STATE OF NEW MEXICO
BEFORE THE
WATER QUALITY CONTROL COMMISSION

PETITION FOR REVIEW OF THE NEW MEXICO SECRETARY OF THE ENVIRONMENT'S DECISION GRANTING GROUNDWATER DISCHARGE PERMIT DP-1132 IN PROCEEDING GWB 17-20(P)

WQCC No. 18-05(A)

COMMUNITIES FOR CLEAN WATER
MOTION TO VACATE AGENCY DECISION AND REMAND
THE PETITION FOR REVIEW OF DP-1132

Petitioner, Communities for Clean Water ("CCW"), by its counsel Lindsay A. Lovejoy, Jr., and Jonathan M. Block, New Mexico Environmental Law Center, move that the rulings by the New Mexico Environment Department ("NMED") in the above-captioned matter be vacated and remanded to the Secretary of the Environment Department due to the disqualification of the Hearing Officer. Counsel for CCW has sought the concurrence of counsel for NMED, the Department of Energy ("DOE"), and Triad National Security, LLC (previously Los Alamos National Security, LLC or "LANS"). Counsel for CCW inquired of counsel for NMED, DOE, Triad National Security, LLC, and NNSA for their respective positions on this motion. All opposed the motion.

I. BACKGROUND OF THIS MOTION.

A. Procedural Matters

Petitioner CCW regrets the need to raise with the Commission a situation that has recently arisen and which necessitates *vacatur* of NMED's decision and reports in this proceeding by the Hearing Officer and remand to NMED under 20.1.3.16(A)(3) NMAC

so that NMED may reconsider its determinations and may conduct such further proceedings as may be necessary. There was no reasonable opportunity to submit comment or evidence on the issue presented herein at an earlier time.[1] *See generally* NMAC 20.1.3.16(A)(3).

Counsel for CCW only learned in January 2019 that the Hearing Officer in the proceeding below had recently left NMED and taken a position at Los Alamos National Laboratory ("LANL"). Counsel for CCW were dismayed and perplexed that the NMED official who presided at the hearing in April 2018, and who decided important issues of law, had apparently applied for a job at LANL and had been hired. On January 15, 2019, counsel for CCW wrote to counsel for Triad National Security, LLC (previously LANS), inquiring as to the date when the process of hiring the Hearing Officer had begun. (Ex. A). On January 17, the lawyer responded (Ex. B), advising that a response would be forthcoming from DOE and its agency, the National Nuclear Security Administration ("NNSA"). On January 22, 2019, counsel for NNSA communicated "the facts I can share" concerning NNSA's hiring of the Hearing Officer, namely, that she had responded to a position announcement dated June 15, 2018, which stated that applications might be submitted on or before July 26, 2018; she was offered a job by NNSA on September 18, 2019; and she had begun work at NNSA General Counsel's office in Los Alamos on November 25, 2018. No further information was provided. The DOE/NNSA response

[1] Petitioners' counsel sought the positions of the parties via email at approximately 4:30 pm on Thursday, January 31, 2019. All other parties requested additional time to provide a position on this motion.

did not answer the question raised by CCW's counsel, namely: when did the hiring process begin?

The merits of this case involve a significant legal question under the Water Quality Act, NMSA 1978, § 74-6-1, *et seq.*, namely: Does that Act authorize NMED to regulate a facility—the LANL Radioactive Liquid Waste Treatment Facility ("RLWTF")—that does not discharge any water or contaminant that might reach ground water? The WQA authorizes NMED only to regulate a "discharge." NMSA 1978, § 74-6-5(A). Three times CCW argued before the Hearing Officer that NMED has no authority to issue a discharge permit for a non-discharging facility, that such a permit would itself not be enforceable, and that such a permit under NMSA 1978, § 74-6-12(A), would improperly block regulation of the RLWTF under the Hazardous Waste Act, NMSA 1978, § 74-4-1 *et seq.*

The Hearing Officer ruled three times on the validity of a WQA permit for a non-discharging facility: in an order dated April 18, 2018, in a Hearing Officer's Draft Report dated July 19, 2018, and in an Amended Report dated August 29, 2018. In each instance the Hearing Officer rejected CCW's argument, and ruled in favor of LANS and DOE, without offering any analysis, reasoning, or explanation—even when CCW drew her attention to the requirement to address the issue of law. *See generally,* CCW Comments on Hearing Officer's Draft Report at 2-3 (Aug. 3, 2018).

B. Particular Facts Indicating Bias.

Ms. Erin Anderson was employed by NMED as a Hearing Officer. The NMED Secretary, then Mr. Butch Tongate, appointed Ms. Anderson to preside in this DP-1132

permit proceeding on September 20, 2017. Ms. Anderson conducted a hearing on April 19, 2018 in this matter. NNSA was and is one of the parties to this DP-1132 proceeding. NNSA issued an announcement of a job opening at the LANL site on June 15, 2018, with a closing deadline for applications of July 26, 2018. *See* Ex. B (emails, including the response of NNSA Attorney Silas R. DeRoma, to a request for information from CCW's counsel, Ex. A). Ms. Anderson applied for a job with NNSA sometime between June 15 and July 26, 2018. (Ex. B).

Ms. Anderson issued a Hearing Officer's Draft Report in this DP-1132 proceeding on July 19, 2018—within the time-frame for applications to the NNSA position (closing July 26th). One may also reasonably infer, based upon Exhibit B, that sometime between July 26, 2018 and September 18, 2018 (the date of the offer of employment), Ms. Anderson was interviewed at least once by NNSA for the position she sought. Ms. Anderson issued a revised Hearing Officer's report on August 29, 2018. NMED Secretary Tongate immediately adopted the Hearing Officer's Report and approved issuance of DP-1132.

On September 18, 2018, Ms. Anderson received an offer of employment from NNSA. She accepted. Ms. Anderson's last day of work at NMED was November 21, 2018. Ms. Anderson started work at NNSA on November 25, 2018. It may fairly be assumed that employment at NNSA was and is a financial benefit to Ms. Anderson.

Much remains undisclosed. Although NNSA has stated that the Hearing Officer applied for employment by NNSA on or before July 26, 2018 (Ex. B), CCW does not know exactly when she applied. For example, the date may have been before the Hearing

Officer's Draft Report on July 19, 2018. Presumably, there were one or more interviews, but the time or times and the substance of the discussions have not been disclosed. Plainly, by July 26, 2018 it was known both to the Hearing Officer and to NNSA that she was seeking a job with NNSA. In other words, the Hearing Officer and NNSA were actively negotiating about the possibility of her employment and the terms of such prospective employment—topics of primary interest to someone in her shoes.

It is not credible that the Hearing Officer regarded her rulings on DP-1132 as unlikely to affect her job prospects at NNSA, and the law does not compel such an assumption. On August 29, 2018 the Hearing Officer issued her final ruling, the Revised Hearing Officer's Report, again rejecting CCW's arguments and ruling for Triad Nuclear Security, LLC (previously LANS) and DOE without any substantive explanation. Soon after, on September 18, 2018, NNSA made her an offer of employment.

It is not known when the offer was accepted nor what other communications occurred. It is not known exactly what role NNSA had in offering a job to the presiding officer in a proceeding in which it was a party. It is known that she accepted the offer and began employment with the NNSA by November 25.

Even with the limited information available, it is indisputable that this Hearing Officer was disqualified from presiding in this proceeding or from making any rulings affecting NNSA's and the other parties' rights and obligations. The only possible action now is to vacate the rulings made by the Secretary and the disqualified Hearing Officer and reopen the proceeding.

II. THE NMED ORDER IN THIS CASE SHOULD BE VACATED AND THE CASE REMANDED TO THE ENVIRONMENT SECRETARY.

Ms. Anderson was appointed as Hearing Officer in the DP-1132 proceeding pursuant to 20.1.4.100(E)(2) NMAC. That rule directs a Hearing Officer to conduct a "fair and impartial proceeding" and to follow these rules:

> Qualifications: The Secretary or the Hearing Officer shall not perform any function provided for in this Part regarding any matter in which the Secretary or the Hearing Officer:
>
> (i) has a personal bias or prejudice concerning a party, the Application or Petition, involved in the proceeding;
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> (ii) has a financial interest in the proceeding or facility that is the subject of the proceeding;
>
> (iii) is related to a party to the proceeding; or
>
> (iv) is an officer, director or trustee of a party to the proceeding.

20.1.4.100 NMAC. Seeking and obtaining employment by a party to a proceeding in which the Hearing Officer is presiding puts that Hearing Officer in a position where his or her livelihood and finances are subject to the control of a party to the proceeding, and may depend on his or her rulings—in violation of 20.1.4.100 NMAC.

Moreover, a Hearing Officer serves in a judicial role, and one may, therefore, look to the applicable codes of conduct for judicial officers.[2] The Code of Judicial Conduct for New Mexico states:

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[2] New Mexico's draft Code of Conduct for Hearing Officers contains similar provisions. https://www.nmbar.org/nmbardocs/aboutus/sections/publiclaw/ALJDraftCodeofConduct.pdf (visited 1/31/2019). In pertinent part, a Hearing Officer is expected to promote public confidence in the integrity of the process, perform duties without bias, avoid external influences or the impression of such influences, disqualify him or herself if necessary, and minimize the risk of conflict by not taking part in activities such as would require disqualification, and not accept anything of value ("gifts, loans, bequests, benefits, or other things of value") if doing so would appear to a reasonable person to undermine the Hearing Officer's impartiality. *See generally, id.* at 2-9

> A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality, or if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

Id. at Rule 21-313(A) NMRA. An offer of employment, and employment itself, are "things of value," and here they were given by a party, NNSA. Acceptance of such by a Hearing Officer while serving in that capacity violates the rule.

Under our legal system, an adjudicator must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or control him but God and his conscience." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015) (quoting from *Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829-1830*, p. 616 (1830)); *see also United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1938).

The ethical issues here are not complex. But it is important to recall that adjudicative hearings, such as were conducted in DP-1132, are invested with Due Process protections under the United States and New Mexico constitutions. U.S. Const., Amend. 5, 14; N.M. Const. Article II, § 18. The Supreme Court has held that the fairness and impartiality of the adjudicator are a due process right. The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the

promotion of participation and dialogue by affected individuals in the decision making process.

The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-243 (1980); *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978); *Mathews v. Eldridge,* 424 U.S. 319, 344 (1976). An unbiased adjudicator "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc., id (*quoting from *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

The courts of New Mexico have ruled similarly. *See Reid v. New Mexico Bd. of Examiners of Optometry,* 1979-NMSC-005, 92 N.M. 414, 589 P.2d 198) (it is important to assure an adjudicator removes him or herself if "there is an indication of a possible temptation to an average [person] sitting as a judge to try the case with bias for or against any issue presented" and "that administrative bodies. . . adjudicat[ing] or mak[ing] binding determinations which directly affect the legal rights of individuals" utilize "procedures which have traditionally been associated with the judicial process"); s*ee also Lujan v. City of Santa Fe*, 89 F.Supp. 3d 1109, discussing the test for bias in *City of Albuquerque v. Chavez*, 1997-NMCA-054, 123 N.M., 428, 941 P.2d 509 ("A hearing

officer should disqualify himself or herself for bias whenever a reasonable person would have serious doubts about whether the hearing officer could be fair").

Here, Ms. Anderson's posture in relation to NNSA compels the conclusion that she was biased in favor of NNSA when she wrote her final decision in DP-1132.[3] There is no presumption that an adjudicator resisted financial inducements; to the contrary, when the situation presents him or her with the opportunity to benefit financially from his or her rulings, it is presumed that he or she succumbed to the temptation. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-25 (1986); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Stivers v. Price*, 71 F.3d 732, 742 (9th Cir. 1995). *See also Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698 (1973) (persons with a pecuniary interest in legal proceedings should not be adjudicators; even less than a direct or positive financial stake is disqualifying of both judges and administrative adjudicators) (citing *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); K. DAVIS, ADMINISTRATIVE LAW TEXT § 12.04, p. 250 (1972) (stating that a financial stake need not be direct or positive; the prevailing view is that "most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators")); *see also Utica Packing Co. v. Block*, 781 F. 2d 71, 78 (6th Cir. 1986) (quoting *D. C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir.

[3] It should also be noted that §§ 30-24-1 and 30-24-2 NMSA 1978 provide that it is a third degree felony to give anything of value to a public officer in exchange for favorable action in any proceeding, or to solicit or accept anything of value with intent to have his or her decision influenced thereby.

1971) ("With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality").

III. CONCLUSIONS AND REQUESTED RELIEF.

The proceedings and decisions below are tainted by indicia of impropriety, bias and conflict of interest, and they suggest actual impropriety. NMED's decision and the Hearing Officer's reports in DP-1132 should be vacated and the case remanded to the Secretary of the Environment for further investigation of the circumstances that led to the recently disclosed ethical violations and consideration of appropriate sanctions, including dismissal.

Respectfully submitted,

BY: _____

Lindsay A. Lovejoy, Jr.
Attorney at law
3600 Cerrillos Road, Unit 1001A
Santa Fe, NM 87507
(505) 983-1800
lindsay@lindsaylovejoy.com

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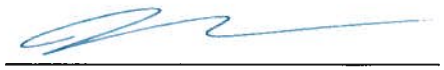
Jonathan M. Block
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 898-9022, Ext. 22
jblock@nmelc.org

Co-Counsel for Petitioner Communities for Clean Water

CERTIFICATE OF SERVICE

I, Jonathan M. Block, hereby certify that on this 4th day of February, 2019, I caused the foregoing *Communities For Clean Water Motion To Vacate Agency Decision And Remand The Petition For Review Of Dp-1132* to be served on the parties listed below by email and mailing it to them, U.S. Mail First Class postage pre-paid, and filing it with the Administrator of Boards and Commissions as an original and twelve copies.



Jonathan M. Block

Mr. Stuart R. Butzier and Ms. Christina C. Sheehan
Modrall Sperling Roehl Harris & Sisk, PA
123 E. Marcy Street, Ste. 201
Santa Fe, New Mexico 87501
sbutzier@modrall.com
ccs@modrall.com

Ms. Susan L. McMichael
Office of Laboratory Counsel/MS A187
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, New Mexico 87545-0001
smcmichael@lanl.gov

Silas R. DeRoma, Site Counsel,
U.S. Department of Energy/NNSA
3734 West Jemez Road/MS-A316
Los Alamos, New Mexico 87544
silas.deroma@nnsa.doe.gov

Triad National Security, LLC, and U.S. Department of Energy/NNSA

Mr. John Verheul, Assistant General Counsel,
New Mexico Environment Department
121 Tijeras Avenue, NE, Suite 1000
Harold Runnels Building, Suite N-4050
Albuquerque, New Mexico 87102
john.verheul@state.nm.us

Counsel for the New Mexico Environment Department