No. 31551 – Marfork Coal Company v. Michael O. Callahan, Secretary, West Virginia Department of Environmental Protection, and Matthew B. Crum, Director, West Virginia Department of Environmental Protection's Division of Mining and Reclamation

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Maynard, Chief Justice, dissenting:

I dissent in this case because I do not believe that Marfork Coal Company ("Marfork") received a fair hearing. Rather, it is clear to me that Marfork faced nothing less than a kangaroo court with Director Crum presiding. To merely say that Director Crum was a biased hearing examiner is being overly generous. His decision to suspend Marfork's surface mining permit was a foregone conclusion before Marfork ever stepped into the hearing room. Director Crum's lack of impartiality and his prejudgment of this case is evident from his remarks in a press release issued prior to the hearing.

In that regard, two months before Marfork's hearing, Director Crum announced to the press that "major enforcement actions" were being taken against three coal subsidiaries of Massey Energy Corporation. He specifically identified Marfork as one of those subsidiaries. Director Crum's press release also stated that Marfork's "patterns of water pollution discharges" were "unpermitted releases into Brushy Fork in Boone County from its impoundment." The press release further indicated that "[t]he show cause proceedings are in addition to assessments of penalties against the companies through notices of

violations" and directly quoted Director Crum as saying that "[t]his method of enforcement has a much greater potential for getting an operator's attention and compelling compliance." The press release concluded with Director Crum declaring that, "These three companies have failed to operate and maintain their facilities in accordance with state law and we are taking the actions necessary to prevent future violations." I emphasize that these are the remarks of the "judge" who will try the case made weeks before the hearing. Astonishing!

Based on Director Crum's press release, it is obvious that Marfork had absolutely no chance of receiving a fair and impartial hearing. Not only had Director Crum already made up his mind, he announced as much in the press release. In effect, Crum was both the prosecutor and the judge in this Star Chamber proceeding.

Generally, "[i]t is the duty of the presiding judge under both the statutory and decisional law to excuse himself when he has an interest in the outcome of the case before him or when he has any doubt as to his ability to preside impartially or whenever his impartiality can be reasonably questioned." 46 Am.Jur.2d *Judges* § 95 (1994) (Footnotes omitted). Moreover,

> [w]here the circumstances are such as to create in the mind of a reasonable man a suspicion of bias, there may well be a basis for disqualification though in fact no bias exists. For this reason, a judge should disqualify himself where grounds for disqualification exist, as well as in situations where his impartiality might reasonably be questioned. A judge should disqualify himself when circumstances and conditions

> surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment.

46 Am.Jur.2d *Judges* § 86 (1994). Clearly, to any fair observer, Director Crum's impartiality was very questionable in this case.

The basic requirement that a judge or hearing examiner be fair and impartial is so fundamental to our system of justice and our concept of due process that to allow this individual to act as a presiding judicial officer in this case, in spite of his so flagrantly and openly expressed bias against a party over whom he is empowered to sit in judgement, is both repugnant and offensive. The actions of Director Crum in this case are similar to a circuit judge making comments regarding an accused murderer two weeks before he sits as the accused's trial judge. If the trial judge made comments to the press indicating that he believed the accused was a bad person or that he committed the murder, without question this Court would find that judge to be disqualified. While factually this case may be different, the premise is the same and Marfork was equally entitled to an impartial tribunal.

In my opinion, this case actually belongs in the annals of bad cases with unfair judges and bad results. It goes somewhere on the list of really bad trials, a few of which follow as examples. The trial of Susan B. Anthony for being a woman and voting, where Judge Ward Hunt barred her from testifying and directed a jury to find her guilty, which of course they did. Or the trial of Galileo for heresy for correctly teaching that the sun, not the

earth, was the center of the solar system and the earth and other planets merely revolved around it. Seven of his ten judges found this incredible, and they promptly convicted him. And Cardinal Bellarmine ordered Galileo not to ever say that again, and so he recanted.

This list could go on forever but I will close it with only one more example, the famous "monkey" trial of John Scopes who was convicted of teaching evolution down in Tennessee. When Judge John Raulston was clearly being one-sided in favor of the prosecutor during trial one day, Clarence Darrow begin saying very provocative things in court about bias and unfairness, which rattled the learned jurist Judge Raultston. "I hope," said the Judge nervously, "that counsel intends no reflection upon this Court!" Whereupon Darrow replied: "Your honor," he said, "is always entitled to hope!"

One is left to wonder how Clarence Darrow would have dealt with the hearing examiner in this case.

Unlike the majority, I think there is considerable evidence showing that Marfork was denied procedural due process, and therefore, I cannot agree with its decision in this case. Furthermore, I am also troubled by the fact that the "punishment" for the types of violations like those alleged against Marfork is suspension of the company's operating permit. When a permit is suspended, as in this case, the only people "punished" are the innocent coal miners who are suddenly out of work. No West Virginian wants our

waterways polluted, and people who allow this to occur should be punished, and severely, but surely very large fines or other harsh sanctions are better alternatives. Our State is losing more and more good paying jobs every day, jobs such as coal mining jobs, which provide a decent income sufficient to raise a family. West Virginia needs these jobs, and I don't believe that putting innocent coal miners out of work is the best answer in these types of cases.

Accordingly, for all the reasons set forth above, I respectfully dissent.