FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, COLORADO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

September 19, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**, Complainant, v. THE MARSHALL COUNTY COAL CO., MCELROY COAL COMPANY, MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	:	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-398 MSHA No. MORG-CD-2016-04 Mine: Marshall County Mine Mine ID: 46-01437
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**, Complainant, v. OHIO COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	:	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-399 MSHA No. MORG-CD-2016-05 Mine: Ohio County Mine Mine ID: 46-01436

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**, Complainant, v. HARRISON COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	:	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-400 MSHA No. MORG-CD-2016-06 Mine: Harrison County Mine Mine ID: 46-01318
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), on behalf of **RONALD BOWERSOX**, Complainant, v. MARION COUNTY COAL CO., CONSOLIDATION COAL CO., MURRAY AMERICAN ENERGY, INC., and MURRAY ENERGY CORPORATION, Respondents, UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, Intervenor.	:	DISCRIMINATION PROCEEDING Docket No. WEVA 2016-401 MSHA No. MORG-CD-2016-06 Mine: Marion County Mine Mine ID: 46-01433

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	
on behalf of **RONALD BOWERSOX**,	:	Docket No. WEVA 2016-402
Complainant,	:	MSHA No. MORG-CD-2016-07
	:	
v.	:	
	:	
MONONGALIA COUNTY COAL CO.,	:	
CONSOLIDATION COAL CO., MURRAY	:	
AMERICAN ENERGY, INC., and	:	
MURRAY ENERGY CORPORATION,	:	
Respondents,	:	
UNITED MINE WORKERS OF AMERICA	:	
INTERNATIONAL UNION,	:	Mine: Monongalia County Mine
Intervenor.	:	Mine ID: 46-01968

ORDER DENYING RESPONDENT'S MOTION FOR THE WITHDRAWAL OR RECUSAL OF THE ADMINISTRATIVE LAW JUDGE

Before:Judge Miller

These cases are before me based upon complaints of interference brought by Ronald Bowersox against five mines owned and operated by Murray Energy Corporation. The cases were brought pursuant to the interference provisions of section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). On July 13, 2016, the Respondents filed a Motion for the Withdrawal or Recusal of the Administrative Law Judge. The Secretary filed a Response in opposition to the Respondents' motion on July 20, 2016. For the reasons set forth below, I **DENY** the Respondents' motion.

On November 15, 2015, I issued a decision disposing of complaints of interference brought by a number of employees at five mines owned and operated by Murray Energy Corporation. *Secretary of Labor on behalf of Thomas McGary, et al. v. The Marshall County Coal Co., et. al.*, 37 FMSHRC 2597 (Nov. 2015) (deciding the "Awareness Meeting Cases"), *aff'd in part, rev. in part*, 38 FMSHRC ___ (Aug. 26, 2016). At issue in those cases was a mandatory "awareness meeting" held at each of the Respondent mines in which the CEO of Murray Energy, Robert Murray, discussed complaints that had been made by miners to the Mine Safety and Health Administration ("MSHA"). I concluded that the awareness meetings violated the interference provision of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). 37 FMSHRC at 2607. Just before the hearing on the awareness meetings case, which took place on September 22, 2015, a complaint was filed by several of the Respondents in a U.S. District Court alleging a breach of the collective bargaining agreement when miners had complained to MSHA without taking those complaints first to the mine operator. The Respondents' federal lawsuit was dismissed without prejudice on June 10, 2016, and has not been appealed. *See*

Consolidation Coal Co. v. United Mine Workers of America, Civ. Action No. 1:15CV167, 2016 WL 3248427 (N.D.W.Va. June 10, 2016).

The instant cases arise from the now dismissed federal lawsuit. The complaint alleges that "Respondents . . . interfered with the exercise of statutory rights by miners and their representatives by filing a federal lawsuit in retaliation against and in an attempt to intimidate miners filing Section 103(g) and 105(c) complaints." *Sec'y Complaint* at 15. The Respondents have moved for my recusal on the following grounds:

> In a prior Mine Act proceeding [the Awareness Meeting Cases], the Administrative Law Judge considered and issued rulings regarding the legality of the Federal Court Lawsuit – the very issue in dispute in this case – going so far as to refer to it as a[n] "extension of intimidation," holding that it was an "attempt to intimidate witnesses," and then issuing enhanced civil penalties based at least in part on its filings. These rulings prejudice and decide the issues in dispute in the instant matters. Accordingly, fair judgment for the Respondents is impossible and the Administrative Law Judge should recuse herself from any further proceedings.

Resp. Mot. at 3.

The Commission has set forth the standard to be applied when it decides whether a judge should be recused from a Mine Act proceeding. Quoting the U.S. Supreme Court decision in *Liteky v. United States*, 510 U.S. 540 (1994), in *Medusa Cement Co.*, the Commission noted as follows:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . [T]hey cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required ... when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of ... current ... or ... prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible. Thus, judicial remarks during the course of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

20 FMSHRC 144, 149 (Feb. 1998), *quoting Liteky*, 510 U.S. at 555 (citations omitted). The

Commission further held that "appearance of bias is an insufficient ground upon which to order recusal when the allegation of bias is based on prior judicial proceedings (as opposed to extrajudicial conduct)." 20 FMSHRC at 150 (*citing Liteky*, 510 U.S. at 552-53 & n.2, 556, and other cases).

The question here is thus whether the record in the prior judicial proceedings on which the Respondents rely "display a deep-seated favoritism or antagonism that would make a fair judgment impossible," 20 FMSHRC at 149, in the instant proceedings. In the Awareness Meeting proceedings, I was presented with evidence of potential intimidation of witnesses that caused me legitimate concern. Given the seriousness of such an allegation, it was incumbent upon me to ensure that the record was complete on that issue. My efforts to do so exhibited no favoritism or antagonism towards the Respondents. To the contrary, I discharged my duty to ensure the integrity of the proceedings. Moreover, to the extent I relied upon the bringing of a federal lawsuit in my Awareness Meeting decision, I limited my reliance to what I found to be an appropriate penalty. 37 FMSHRC at 2609-10. Notably, on appeal by the Respondents, the Commission vacated my penalty assessments and remanded the cases to me to reassess the penalties "without considering Respondents' filing of the federal court suit," this "[i]n light of the federal court's recent dismissal of the suit." 38 FMSHRC ___, slip op. at 20.

The Respondents also argue as grounds for recusal that assignment of the instant proceedings to me violated Commission Procedural Rule 50. Resp. Mem. at 10-12. Rule 50 states that "Judges shall be assigned cases in rotation as far as practicable." 29 C.F.R. § 2700.50. Under this rule, the Chief Administrative Law Judge has a great degree of discretion to assign cases so as to preserve Commission resources and ensure judicial efficiency. Here, in assigning interrelated cases to me, even the Respondents do not suggest that the Chief Judge abused his discretion in assigning the instant cases to me. I find their argument, which rests upon a single non-precedential decision by an Administrative Law Judge, unconvincing. In fact, the Commission has held that "Section 113(d)(1) of the Mine Act, 30 U.S.C. § 823(d), gives an operator the right to a hearing before an administrative law judge but it does not confer the right to a hearing before a particular judge. *See also* 29 C.F.R. § 2700.50." *Big Horn Calcium Co.*, 12 FMSHRC 1493, 1496 (Aug. 1990).

Having considered of the Respondents' motion, affidavit, and supporting memorandum of law, as well as the Secretary's response, I find the Respondents' position without merit. If the Respondents wish to file a request for interlocutory review they must file a separate motion. I do not rule on that issue here. Accordingly, the Motion for the Withdrawal or Recusal of the Administrative Law Judge is **DENIED**.

Margaret A. Miller
Administrative Law Judge

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Winfield J. Wilson, U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450

Philip K. Kontul, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One PPG Place, Suite 1900, Pittsburgh, PA 15222

Laura Karr, United Mine Workers of America, 18354 Quantico Gateway Drive, Suite 200, Triangle, VA 22172-1779