

STATE OF NEW MEXICO  
ALBUQUERQUE-BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

IN THE MATTER OF THE PETITION FOR  
A HEARING ON THE MERITS REGARDING  
AIR QUALITY PERMIT NO. 3136 ISSUED TO  
SMITH'S FOOD AND DRUG CENTERS, INC.

AQCB No. 2014-3

Arthur Gradi, Ruth A. McGonagil, Jerri Paul-Seaborn,  
Bernice Ledden, Americo Chavez and Pat Toledo, Petitioners

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**CITY OF ALBUQUERQUE ENVIRONMENTAL HEALTH DEPARTMENT'S  
RESPONSE TO  
PETITIONERS' MOTION TO DISQUALIFY**

The City of Albuquerque Environmental Health Department ("EHD") responds ("Response") to Petitioners' Request to Air Board to Disclose Possible Conflicts of Interest and Motion to Disqualify ("Motion"). Smith's Food and Drug Centers, Inc. concurs in this response. As grounds, EHD states as follows:

**I. Introduction.**

EHD does not object to Petitioners' request to have Air Board members disclose any possible conflicts of interest provided that "conflicts" are properly interpreted according to law. EHD objects to Petitioners' Motion to Disqualify on two grounds. First, Petitioners failed to seek EHD's position on the Motion and failed to state why, in the Motion, concurrence was not sought. 20.11.81.12(H)(3) NMAC. Second, Petitioners' Motion relies on a mistaken understanding of the law.

**II. Petitioners were required to seek EHD's position on the Motion or, at least, explain why concurrence was not sought.**

Petitioners' counsel has no difficulty locating the Air Board's rules because he cited subsection 12(B)(3) in his Motion. Yet, the very same section explains that a movant must determine the opposing parties' respective position on a motion prior to

filing it. 20.11.81.12(H)(3) NMAC. There are exceptions to the requirement for seeking concurrence or opposition to a motion spelled out in the Rules of Civil Procedure which the Air Board may rely upon for guidance. 20.11.81.12(A) NMAC. Rule 1-007.1 provides that:

The movant shall not assume that the nature of the motion obviates the need for concurrence from all parties unless the motion is a (1) motion to dismiss; (2) motion for a new trial; (3) motion for judgment as a matter of law; (4) motion for summary judgment; [or] (5) motion for relief from a final judgment, order or proceeding pursuant to Paragraph B of Rule 1-060 NMRA.

Rule 1-007.1(A) NMRA.

In this case, the Motion does not fit within any of these exceptions. Petitioners' counsel has violated the Air Board's rules and the Motion should be rejected.

**III. To recuse a member of the Air Board from an adjudicatory proceeding requires extra-judicial, personal bias against a party which Petitioners have not shown.**

Petitioners' Motion relies on a misinterpretation of the law on bias and prejudice in an adjudicatory proceeding.

As the United States Supreme Court has explained, in the context of federal judicial disqualification:

The alleged bias or prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.

*U.S.v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

Thus, a party who repeatedly makes incorrect legal arguments may experience continuing adverse rulings from a judge but cannot characterize such decisions as "biased" because they are not extra-judicial.

To illustrate, the New Mexico Supreme Court discussed a situation in which a party moved for disqualification after a judge accused the party of a “cover-up” and “stonewalling.” *United Nuclear Corporation v. General Atomic Corp.*, 1980-NMSC-094, ¶ 419, 96 N.M. 155. The Court found that such remarks did not constitute bias or prejudice that justified recusal because they resulted solely from in-court comments and rulings. As the Court explained, “These afford no basis for disqualification.” 1980-NMSC-094, ¶ 421.

For the same reason, adverse rulings do not constitute a valid basis for disqualification based on personal bias or prejudgment of a disputed factual issue. *Albuquerque-Bernalillo County Water Utility Authority v. N.M. Public Regulation Com’n*, 2010-NMSC-013, ¶ 42, 148 N.M. 21. “Judicial rulings alone almost never constitute valid basis for a bias or partiality recusal motion.” *Id.* [internal citations omitted].

Having previously voiced strong views on an environmental issue, even when the Board member is serving on an environment related board, is not enough to justify recusal. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Com’n*, 2006-NMSC-115, ¶¶ 41-46, 140 N.M. 463.

In summary, in order to demonstrate bias or prejudice, there must be a personal animus against a party. It cannot be based on statements made during past or current judicial proceedings. Merely having strong views on issues which come before a board is not sufficient to justify recusal. With that statement of the law, EHD now turns to the specifics here.

Petitioners move to recuse any Board Member who has any professional or financial interest in the proceedings and facilities that are subject to the Air Board's jurisdiction. Motion p. 2. Petitioners further allege that the decision by the Air Board to intervene in one of two decisions on appeal in the New Mexico Court of Appeals indicates bias or prejudice by the Air Board and its attorney. Motion p. 2. These are insufficient as a matter of law to demonstrate bias or prejudice.

**A) The Air Act allows persons who have a financial interest in matters before the Air Board other than a specific permit being considered, to participate in Air Board decisions.**

Subsection 4(B) of the Air Quality Control Act ("Air Act") provides:

At least a majority of the members of a local board shall be individuals who represent the public interest and do not derive any significant portion of their income from persons subject to or who appear before the local board on issues related to the federal act or the Air Quality Control Act.

NMSA 1978, § 74-2-4(B).

Thus, it is clear that the Air Act allows a minority of Air Board members to be persons who "derive any significant portion of their income from persons subject to or who appear before the local board..." *Id.* The reason for such language is clear—persons who make a living assisting people with permitting matters can provide a valuable perspective when a permit is challenged. They are often engineers and other technically qualified persons who contribute valuable educational background and technical expertise that allows more informed Air Board questioning of persons who appear before the Air Board. Such Air Board members, provided that they are not a majority of the Air Board, can assist the Air Board in reaching practical and sound decisions on permits.

Of course, no Air Board member should have a financial interest in the specific proceeding. This is spelled out in the City Joint Air Quality Control Board Ordinance which both requires recusal of Air Board members who have conflicts of interest and defines the term “conflict of interest.” Revised Ordinances of Albuquerque (“ROA”) § 9-5-1-3(E). “Conflict of interest” is defined as follows:

A conflict of interest means any interest which may yield, directly or indirectly any monetary or other material benefit to the Board member or the member’s spouse or minor child.

ROA § 9-5-1-3(E).

In this case, if an Air Board member were expecting a monetary or other material benefit to come to the Air Board member, the member’s spouse or minor child as the result of the Air Board member’s decision in this matter, EHD would certainly agree that such a person should recuse themselves. EHD is not aware of any such relationship here. EHD does not object to Petitioners’ request to have Air Board members disclose such conflicts of interest, if any exist.

However, Petitioners seek much more. Petitioners contend that anyone who assists any third party permittee-applicants to obtain air quality permits in their professional or corporate capacities should also recuse themselves. This request clearly exceeds the law and does not justify recusal.

As explained above, the Air Act and the City ordinance, expressly allow a minority of Air Board members to be the very persons that Petitioners seek to recuse. The New Mexico Supreme Court expressly considered such a situation in *Phelps Dodge Tyrone*. There, a WQCC member had previously participated as a Sierra Club member against Phelps Dodge in a Mining Commission proceeding. The Court found no

objection to the WQCC member's previous involvement and statements against Phelps Dodge in a separate proceeding. The Court pointed out that the relevant statute expected the Governor to appoint public members to the WQCC and it would be unreasonable to expect such persons not to be persons from industry and people who had previously expressed strong views and who have been engaged in the regulatory process. *Phelps Dodge Tyrone*, 2006-NMSC-006, ¶¶ 41-42. The fact that the WQCC Commissioner had a certain philosophy on environmental matters was not sufficient to disqualify her.

Similarly here, the Air Act and the City ordinance expressly allow the appointment of members of the public to the Air Board including a minority of members who have a financial interest in the area of Air Board permitting. If such persons should always be recused, allowing them to be appointed to the Air Board in the first place would be pointless.

The basis for recusal is spelled out in the Air Board's rules. Air Board members should not perform adjudicative functions in a particular proceeding if the Air Board member:

Has a person bias or prejudice concerning a party or the outcome of a proceeding;

Has personal knowledge of disputed facts concerning the proceeding;

Is related to a party within the third degree of relationship;

Is an officer, director or trustee of a party or interested participant in the proceeding;

Has a financial interest in the proceeding or facility that is the subject of the proceeding or has any other conflict of interest; or

Has performed prosecutorial or investigative functions in connection with a permitting action at issue in the proceeding.

20.11.81.12(B)(3)(a) NMAC.

#### **IV. Conclusion.**

Wherefore, EHD requests the following relief:

A) With respect to Petitioners' request to have Air Board members "disclose any permit matters outside of the Air Board members' official capacities where any such members have a professional or financial interest in proceedings and facilities that are subject to the Air Board's jurisdiction, Motion at pp. 1-3:

EHD requests that relief be limited to requesting that Air Board members be asked to disclose any conflicts of interest as defined by the Joint City Air Quality Control Board Ordinance and Air Board Adjudicatory Rules.

B) With respect to Petitioners' request that Air Board members "disclose any third-party permittees-applicants, of which any individual board members have assisted or are assisting regarding permits under the Air Board's jurisdiction[.]" Motion at p. 2:

EHD requests that relief be limited to requesting that Air Board members be asked to disclose any conflicts of interest as defined by the Joint City Air Quality Control Board Ordinance and Air Board Adjudicatory Rules.

C) With respect to Petitioners' motion to disqualify any board members that disclose "1) any professional or financial interest in proceedings or facilities that are subject to the Air Board's jurisdiction, including Smith's gas stations located throughout Albuquerque, and 2) personal bias or prejudice concerning Petitioners or the outcome of this proceeding." Motion at p. 4.

EHD requests that relief be limited to disclosure of any professional or financial interests relating to Smith's gas stations in Albuquerque and any personal bias or prejudice concerning Petitioners. Air Board members should not be disqualified because, based on the briefing or information they have received as part of this proceeding or previous Air Board proceedings, they have developed opinions as to the correct legal interpretations of issues raised in this proceeding. Such a disqualification would clearly be contrary to law. Bias or prejudice must have an extrajudicial basis. *Grinnell Corp.*, 384 U.S. at 583. Judicial rulings almost never serve as a proper basis for recusal. *Albuquerque-Bernalillo County Water Utility Authority*, 2010-NMSC-013, ¶ 42.

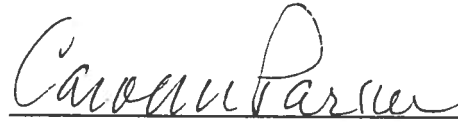
D) With respect to Petitioners' allegation that the Air Board's decision to intervene in one of two proceedings before the Court of Appeals indicates bias or prejudice by the Air Board or its attorney, Motion at pp. 2-3:

EHD requests that Petitioners be denied any relief regarding this request because it is contrary to law. Bias or prejudice must have an extrajudicial basis and must be personal; judicial statements or decisions almost never create a basis for recusal. *Grinnell Corp.*, 384 U.S. at 583; *Albuquerque-Bernalillo County Water Utility Authority*, 2010-NMSC-013, ¶ 42.



Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *City of Albuquerque Environmental Health Department's Response to Petitioners' Motion to Disqualify* was served on Oct 22, 2014 by the method indicated below:


- 1) The City's original *City of Albuquerque Environmental Health Department's Response to Petitioners' Motion to Disqualify* was filed with the Hearing Clerk in the above-captioned matter and nine copies were hand delivered.
- 2) One copy was sent by electronic mail to the Hearing Officer/Air Board Attorney and an additional copy was hand-delivered to the Hearing Clerk for delivery:

Felicia Orth  
c/o Andrew Daffern, Hearing Clerk  
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*Attorney for the Albuquerque-Bernalillo County Air Quality Control Board and Hearing Officer for AQCB Petition No. 2014-3*

- 3) One hard copy was mailed by first class mail and an electronic copy was sent by electronic mail to:

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