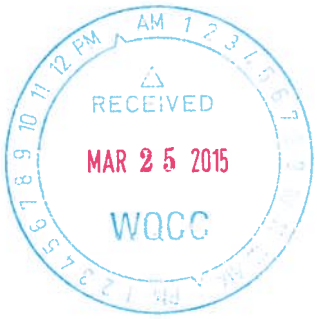

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

In the Matter of	)	
PROPOSED AMENDMENT	)	Nos. WQCC 12-09(R) and 13-08(R)
TO 20.6.6 NMAC (Dairy Rule)	)	

ATTORNEY GENERAL'S REPLY TO NMED'S RESPONSE TO ATTORNEY GENERAL'S MOTION TO DISQUALIFY HEARING OFFICER

Preliminary Statement

The Attorney General moves to disqualify the Hearing Officer based on the appearance of a financial conflict of interest. The Hearing Officer also serves under contract as hearing officer for one of the parties appearing before him, the New Mexico Environment Department ("NMED"). The Hearing Officer, therefore, is dependent upon the discretion of NMED to assign him future cases and for future income. The courts have found that this type of contractual relationship between an administrative hearing officer and a party violates due process because it creates a structural bias in favor of the party contracting with hearing officer. *Esso Standard Oil Co. v. Lopez-Freytes,* 522 F.3d 136, 147 (1st Cir. 2008); *Lucky Dogs LLC v. City of Santa Rosa,* 913 F. Supp. 2d 853, 860-62 (N.D. Ca. 2012); *Hass v. Co. of San Bernadino,* 45 P.3d. 280, 289-90. As such, the Hearing Officer in this matter should be disqualified. Nothing in NMED's response effectively counters this analysis.

Argument

I. THERE IS NO LEGAL AUTHORITY FOR THE COMMISSION TO CONTRACT WITH A HEARING OFFICER WHO SERVES AS HEARING OFFICER ON BEHALF OF A PARTY BEFORE HIM

NMED first argues that the Commission's regulations authorize the Commission to contract with a hearing officer who also serves as hearing officer for NMED. NMED Response,

pp. 1-2. In support of its argument, NMED cites Commission regulation 20.1.3.10.B(1) NMAC. *Id.* NMED's argument, however, is not supported by that regulation.

First, Section 20.1.3.10.B(1) applies to adjudicatory proceedings before the Commission, not to this rulemaking proceeding before the Commission. 20.1.3.2 NMAC.

Second, Section 20.1.3.10.B(1) does not apply the circumstance challenged by the Attorney General. Section 20.1.3.10.B(1) provides:

> (1) Qualifications: Hearing officer may be an *independent contractor* or a commissioner, shall be knowledgeable of the laws of the state and of administrative hearing procedures, and *shall not be:*
>
> (a) *an employee of the department*, except for the commissioners themselves or their designees, *or unless employed by the department as a hearing officer*;
>
> (b) a person who has a *personal bias* or prejudice *concerning a party* or a party's lawyer or consultant, or has personal knowledge of disputed facts concerning the proceeding, or is related to a party within the third degree of relationship, or has a financial interest in the proceeding; or . . . .

Section 20.1.3.10.B(1)(a) allows a Commission hearing officer also to be a hearing officer for NMED if "*employed*" by NMED. It does not authorize a Commission hearing officer *under contract* with both the Commission and NMED. The Attorney General's challenge is based on the fact that the Hearing Officer is *under contract* with NMED to serve as NMED hearing officer. As a consequence, the Commission's Hearing Officer is dependent on NMED's discretion for future NMED hearing officer assignments and income from NMED. The financial incentives of an NMED employee and an NMED contractor are very different. An NMED employee has classified service protection in his/her employment, and is only subject to adverse employment action based on demonstrated "just cause." 1.7.11.10 NMAC. An NMED employee, therefore, has protection in his/her future employment and income. A contractor has no such protection.

Third, Section 20.1.3.10.B(1) allows an "independent contractor" to serve as Commission hearing officer. A contractor who is also under contract with a party before the Commission is not "independent." Furthermore, Section 20.1.3.10.B(1)(b) prohibits a person with a "personal bias" "concerning a party" to serve as Commission hearing officer. The courts have found that a bias is created if a hearing officer is under contract with a party before him/her. *Esso Standard Oil Co.,* 522 F.3d at 147 (1st Cir. 2008) (due process violated where hearing officer dependent on future income from party before him/her); *Lucky Dogs,* 913 F. Supp. 2d at 860-62; *Hass,* 45 P.3d. at 289-90 (same). Rather than authorizing the Hearing Officer to serve if he has contractual relationship with NMED, the Commission's regulation prohibits such service because of the "bias" "concerning a party" that is created.

Fourth, even if the regulation did authorize the Commission to appoint a hearing officer who is also under contract with a party (which it does not), if such a contractual arrangement violates due process as a matter of constitutional law, the administrative regulation is invalid.

II. THERE IS NO NEW MEXICO PRECEDENT THAT SUPPORTS THE COMMISSION HEARING OFFICER BEING UNDER CONTRACT WITH A PARTY BEFORE HIM

NMED argues that hearing officers in other state agencies "are often *employed* by that agency to perform hearing officer services," and if the Commission were to accept the Attorney General's argument, those hearing officers would be subject to disqualification. NMED Response, p. 3 (emphasis added). In support of its argument, NMED cites *Kmart Properties, Inc. v. N.M. Taxation and Rev. Dep't,* 2006-NMCA-026, ¶ 57, 139 N.M. 177, 192-93. In that case, the court held that hearing officers *employed* by state agencies were not biased. *Id.*

NMED misses the point. The Attorney General's challenge is not based on the Commission *employing* its own hearing officer or the Commission utilizing NMED's *employed*

hearing officer. As explained above, a hearing officer employed by the Commission or by NMED is not subject to the type of financial incentive courts have found constitutionally unacceptable. Hearing officers under contract with a party, however, are beholden to that party for future assignments and income and, therefore, have an unacceptable incentive to rule in that party's favor. *Esso Standard Oil Co.,* 522 F.3d at 147; *Lucky Dogs,* 913 F. Supp. 2d at 860-62; *Hass,* 45 P.3d. at 289-90. Significantly, NMED does not cite any cases in which courts have upheld the contractual relationship challenged here by the Attorney General.

III. THE ATTORNEY GENERAL DOES NOT CHALLENGE ANY "COMBINED FUNCTIONS" OF THE COMMISSION

NMED argues that administrative agencies serve in the roles of investigator, prosecutor and judge, that these combined functions are valid, and that somehow these combined roles justify the Commission appointing a hearing officer who is under contract with a party before it. NMED Response, pp. 4-5.

The Attorney General does not challenge any combined functions of the Commission. The Commission, in this legal proceeding, is conducting a rulemaking. The Commission is not serving as investigator, prosecutor and judge. The Commission is serving as decision maker, and is not a party before itself. NMED's argument has no bearing on and is completely irrelevant to whether the Commission may appoint a hearing officer who is also under contract with a party before him.

IV. THE ATTORNEY GENERAL HAS NOT ALLEGED ACTUAL BIAS

NMED argues that the Attorney General has not proved actual bias of the Hearing Officer. NMED Response, p. 7. However, as the Attorney General makes clear, the Motion to Disqualify is based on "an unacceptable *appearance* of a financial conflict of interest." AGO Motion, p. 1; *see also id.* pp. 2, 3, 5, 7. The Attorney General does not allege actual bias. In

New Mexico, the appearance of bias based on an objective standard is a basis for disqualification of administrative decision makers. *Reid v. N.M. Bd. of Examiners of Optometry,* 1978-NMSC-005, ¶¶ 7-8, 92 N.M. 414, 416.[1]

NMED argues that one of the cases cited by the Attorney General, *Esso Standard Oil,* is does not apply to this circumstance. In *Esso Standard Oil,* the Puerto Rico Environmental Quality Board ("EQB") contracted with hearing examiners to hear administrative matters. In those matters, the EQB appeared before the hearing examiners to present the case. *Esso Standard Oil v. Cotto,* 389 F.3d 212, 214 n.1 (1st Cir. Ct. App. 2004). Under their contracts, the hearing examiners were dependent upon the discretion of the EQB to assign them cases. *Esso Standard Oil Co. v. Lopez-Freytes,* 522 F.3d at 147. The federal Court of Appeals found this contractual relationship created a "structural bias" for the hearing examiners to rule favor the EQB. *Id.* "Given that a Hearing Examiner's pay is entirely dependent upon the discretionary assignment of cases from the EQB, the examiner is vulnerable to the temptation to make recommendations favorable to the EQB." *Id.*

NMED tries to distinguish this case on two bases. First, NMED argues that the court relied upon the fact that the EQB had dismissed two prior hearing officers that had disagreed with it as demonstrating "structural bias." NMED Response, p. 6. NMED, however, misstates the court's holding in *Esso.* The court did not find that dismissal of two prior hearing officers demonstrated structural bias. The court found:

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[1] At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. In addition, our system of justice requires that the appearance of complete fairness be present. *The inquiry is not whether the [administrative body members] are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.*

Reid, 1978-NMSC-005, ¶ 7, 92 N.M. at 416 (emphasis added) (internal citations omitted).

> The district court concluded that the contractual relationship between the EQB and the Hearing Examiners *exhibited structural bias on account of both the method by which the Hearing Examiners receive assignments and because of the particularities within the pay structure. We agree.* Hearing Examiners are not protected from the pressures of political appointments and their employment is entirely dependent on the EQB's willingness to assign cases to them. Furthermore, the evidence on the record indicates that the Hearing Examiner's contract in this case provides an hourly salary rate with a set maximum number of hours for work. Notably, there is no provision for a minimum number of hours. *Given that a Hearing Examiner's pay is entirely dependent upon the discretionary assignment of cases from the EQB, the examiner is vulnerable to the temptation to make recommendations favorable to the EQB.*

Esso Standard Oil, 522 F.3d at 147 (emphasis added) (footnote omitted). In a footnote to that paragraph, the court noted, "Esso asserts that two prior Hearing Examiners were dismissed after various disagreements with the EQB regarding the proceedings against Esso." *Id.* n.5. The court did not base its holding on this assertion, but on the contractual arrangement between the EQB and the hearing examiners that is analogous to the one between NMED and the Commission's Hearing Officer.

NMED's second basis to distinguish is that the funds from which the EQB hearing examiners were paid came from fines issued by the EQB. NMED Response, pp. 6-7. While the court found that this fact was *another* basis for concern with the independence of the hearing examiners, the court was also clear that the hearing examiners were "vulnerable to the temptation to make recommendations favorable to the EQB" based solely on the fact that the hearing examiners' "pay is entirely dependent upon the discretionary assignment of cases from the EQB," *Esso Standard Oil,* 522 F.3d at 147, the basis for disqualification asserted by the Attorney General.

NMED does not attempt to distinguish the other two cases cited by the Attorney General, *Lucky Dogs* and *Hass.* Those cases, as well, stand for the proposition that due process is violated

"when [hearing officer's] future income from judging depends on the goodwill of frequent litigants who pay the adjudicator's fees." *Hass,* 45 P.3d. at 294-95.

V. THE COMMISSION IS ADMINISTRATIVELY ATTACHED TO NMED, AND WHILE PAYMENTS FOR CONTRACT COMMISSION HEARING OFFICERS WOULD BE PAID BY NMED, THAT FUNDING IN AND OF ITSELF DOES NOT VIOLATE DUE PROCESS

NMED argues that, because the Commission is administratively attached to NMED, any payment for a Commission hearing officer will necessarily come from NMED and, therefore, the Attorney General "attacks the legislatively mandated relationship between the WQCC and the Department." NMED Response, pp. 5-6.

NMED, again, misses the point. The Attorney General does not challenge NMED funding a *separate contract* for hearing officer services for the Commission. If the Commission contracts with a hearing officer who is not *also* a hearing officer under contract for NMED, there is no constitutional impairment if NMED pays the bills of the Commission's own hearing officer. The challenge brought by the Attorney General is that the Commission-contracted hearing officer is *also* the NMED-contracted hearing officer. Because NMED is a *party* before the Commission, the Commission/NMED Hearing Officer has a financial incentive to rule in favor of NMED because his future income is dependent upon future NMED case assignments. If that financial incentive is removed, and the Commission Hearing Officer is not *also* an NMED hearing officer, there is no constitutional prohibition to NMED simply funding a contract for Commission hearing officer services.

VI. THERE IS A SIMPLE REMEDY, WHICH IS FOR THE COMMISSION TO CONTRACT SEPARATELY, THROUGH NMED, FOR HEARING OFFICER SERVICES

NMED complains that the Attorney General offered no remedy for the constitutional defect identified. The short answer to this argument is that the Attorney General is not required

to identify a remedy for the constitutionally defective hearing officer system established by NMED and the Commission, and NMED has not cited any cases which require the Attorney General to offer a remedy. It is the responsibility of the Commission to establish a constitutionally valid hearing officer system.

That said, if the Commission contracted separately for its own hearing officer -- who is not also under contract with NMED or any other party appearing before the Commission -- that simple fix would cure the constitutionally defective system now in place. There is no constitutional defect, as stated above, if the Commission contract is funded by NMED because the financial incentives found unconstitutional by the courts would not exist under such a contractual arrangement.

VII. IT IS IMPROPER FOR AN ADMINISTRATIVE HEARING OFFICER TO HAVE A BUSINESS RELATIONSHIP WITH A PARTY BEFORE HIM/HER

New Mexico courts have looked to the New Mexico Code of Judicial Conduct as guidance for disqualification for administrative decision makers. *City of Albuquerque v. Chavez,* 1997-NMCA-054, ¶ 16, 123 N.M. 428, 433 (citing Rule 21-400(A) NMRA). Under the Code of Judicial Conduct, a judge may not engage in "frequent transactions or continuing business relationships" with persons "likely to come before the court on which the judge serves." Rule 21-500(D)(1)(b) NMRA. In this case, the Hearing Officer has a continuing business relationship with a party who *is* before him. Such a business relationship would be prohibited if the Hearing Officer were a judge, and should be prohibited here as an unacceptable conflict of interest.

Conclusion

For the reasons set forth herein and in the Attorney General's Motion to Disqualify, the Attorney General respectfully requests the Commission to disqualify the Hearing Officer in this matter.

Respectfully submitted,

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