STATE OF NEW MEXICO
ALBUQUERQUE BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

Greater Gardner Neighborhood Assoc., North Valley Coalition of Neighborhood Assoc., Kyle Silfer, David Wood, Marcia Finical, as individuals,

AQCB Petition No. 2009-7

Petitioner /Appellants,

v.

City of Albuquerque Environmental Health Department, Air Quality Division

Respondent/Appellee,

American Cement Corporation, Intervenor

HEARING OFFICER'S RECOMMENDATION ON THE MOTION TO DISQUALIFY MEMBER BRINKMAN

This matter comes before the Board on Intervenor American Cement Corporation's ("American Cement") Motion to Disqualify Member Brinkman, filed January 22, 2010, and the Response to Motion to Disqualify Member Brinkman, filed by Mr. Brinkman January 26, 2010. As required by 20.11.81.12.B (3) (c) (ii) NMAC, I hereby file my recommended decision on the motion. For the reasons discussed below, I recommend that the motion be sustained.

Applicable Law

Moving party American Cement correctly notes that under 20.11.12.B (3)(b) NMAC, "[i]n making its decision regarding whether a board member or hearing officer should be disqualified or recuse himself or herself, the board and hearing officer may rely on applicable legal authority."

The leading New Mexico case addressing recusal of board members sitting in an adjudicative function is Reid v. New Mexico Board of Examiners in Optometry, 92 N.M. 414, 589 P.2d 189 (1979). There the court held that the respondent's due process rights were violated by the board's failure to disqualify a board member who, prior to the hearing on the merits, had expressed an opinion on the ultimate question in the case (i.e., that the respondent would lose his optometry license). In so holding, in fairly sweeping language, the court stated:

> 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 Board 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.

Id. at 416, 589 P.2d at 200.

In Las Cruces Professional Fire Fighters v. City of Las Cruces, 123 N.M. 239, 938 P.2d 1384, (N.M. Ct. App. 1997), the New Mexico Court of Appeals noted that this language must be understood in the context the *Reid* court's conclusion that "because the board member had 'admitted making a statement indicating his bias and prejudgment of the issues ..., the Board's failure to disqualify [the board member] clearly violated Reid's constitutional right to procedural due process." 123 N.M. at 245, 938 P.2d at 1390, quoting *Reid,* 92 N.M. at 416, 589 P.2d at 200 (ellipses and brackets in original). Thus, the Court of Appeals warned, "[o]ne should not infer from *Reid* that a member of a tribunal is necessarily disqualified whenever prior conduct of the member indicates a view that would favor one party or the other." *Id.* Instead, the court noted, "[b]ias can take different forms", and [w]hether a bias is disqualifying depends on the nature of the bias." *Id.*

The *Las Cruces* court went on to discuss five types of bias as set forth in a secondary source (3 Kenneth Culp Davis, *Administrative Law Treatise*):

> (1) A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification.
> (2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification.
> (3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be.
> (4) A personal bias or personal prejudice, that is, an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough; such partiality may be either animosity or favoritism.
> (5) One who stands to gain or lose by a decision either way has an interest that may disqualify; even a legislator may be disqualified on account of a conflict of interest.

Id. at 246, 938 P.2d at 1391.[1]

Discussion

(1) Prejudgment of the issues. American Cement asserts that "Member Brinkman has already formed an opinion that the permit modification should have been denied prior to the commencement of this hearing. As such, Member Brinkman cannot act in a fair and impartial manner in the adjudicatory hearing of this matter." Motion to Disqualify at ¶ 9.

This characterization overstates the facts. Unlike the Board member whose disqualification the Supreme Court found necessary in *Reid*, nowhere in his testimony did Mr. Brinkman express an opinion on the ultimate issue – in this case, whether the permit revision should be approved.

[1]The court acknowledged that this summary of the law with respect to bias types 1, 2, and 3 "appears to contradict the broad language of Reid" and therefore provided an extensive discussion of the "strong precedential support for that summary." See *Las Cruces*, 123 N.M. 246-247, 938 P.2d 1391-1392.

American Cement also asserts, however, that Mr. Brinkman testified that modeling for "trace metals should have been conducted," that "American Cement should be required to conduct fence line monitoring," and that the permit "should address . . . acute exposure," despite the lack of federal, state, or local requirements for such conditions. Motion to Disqualify at ¶ 8.

While Mr. Brinkman did not explicitly state that he believed that the modeling and monitoring requirements should have been required, the tone and form of his questions do reasonably indicate such a belief. Mr. Brinkman repeatedly pressed the question of whether monitoring or modeling was conducted "for trace metal that is in the fly ash – arsenic, selenium, cadmium, chromium, uranium, thorium." Being answered in the negative, Mr. Brinkman stated "So in other words there is no guarantee that people in the area . . . are not being exposed to trace metals . . . that [are] known to be in the fly ash . . . that's coming off in that dust." At another point, Mr. Brinkman stated "It's a 12 ton source with neighbors adjacent to that source, with . . fallout in their trees and obviously in their breathing zone as well." Finally, Mr. Brinkman stated "when the wind comes up you know that those levels on the average are being broken considerably – people can get pretty sick from breathing that really thick air for a short amount of time." (AR090, *American Cement Public Hearing 3/18/2008 Audio File*, hour 2:20 – 2:30).

To the extent that Mr. Brinkman's statements reflect a bias in favor of a policy of requiring certain permit conditions (i.e., certain form of monitoring or modeling or addressing acute exposures) such a bias is not a grounds for disqualification, as set forth in the standard for the type (1) bias in *Las Cruces* "[a] prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a dis-qualification." 123 N.M. 246, 938 P.2d at 1391 (quoting *Administrative Law Treatise)*

However, to the extent Mr. Brinkman's statements reflect potential bias with respect to the finding of facts in this proceeding, such "type 3" bias may be grounds for disqualification: "advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, *but a prior commitment may be*." *Id.* (Emphasis added). Thus the test is whether Mr. Brinkman's testimony at the 2008 hearing indicate a prior commitment to a view of the facts.

In his response to the Motion to Disqualify, Mr. Brinkman states:

> I did not testify in opposition to the permit modifications. . . .I asked questions seeking information regarding my concerns. I hoped that the facility and the division would consider these concerns. Given my lack of familiarity with governing regulations, the permit application and other information about the facility and its neighbors, I was not sure of the applicability and appropriateness of my concerns to the specific permit application." Response to Motion to Disqualify at 2.

He further attests that he "has formed no opinion as to the outcome of the upcoming hearing," and that "he can and will act in a fair and impartial manner at the hearing." *Id.* As a person serving as an adjudicator in an administrative function, Mr. Brinkman is entitled to a presumption of honesty and integrity. Jones v. New Mexico State Racing Commission, 100 N.M. 434, 437, 671 P.2d 1145, 1148 (citing Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)).

Notwithstanding Member Brinkman's undoubted commitment to impartiality and fairness going forward, however, his statements in the 2008 hearing clearly indicate not merely a passive advance knowledge of adjudicatory facts, but a prior commitment to a position based on his understanding of those facts. That is, his statements indicate that he believed it was a fact that dust emitted from the facility contained certain heavy metals, was deposited on neighbors, could result in sickness from short term exposure, and therefore necessitated certain permit

requirements. Moreover, any doubt as to whether such prior commitment has been demonstrated must be resolved in accordance with the dictate of *Reid* that "our system of justice requires that the appearance of complete justice be present." 92 N.M at 416, 589 P.2d at 200. By indicating a commitment to a position on the existence and significance of certain facts, Mr. Brinkman's questions and statements in the 2008 hearing present "an indication of a possible temptation . . to try the case with bias for or against any issue presented to him. *Id.* For this reason, and this reason only, disqualification is called for.

(2) Personal Bias. American Cement cites 20.11.81.12.B (3)(a)(i) NMAC, which provides that a board member shall not perform any function under Part 81 if he "has a personal bias or prejudice concerning a party or the outcome of a proceeding." According to the treatise cited favorably in *Las Cruces*, "a personal bias or personal prejudice, that is, an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough; such partiality may be either animosity or favoritism." 123 N.M. at 246, 938 P.2d at 1391. American Cement has not presented any evidence of any personal bias, regardless of strength (as opposed to an attitude about an issue), and nothing in Mr. Brinkman's comments indicate such a bias.

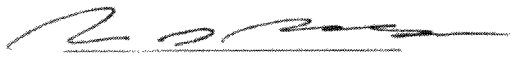
3). Investigative or Prosecutorial Function. Finally, American Cement cites 20.11.81.12.B (3)(a)(vi) NMAC, which provides that a board member shall not perform any function under Part 81 if he "has performed prosecutorial or investigative functions in connection with a permitting action at issue in the proceeding." American Cement does not elaborate on the applicability of this provision, except to state that "Member Brinkman has apparently investigated the proposed permit modification and has personal knowledge of the

facts of this matter outside the context of the facts and evidence to be presented to the board at the hearing set to commence February 22, 2010." Motion to Disqualify at ¶ 9.

Because 20.11.81.12.B (3)(a)(vi) NMAC refers to "prosecutorial or investigative *functions*" (emphasis added), the plain meaning of this provision appears to refer to actions taken in a formal role as a prosecutor or investigator on behalf of the Division or some other agency. See the definition of "function," e.g. at http://www.merriam-webster.com/dictionary/function: 1) professional or official position; occupation, 2) the action for which a person or thing is specially fitted or used or for which a thing exists. 20.11.81.12.B (3)(a)(vi) NMAC appears to mirror the separation of functions embodied in the federal Administrative Procedures Act at 5 U.S.C. § 554(d): "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision...." Because Mr. Brinkman clearly has not performed investigative or prosecutorial functions in this sense, invocation of 20.11.81.12.B (3)(a)(vi) NMAC does not add anything to the analysis of Mr. Brinkman's personal knowledge of the facts, as discussed above.

Conclusion

Member Brinkman's testimony at the 2008 hearing indicates a commitment to a position based on advance knowledge of adjudicative facts and forms an indication of a possible temptation to try the case with bias. Under New Mexico's high standards for the appearance of complete fairness, whether or not actual bias or prejudice exists, this testimony should result in Member Brinkman's disqualification from this proceeding. Therefore I respectfully recommend that the motion to disqualify be sustained.



Bill Grantham
Hearing Officer