

In the matter of the alleged violation(s) of the New York State Environmental Conservation Law (ECL) Articles 3, 17 and 23, Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (NYCRR), and permits issued pursuant to Environmental Conservation Law Article 17, Title 8 and Article 23, Title 13; and the application for ECL Article 23 modification permit by

**BATH PETROLEUM STORAGE, INC.,
E.I.L. PETROLEUM, INC., and
ROBERT V. H. WEINBERG,**

Applicants-Respondents.

**RULING ON
RESPONDENTS' MOTION TO RECUSE
THE DEPARTMENT'S DEPUTY
COMMISSIONER AND GENERAL
COUNSEL**

DEC Case No: R8-1088-97-01
and
ECL Article 23-1301 Permit
Hearing

PROCEEDINGS

On November 19, 2004, Respondents Bath Petroleum Storage, Inc. ("BPSI"), E.I.L. Petroleum, Inc. ("EIL"), and Robert V.H. Weinberg (collectively, "Respondents") moved for recusal of James F. Ferreira, the Department's Deputy Commissioner and General Counsel (hereinafter "the General Counsel"), "and his immediate staff from any further consideration or participation at any level in the above-captioned matter." Motion, at 1. Respondents requested that the administrative law judge ("ALJ") issue an order "clarifying that neither Mr. Ferreira nor his office will play any role in the consideration of this matter, either before OHMS [the Office of Hearings and Mediation Services] or before the Commissioner on appeal," and contended further that "[e]ntry of such an order is necessary to preserve [Respondents'] rights to fairness and due process under the law." Motion, at 4. Department Staff opposed the motion in a submission dated November 24, 2004.

POSITIONS OF THE PARTIES

Respondents contended that the General Counsel had engaged in "litigation posturing" in a letter to James Sherron, Chairman of the Steuben County Industrial Development Agency.¹ Motion, at 1. According to Respondents, the General Counsel's letter improperly disclosed the status of settlement discussions in this matter, and also indicated that "Respondents are destined to lose this action at both the hearing phase and on appeal." Motion, at 2. Respondents took the position that the General Counsel's "pre-judgment creates a perception of DEC bias which necessarily must be attributed to the Commissioner, whom the General Counsel advises on legal matters as a significant part of his duties." Id.

Respondents also argued that in the event a legal issue were referred to the General Counsel for a declaratory ruling, "there is now no question as to how the General Counsel would rule." Id. Respondents maintained that the General Counsel "is unfit to have any involvement in these proceedings and should be ordered not to participate" both because of the bias alleged and because the General Counsel previously served as the Assistant Commissioner for Hearings and Mediation Services. Id. Consequently, Respondents sought a ruling "that bars the General Counsel's Office, in its entirety, from consulting with agency decision-makers on any aspect of the instant prosecution and from considering any request for Declaratory Ruling that may arise during the upcoming administrative hearing." Motion, at 3.

Respondents went on to note that several states have put in place a central panel of administrative law judges in an effort "to avoid the ambiguities that gave rise to the instant dispute." Id. According to Respondents, "the instant case raises altogether different concerns in that a former Assistant Commissioner for Hearings, who is now General Counsel to the same agency, accessible to the Commissioner for advice and input, has indicated a personal bias - indeed an animus - towards BPSI." Id.

Respondents cited to Section 307(2) of the State Administrative Procedures Act ("SAPA"), which articulates the rule prohibiting *ex parte* communications between agency decision makers and parties to a proceeding except upon notice and an

¹ The letter itself is not a part of the record, nor has it been reviewed by the ALJ. The ALJ was copied on correspondence dated October 13, 2004 from Respondents objecting to the letter, and on a November 8, 2004 letter sent by counsel for Department Staff in response.

opportunity for all parties to participate. Respondents noted that this provision "has been interpreted to allow contacts between agency decision-makers and other agency employees, unless those employees are personally involved in prosecuting or investigating that case or a factually related case," and acknowledged that this would include the General Counsel and his staff, "assuming he played no role in the prosecution of this action." Motion, at 4. Respondents argued that because this is not the case, clarification of the General Counsel's role was necessary "to avoid tainting these proceedings." Id.

Department Staff's response, dated November 24, 2004, pointed out that neither the Department's Part 622 regulations nor SAPA provide for recusal of the General Counsel, but rather address only recusal of the ALJ (or, under SAPA Section 303, a "presiding officer"). Department Staff noted that the relief sought in the motion was ambiguous, and then went on to discuss the factual assertions in Respondents' motion, arguing that the General Counsel's letter had been mischaracterized by Respondents.

Department Staff discussed the role of the General Counsel in enforcement proceedings. Department Staff noted that "the General Counsel simply does not sit as an 'appellate judge' in the instant proceeding," and took issue with Respondents' argument that the General Counsel's actions gave rise to a perception of bias on the part of the Department or the Commissioner. Response, at 4. Department Staff argued further that Respondents' concern as to involvement by the General Counsel in any request for a declaratory ruling in this matter would be obviated by Sections 619.3(b) and (c) of Title 6 of the Official Compilation of Codes, Rules and Regulations, which provide that the General Counsel may decline to issue a declaratory ruling on the grounds that a petition raises issues that are the subject of an enforcement proceeding or pending litigation. According to Department Staff, the General Counsel's former role as the Assistant Commissioner for OHMS does not provide a basis for recusal in this case, because at that time he was subject to the same *ex parte* rules applicable to ALJs, and was required to maintain impartiality with respect to cases pending before OHMS during his tenure.

DISCUSSION AND RULING

The motion must be denied. Section 622.10(b)(2)(iii) provides that "[a]ny party may file with the ALJ a motion in conformance with section 622.6 of this Part, together with supporting affidavits, requesting that the ALJ be recused on the

basis of personal bias or other good cause." As Department Staff correctly noted, there is no provision in the statute or regulations which authorizes an ALJ to recuse the General Counsel. Respondents did not cite to any authority in support of their position, and research has not revealed any precedent that would support granting the motion.

With respect to the merits of the motion, the relief sought is unclear. On page 1 of the motion, Respondents requested an order to recuse the Deputy Commissioner and General Counsel "and his immediate staff from any further consideration or participation at any level" in this matter. The motion went on to seek "a ruling that bars the General Counsel's office, in its entirety, from consulting with agency decision-makers on any aspect of the instant prosecution and from considering any request for Declaratory Ruling that may arise during the upcoming administrative hearing." Motion, at 2-3. In conclusion, the motion requested "the intervention of Your Honor, clarifying that neither Mr. Ferreira nor his office will play any role in the consideration of this matter, either before OHMS or before the Commissioner on appeal. Entry of such an order is necessary to preserve BPSI's rights to fairness and due process under the law." Motion, at 4. Thus, the nature and scope of the relief sought (an order, a ruling, a clarification) is equivocal. Terms such as "his immediate staff," "the General Counsel's office, in its entirety," and "his office" are ambiguous.

In any event, it is not necessary to characterize the motion, because Respondents are essentially raising a due process concern which is unwarranted under the circumstances. In evaluating a claim of biased decisionmaking, the inquiry centers around whether "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Withrow v. Larkin, 421 U.S. 35, 47 (1975). In order to succeed on their motion, Respondents must show an unacceptable probability of actual bias on the part of those who have demonstrable decisionmaking power in this matter. Respondents cannot make such a showing, because the General Counsel and his staff play no role in the deliberations in this case, and are on the same footing as any other party in a Department hearing.

The Office of Hearings and Mediation Services ("Office of Hearings") is a division entirely separate and distinct from the General Counsel's office, and reports to the Commissioner through an Assistant Commissioner for Hearings and Mediation Services. Executive Order 131 (December 4, 1989) required agencies to develop administrative adjudication plans to ensure that hearing

officers "do not report with regard to functions that relate to the merits of adjudicatory proceedings to any agency official other than the head of the agency, a supervisor of hearing officers or the general counsel." Executive Order 131, III (B)(2). Although Executive Order 131 would allow hearing officers to report to an agency general counsel, the Department's Office of Hearings is not so organized. The Department of Environmental Conservation's administrative law judges and the Assistant Commissioner for Hearings and Mediation Services report directly to the Commissioner, and there is no interface between the Office of Hearings and the General Counsel or his staff during the decisionmaking process.

Pursuant to Section 622.10(b)(2)(i), the ALJ is required to "conduct the hearing in a fair and impartial matter." Section 622.16 sets forth the *ex parte* rule in the context of an enforcement hearing, while Section 624.10 contains a corresponding provision with respect to permit proceedings. The rule forbids an ALJ or the Commissioner, and by extension, anyone in the decisionmaking chain, from communicating with any party or that party's representative in connection with any issue without providing proper notice to all other parties. The language of SAPA 307(2) is similar. These provisions prohibit the decisionmaker from involving the General Counsel or his staff in deliberative functions to the extent the General Counsel or his staff appear as a party or are actively prosecuting a case before the Office of Hearings. Furthermore, as Department Staff points out, Respondents' concerns with respect to the General Counsel's consideration of a declaratory ruling in this case are unfounded in light of Sections 619.3(b) and (c).

CONCLUSION

Respondents' motion to recuse the General Counsel is denied.

Maria E. Villa
Administrative Law Judge

Dated: December 10, 2004
Albany, New York

c: Administrative Law Judge Daniel P. O'Connell

TO: Service List