiming that this Commission which was given only a single function to perform ('carrying out adjudicatory functions under the Act')[11] has the broad scope of regulatory powers Congress granted to the Federal Power Commission under the Federal Power Act[12] and the Natural Gas Act[13] or that the quoted reference in the Gordon case transposed the authority of this Commission from an adjudicatory agency into a protector of the public interest. The Ninth Circuit specifically rejected such a result in Dale M. Madden Construction Co., Inc. v. Hodgson[14] with these words:

> 'Unlike the NLRB and the FTC, [the Occupational Safety and Health Review Commission] has neither prosecution nor enforcement powers. Those have been exclusively delegated to the Secretary [of Labor].
>
> Policy making is arguably a by-product of the Commission's adjudication. But the Act imposes policy-making responsibility upon the Secretary, not the Commission . . .. The administrative procedure limits the Commission to adjudication.'

I submit that the foregoing discussion demonstrates that the majority is once again resorting to 'bootstrapping' in an attempt to arrogate to itself policy-making powers which it simply does not have.

I conclude this opinion (and I apologize for its length but ask indulgence on the grounds that I am being divested herein of a very basic statutory power) with the observation that Commission members—just as all other persons—intend the natural consequences of their acts. Obviously Messrs. Barnako and Cleary have no intention in this case of affirming, modifying or vacating the decision which was rendered by the Administrative Law Judge. Surely they would have said so if that was their intention. Their failure to take any action on the Judge's decision—or on the Secretary's citation or penalty proposal—is what is causing the real delay in the enforcement of this Act. This 'order' is clearly in error.

APPENDIX A

---

[11] 29 U.S.C. § 651(b)(5)
[12] 16 U.S.C. §§ 791a–825r
[13] 15 U.S.C. §§ 717–717w
[14] 502 F.2d 278, 279–280 (9th Cir. 1974).

Press Releases on Failures Helped Demote Chief of Health Unit

By David Pike

Washington Star Staff Writer

Robert D. Moran was reasonably happy and secure for the first several years of being chairman of the three-member Occupational Safety and Health Review Commission, after being appointed when it came into existence in April 1971.

Moran, a lawyer with experience in. labor matters both in the private sector and with the government, had a six-year presidential appointment and a salary in the high-$30,000 range with the commission, which serves as the "court system" for the Labor Department's Occupational Health and Safety Administration (OSHA).

But then in late 1973, it started to become apparent "that the Labor Department didn't like me," Moran said yesterday. And the situation has become so bad lately, Moran charged in a suit filed this week in U.S. District Court, that the two other commissioners and the body's executive secretary have recently been making decisions without even telling him.

MORAN SAID yesterday that the situation began to deteriorate when he was called in late 1973 by an undersecretary to then Labor Secretary Peter Brennan and told that "the boss doesn't like the press releases" and that "heads could roll in such a situation"

At issue were releases, as many as five a week, that reported decisions by the commission's 42 hearing judges and three commissioners on "significant" cases involving alleged safety violations by employers.

The releases reported the outcome, regardless of whether OSHA had won or lost the case, and Moran said that OSHA was losing about half the cases and didn't like, the publicity. Headlines on releases, such as "Labor Department Loses Attempt to Enforce Safety Standards," probably didn't help, Moran recalled, but he persisted anyway.

Then early last year, Moran said, he was called by a personnel aide at the White House and told that he shouldn't offend the bosses at Labor and that he "was putting himself in a bad position."

"But I said that I felt it was in the public interest to report what we were doing, to let the public, the trade associations and the unions know about the law in this area," Moran said.

BECAUSE HE continued to issue the press releases, and because of some speeches he

made to trade groups, Moran said, “I think I was slated to be dumped as chairman in the summer of 1974, but then President (Richard M.) Nixon resigned and things were held up.”

Then last summer, one of the other commissioners resigned and Frank R. Barnako, a lawyer for Bethlehem Steel, was appointed by President Ford to fill the slot. “He was sworn in by me on Aug. 1, and I went off to the American Bar Association convention in Montreal,” Moran said.

While in Montreal, Moran was informed that Ford had designated Barnako to be the commission chairman and that he was now just a commissioner. “I guess I was sort of Schlesingered out of my job,” Moran said with a chuckle, referring to the recent shakeup at the Defense Department.

On his first day as chairman, Barnako eliminated the frequent and detailed press releases, Moran said, and now the commission merely offers a brief mention of selected cases about every three weeks.

Barnako also discontinued the official report of the commission’s activities that was printed by the Government Printing Office, and the reporting is now left to the private journals that cover the commission, Moran said. He added that this procedure concerned him, “because under the Freedom of Information Act, if you don’t publish a decision, it can’t be used as a precedent in other cases.”

The new situation did not deter Moran, and it led to the suit he filed this week. “To circumvent the procedure, I began using my authority as a commissioner to order a review of a hearing judge’s decision, because decisions of the commission get published,” Moran said.

Most of the thousands of cases sent to the commission are resolved by the judges, whose decisions are final unless a commission review is ordered within 30 days. Moran said that once the commission reviews a ruling, he also has the opportunity to include his own comments in the review and in the published order.

Cited in his suit is a case in which he ordered a review of a judge’s ruling and in which, Moran charged, the other two commissioners and the body’s executive secretary vacated his order “without his knowledge.”

The suit charges that since Aug. 5, when Barnako became chairman, there have been “at least 15 other cases” in which Moran has been overruled by the others without telling him. The suit added that “plaintiff (Moran) believes that there may be more cases which have been

disposed of in the same manner ... but he has been unable to identify the same because of efforts by the defendants to keep such information from plaintiff."

Named as defendants are Barnako, Commissioner Timothy F. Cleary and Executive Secretary William S. McLaughlin. Barnako was out of town late yesterday and could not be reached for comment, Inquiries to the other defendants were handled by the commission's public information office, which said there would be no comment "because it would not, be proper in view of the pending litigation."

AT A HEARING earlier yesterday before U.S. District Judge June L. Green, on a request by Moran for an emergency order blocking further such alleged abuses of his review authority, Moran sat at one table, with the defendants and their lawyers seated sternly at another. But any possible fireworks were avoided when Asst. U.S. Attorney Gil Zimmerman, representing the defendants, suggested a written agreement pending a full hearing on Jan. 7.

The agreement said that Moran will be informed of all commission actions and will be given an opportunity to participate in all decisions pending the hearing.

Moran, 44, who lives in Northwest Washington, said later that the situation was really quite amicable. "They just attempted to get away with something, and I'm showing them that I have some recourse," Moran said.

He summed up the situation by stating: "It's a power play, I think. It's an attempt to circumvent the public display of our views, to push through one-sided opinions without public scrutiny and news releases."

Asked about his future on the commission in view of all the trouble, Moran replied: "I'm fine. I'm here until April 27, 1977. I don't intend to stay one day longer, and I never intended to stay beyond the six years. I guess that's why I've been so independent while I've been here."

[Annex II follows]

May 21, 1976

MEMORANDUM FOR

William S. McLaughlin Executive Secretary

FROM: Frank R. Barnako Chairman

Timothy F. Cleary Commissioner

You are hereby directed to issue the following order in each case listed on the attachment hereto. 'The direction for review issued by Commissioner Moran on the above captioned case is hereby vacated for the reasons set forth in Secretary v. Francisco Tower Service, OSHRC Docket No. 4845, February 6, 1976.'

Not otherwise called

13693	14065
13749	12496
10620	11367{, 14045} (500(d)(1))
12031	14123
11983	12893, 12894
13854	12411, 12483, 12843
9352	
13297	13795 (500(d)(1))
12721 (500(d))	13101 (mesh glow)
9820	12328
10859	14687
12796	13898
14057	12097, 12098
13806	14203
13142	14070
10199	11957
12850, 13297, 12349, 12801, 12721, 12270	3667, 12757
13839 (500(d))	12459
13057	14280
13815	~~13134 Reassigned to Burchum?~~
14425	8393 when was the next trial? 4/1
13972	13259 20 day or 30 day penal?
12143	
14015	
13393	
12812	
13321 (500(d))	
14502	
13503	
13648	
13417	
12725	

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. C. N. STEMPER COMPANY, INC., Respondent.	OSHRC DOCKET NO. 13815

January 5, 1976

DECISION AND ORDER

Bruce C. Heslop for the Secretary of Labor.

Robert A. Stemper, Jr. for the respondent.

William Ellis for the employee's union.

BURCHMORE, Judge:

By citation issued May 27, 1975, complainant charged that on May 16, 1975, the respondent committed 25 nonserious violations of section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (the Act), in that respondent failed to comply with various provisions of the Occupational Safety and Health Standards provided in 29 C.F.R. 1910. Timely notice of contest was filed as to items 10 and 12 of the citation and the proceeding was assigned to the undersigned administrative law judge for hearing and adjudication. Hearing was held at Dayton, Ohio, on October 15, 1975. The parties have submitted the case for decision on the record, without filing briefs.

At the outset of the hearing, it was stipulated and conceded, and I find, that respondent in an employer engaged in a business affecting commerce within the meaning of the Act. It was also announced that respondent was withdrawing its notice of contest to item 12 of the citation. Accordingly, item 12 and the proposed penalty of $55 will be affirmed.

The remaining item, number 10, for which zero penalty is proposed, charges that

respondent at its Dayton, Ohio, place of business violated 1910.36(b)(8) which provided in general terms as follows:

> (8) Every building or structure, section, or area thereof of such size, occupancy, and arrangement that the reasonable safety of numbers of occupants may be endangered by the blocking of any single means of egress due to fire or smoke, shall have at least two means of egress remote from each other, so arranged as to minimize any possibility that both may be blocked by any one fire or other emergency conditions.

According to complainant, the violation was that 'an exit door was not present at the back of the warehouse and was needed as the nearest exit was 115 feet away, which created a hazard in case of fire to employees as no other way out was possible from the area.'

The inspecting officer made a sketch of the layout of the property, which is reproduced as Appendix A. The evidence establishes that the warehouse portion of the building contains storage of food products. The products are stored in stacks between which there are four, ten-foot aisles leading from front to rear, connected by two narrower cross aisles. At times there may be as many as seven employees in the warehouse, but usually there are only one or two. There are no highly flammable materials stored in the warehouse; the food products are packed either in paper bags or in tins in boxes. Egress is available through the four front doors of the warehouse, which are hand operated overhead type, or via the office or meat cutting room to the front office door or an electrically operated overhead door beyond the office.

The union steward testified that the four doors in the warehouse are sometimes partially blocked by trucks loading or unloading, at which times the only other egress is as stated above.

The building is of masonry with concrete floor. The office partition wall is of wood and the office is carpeted. The distance from the back wall of the warehouse to the front doors is about 115 feet. There has not been a fire in the warehouse in the 25 years that respondent had done business there.

The inspecting officer testified (R. 17) that it was the narrowness of the aisles that led him to believe there was a problem. However, that condition was the subject of a separate item number 9 in the citation, and it has been abated.

The evidence shows that, even when trucks are loading, there is room for a person to get out between the side of the truck and the side of the door. (R. 37–8)

Considering all of the evidence, I conclude that the size, occupancy, and arrangement of

respondent's workplace are not such that the reasonable safety of occupants may be endangered by the blocking of a single means of egress. I find that there are several means of egress, remote from each other, and so arranged as to minimize any possibility that all may be blocked by any emergency condition. Accordingly, I conclude that there has been no violation of the regulation and the citation should be vacated.

It is ORDERED that item 10 of the citation be and the same is hereby vacated, that item 12, and the proposed penalty therefor, be and the same are hereby affirmed and that this proceeding be and the same is hereby discontinued.

Robert N. Burchmore
Judge OSAHRC
January 5, 1976

APPENDIX A

APPENDIX A

Approximate layout of respondent's worksite