

BEFORE THE IDAHO OIL AND GAS CONSERVATION COMMISSION

Randy and Thana Kauffman, *Complainants*,) Docket No. CC-2017-OGR-01-002
)
v.) **ORDER DENYING MOTION**
) **FOR DISQUALIFICATION**
AM Idaho, LLC and Alta Mesa Services, LP,)
Respondents.)
_____)

On April 27, 2019 the *Complainants* in this matter submitted an electronic correspondence to Mr. Mick Thomas, Oil & Gas Division Administrator of the Idaho Department of Lands, requesting the dismissal of this Hearing Officer. On May 8, 2019 the Division Administrator referred the correspondence to this Hearing Officer for resolution. While the correspondence does not cite to any particular legal standard, this Hearing Officer will accept the document from *Complainants* as a Motion to Disqualify under Idaho Code 67-5252 and IDAPA 04.11.01.412 (hereafter referred to as the “Motion”). No objection or response to the Motion was received from *Respondents*.

DISQUALIFICATION WITH OR WITHOUT CAUSE

The Motion does not specifically delineate if the *Complainants* are seeking disqualification with or without cause, as both are allowed pursuant to statute and law. Motions for disqualification without cause are required to be filed within 14 days of the “after receipt of notice indicating that the person will preside at the contested case.” (Idaho Code 67-5252(2)(a) and IDAPA 04.11.01.412). Given the Motion was filed well after that deadline, the *Complainants* have waived their right to disqualify without cause. Therefore, to the extent the *Complainants’* Motion was a motion to disqualify without cause, it is denied on the basis of timeliness.

However, given the *Complainants'* statement that they are concerned with this Hearing Officer's "ability to render a fair and unbiased opinion," the Hearing Officer can, and will, treat the Motion as a request for disqualification for cause.

PROPER AUTHORITY TO DETERMINE THE MOTION

Having ruled that the *Complainants'* Motion will be treated as a Motion to Disqualify for Cause, as an initial matter there must be a determination as to who is the proper authority to decide the Motion, the Administrator or this Hearing Officer. Idaho Code 67-5252 is clear on this point stating: "A person whose disqualification for cause is requested shall determine in writing whether to grant the petition, stating facts and reasons for the determination." Idaho Code 67-5252(3). Therefore, this Hearing Officer is the authority to make a ruling on the *Complainants'* Motion.

FACTS AND REASONS FOR DETERMINATION OF MOTION

Idaho Code allows for disqualification under the following circumstances:

Except as provided in subsection (4) of this section, ... any party shall have a right to move to disqualify for bias, prejudice, interest, substantial prior involvement in the matter other than as a presiding officer, status as an employee of the agency hearing the contested case, lack of professional knowledge in the subject matter of the contested case, or any other cause provided in this chapter or any cause for which a judge is or may be disqualified.

Idaho Code § 67-5252(1).

Nothing in the *Complainants'* Motion is related to this Hearing Officer's interest, substantial prior involvement in the matter other than as a presiding officer or status as an employee of the agency hearing the contested case. Nor do the *Complainants* cite to any other cause provided in the chapter or any cause for which a judge may be disqualified. Therefore, while not specifically stated in the Motion, the Hearing Officer will treat the Motion as a request for disqualification

for the reasons of bias and prejudice and/or lack of professional knowledge in the subject matter of the contested case.

A. There is no evidence of bias or prejudice.

The *Complainants* in their Motion set forth two numbered paragraphs as to the basis for their request that this Hearing Officer be disqualified:

1. Mr. Risch issued a Protective Order on July 20, 2018. There was absolutely no legal basis for the Protective Order. The only result of that order was several weeks of delay. The hearing officer's protective order was vacated in the IOGCC Final Order dated February 6, 2019.

...

2. Now, Mr. Risch is ignoring IC 47-332 (4) and the IOGCC Final Order issued February 6, 2019. That Final Order remanded this matter to the hearing officer for deadlines and further proceedings consistent with its (sic) directives.

Complainants' Motion, Page 1.

The *Complainants* take issue with the fact that this Hearing Officer recommended an order to the Commission that was not adopted by the Commission. As is well established in the record of this case, the recommended order was based on the *Complainants'* failure to present any evidence to support their claims, the *Complainants* admit this fact (Commission Order entered February 6, 2019, Page 2.) However, the primary issue in this matter became whether or not the information sought by *Complainants* was subject to a protective order as requested by *Respondents*. This issue, not being directly addressed in the law, was subject to statutory interpretation. This Hearing Officer was required to make an interpretation and did so. Ultimately, the Commission is entitled to also make a statutory interpretation and also did so. (Commission Order at 3.) When a Hearing Officer's interpretation of the law and the Commission's interpretation conflict, the Commission's interpretation will control. Nothing in the prior record, the recommended order or the Commission's decision not to adopt the same, evidences or supports the *Complainants'* claim of bias or prejudice.

In their Motion, the *Complainants* also state this Hearing Officer is “ignoring IC 47-332(4).” The details of this point are expanded in the subsequent paragraph in *Complainants’* Motion and makes it apparent that this allegation is based upon this Hearing Officer’s order at a recent prehearing conference. This order required written submissions on the significant issue relating to the production of certain “end purchaser” documents. The allegation that this Hearing Officer’s ruling “ignores” Idaho Law is premature as this ruling is under advisement and has not been made. Nevertheless, presuming for the purposes of this Motion that the ruling does go against *Complainants* interpretation of Idaho Code, such a ruling would still not be evidence of bias or prejudice.

The Idaho Supreme Court, quoting the United States Supreme Court, has ruled that in order to show bias or prejudice sufficient to deprive due process and thus warrant disqualification there must be something more than a disagreement with a ruling or legal view. There must be evidence that a judge or hearing officer, due to a lack of impartiality, will not assure equal application of the law:

In *Republican Party of Minn. v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002), the United States Supreme Court addressed the meaning of “impartiality” as it is used in the context of applying the Due Process Clause to judges. It means “the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.” *Id.* at 775–76, 122 S.Ct. at 2535, 153 L.Ed.2d at 705. In the context of due process, it does not mean “lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case.” *Id.* at 777, 122 S.Ct. at 2536, 153 L.Ed.2d at 706. It also does not mean having “no preconceptions on legal issues, but [being] willing to consider views that oppose his preconceptions, and remain [ing] open to persuasion, when the issues arise in a pending case.” *Id.* at 778, 122 S.Ct. at 2536, 153 L.Ed.2d at 707. Impartiality under the Due Process Clause does not guarantee each litigant a chance of changing the judge’s preconceived view of the law. *Id.* “A decision maker is not disqualified simply because

he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that the decision maker is ‘not capable of judging a particular controversy fairly on the basis of its own circumstances.’ ” *Eacret v. Bonner County*, 139 Idaho 780, 785, 86 P.3d 494, 499 (2004) (quoting from *Hortonville Joint School Distr. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 493, 96 S.Ct. 2308, 2314, 49 L.Ed.2d 1, 9 (1976)).

Marcia T. Turner, L.L.C. v. City of Twin Falls, 144 Idaho 203, 209 (2007)

This Hearing Officer has no bias or prejudice against the *Complainants* or *Respondents*. *Complainants* have not produced evidence to the contrary. The Hearing Officer has, and will continue to, apply the standards of the law equally to all parties.

B. This Hearing Officer is not lacking in professional expertise or knowledge.

To the extent the *Complainants*’ Motion is asserting the lack of professional knowledge aspect of Idaho Code 67-5252, the Idaho Supreme Court in ruling on a nearly identical Motion to

Disqualify stated:

The Rammells contend that the hearing officer should have disqualified herself in response to the December 13, 2004 motion to disqualify they made pursuant to I.C. § 67–5252. They moved to disqualify her based on bias and lack of expert knowledge regarding the domestic cervidae industry and elk diseases. The Rammells have not appealed the ruling on the basis of bias, but they do argue that the hearing officer needed some expert knowledge of domestic cervidae in order to fairly hear the case.

...

Second, the Department points out there is no requirement that attorneys serving as hearing officers possess technical expertise.

I.C. § 67–5252(2)(a) requires that motions to disqualify hearing officers be filed “within fourteen (14) days after receipt of notice indicating that the person will preside at the contested case.” See also IDAPA 02.01.01.010.04. The Rammells received notice that hearing officer Jean Uranga was assigned to hear the contested case on August 12, 2004. The Rammells did not move to disqualify Ms. Uranga until December 13, 2004—just two days before the hearing was scheduled to occur. Therefore, the motion was untimely filed and properly denied.

IDAPA 02.01.01.010.02 provides that “[h]earing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency.” The regulation does not require hearing officers who are attorneys to possess any experience or expertise.

Therefore, the hearing officer, Jean Uranga—who is an attorney—was not required to disqualify herself, and properly declined to do so.

Rammell v. Idaho State Dep't of Agric., 147 Idaho 415, 419 (2009)

While the IDAPA citation in *Rammell* was specific to the Idaho Department of Agriculture, the exact same rule is contained in the Idaho Rules for Administrative Procedure applicable to this matter:

410. APPOINTMENT OF HEARING OFFICERS (RULE 410). A hearing officer is a person other than the agency head appointed to hear contested cases on behalf of the agency. Unless otherwise provided by statute or rule, hearing officers may be employees of the agency or independent contractors. Hearing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency.

IDAPA 04.11.01.410.

This Hearing Officer, as an attorney licensed in the State of Idaho and having a robust litigation practice for over a decade, possesses the requisite expertise and knowledge to hear this case.

CONCLUSION

The *Complainants'* Motion to Disqualify without cause is denied as untimely. The *Complainants'* Motion to Disqualify for cause is denied as the *Complainants* have failed to produce or cite to evidence of bias or prejudice, or a legal standard that the Hearing Officer is not professionally qualified to hear this matter.

IT IS SO ORDERED.

DATED this 8th day of May, 2019.

By 
JASON S. RISCH, Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2019, I caused to be served a true and correct copy of the following items in the Docket No: CC-2017-OGR-01-002: *Order Denying Motion for Disqualification* by the method indicated below and addressed to the following:

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c/o Michael Christian
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