STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Articles 17 and 25 of the New York State Environmental Conservation Law and Part 661 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York

RULING

- by -

DEC FILE NOS.
R2-20030505-128
R2-20030505-129

CALL-A-HEAD PORTABLE TOILETS, INC.;

CALL-A-HEAD CORP.;

CHARLES W. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp.;

KENNETH HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp.; and

CHARLES P. HOWARD, individually and as corporate officer of Call-A-Head Portable Toilets, Inc. and Call-A-Head Corp.

Respondents.

PROCEEDINGS

Staff of the Department of Environmental Conservation (Department or DEC) filed an amended complaint (complaint), dated May 8, 2012, which alleges that respondents violated numerous provisions of the laws and regulations pertaining to tidal wetlands and the State Pollution Discharge Elimination System (SPDES). The vast majority of the allegations in the complaint relate to the operation of a portable toilet business by respondents. The complaint sets forth nineteen causes of action.

This ruling addresses respondents' motion (motion), dated September 6, 2016, to disqualify DEC staff counsel, Udo Drescher, and the entire DEC Office of General Counsel from further participation in the instant proceeding.

By its motion, respondents assert two bases for disqualification of Mr. Drescher: (1) that he is a material witness to matters at issue in this proceeding, and (2) that his personal

involvement and misconduct warrant disqualification. As to the DEC Office of General Counsel, respondents argue that, under New York State Rules of Professional Conduct, where an attorney is disqualified as a material witness, the office or department where that attorney works must also be disqualified.

Department staff responded by affirmation with points of law (Drescher affirmation), dated September 12, 2016. Staff argues Mr. Drescher is not a material witness and that respondents are attempting to raise ancillary facts to the level of materiality. Staff also denies that Mr. Drescher has engaged in any form of misconduct and characterizes such claims as spurious.

Respondents filed a response (response), dated September 22, 2016, in further support of the motion. By letter dated September 28, 2016, Department staff requested that the response be disregarded or, in the alternative, that staff be granted the opportunity to file a further response.

As Department staff notes in its letter of September 28, 2016, 6 NYCRR 622.6(c)(3) limits filings on a motion to the moving papers and responses thereto filed by other parties. Further responsive filings are not allowed without the permission of the assigned ALJ. Here, respondents did not seek permission to file the response. Accordingly, the response, dated September 22, 2016, is not considered herein.

For the reasons discussed below, the motion is denied.

DISCUSSION

Timeliness of Motion

The date set for pre-hearing motions in this matter has long passed. As detailed in a previous ruling, the hearing in this matter had been scheduled to commence on October 27, 2015, and pre-hearing motions were due on or before September 24, 2015 (Matter of Call-a-Head, ruling, June 3, 2016, at 2). I opened the hearing record as scheduled on October 27, 2015 and, at the request of the parties, granted an adjournment to afford the parties additional time to pursue settlement (see Administrative Law Judge [ALJ] letter to the parties dated October 28, 2015 [noting that the parties advised that they had reached an "agreement in principle" and that settlement appeared likely]).

The parties were unable to finalize a settlement agreement and the hearing was rescheduled to commence on June 13, 2016. Although the September 24, 2015 deadline for filing pre-hearing motions had passed, I advised the parties that I would entertain additional motion practice under certain conditions. Specifically, I directed that, in the event that either party elected to file a pre-hearing motion, the movant was to provide "reasonable justification" for not filing the motion prior to the previously scheduled deadline (ALJ letter to the parties dated April 21, 2016; see also Matter of Call-a-Head, ruling, June 3, 2016, at 2-3 [setting forth the procedural background that led to the imposition of the reasonable justification requirement

and denying respondents' motion to dismiss on that basis]; Hearing Notice, dated Aug. 23, 2016 [reminding the parties that the reasonable justification requirement remains in effect]).

Here, respondents argue that they meet the reasonable justification requirement because the impetus for the instant motion was testimony from a witness for the Department on June 15, 2016, the third day of the hearing in this matter (respondents' memorandum of law [respondents' memorandum], dated Sept. 6, 2016, at 1). Specifically, respondents assert that "not until the third day of testimony did Respondents know that Drescher was one of two inspectors who inspected one of the three properties at issue in these proceedings" (id.). The site inspection to which respondents refer was undertaken at 40 West 17th Road in Broad Channel, on May 27, 2005 (see hearing transcript [tr] at 573-574). This location is identified as "Site 3" in the complaint (complaint ¶¶ 30-31).

The May 27, 2005 inspection of Site 3 was undertaken as part of the discovery process and under a directive from a former ALJ with this office (see tr at 405-406, 573-574; Matter of Call-a-Head, ruling, Apr. 29, 2005, at 7 [granting staff's motion to compel disclosure and directing the parties "to schedule a date . . . on which the inspection would occur"]). The fact that staff counsel accompanied DEC program staff conducting a site inspection undertaken at the direction of an ALJ during discovery is hardly surprising. Moreover, as staff notes in its opposition to the motion, shortly after the site inspection occurred, Mr. Drescher wrote to the ALJ (with copy to respondents' counsel) and expressly stated that "DEC staff (consisting of one marine biologist and two staff members of the water program, accompanied by the undersigned) conducted an inspection of the three subject sites on Friday, May 27, 2005" (Drescher affirmation, exhibit 1 at 1). Mr. Drescher also advised the ALJ that "access on Site 1 (302-304) Cross Bay Boulevard) to the interior of four large shipping containers . . . was denied by Respondents Charles Howard Jr. and Kenneth Howard" (id.).

As the foregoing makes clear, (1) the May 2005 site inspections, including that conducted at Site 3, were undertaken at the direction of an ALJ; (2) Mr. Drescher accompanied DEC program staff to each of the inspections; (3) respondents were aware of Mr. Drescher's presence at the inspections on the date they occurred; and (4) Mr. Drescher openly noted that he was present at the inspections in a letter to the ALJ. Accordingly, respondents' assertion that "not until the third day of testimony did Respondents know that Drescher was one of two inspectors who inspected one of the three properties at issue in these proceedings" is false.

I conclude that respondents have failed to demonstrate reasonable justification for filing the instant motion at this stage of the proceedings. Nevertheless, given the gravity of respondents' assertions concerning Mr. Drescher's participation in this matter, I will consider the motion on the merits.

Respondents' Point I: Mr. Drescher is a Material Witness

It is well settled in New York that a party seeking the disqualification of opposing counsel bears a "heavy burden" (Mayers v Stone Castle Partners, LLC, 126 AD3d 1, 5-6 [1st Dept 2015][also noting that a motion to disqualify "must be carefully scrutinized" and that "Courts should also examine whether a motion to disqualify, made during ongoing litigation, is

made for tactical purposes" (internal citations and quotation marks omitted)]). Where the movant seeks to disqualify opposing counsel on the basis of the witness-advocate rule, "the testimony sought from the lawyer witness must be necessary . . . 'tak[ing] into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence'" (Matter of Advent Assoc., LLC v Vogt Family Inv. Partners, L.P., 56 AD3d 1023, 1024 [3d Dept 2008] [quoting S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 446 (1987)]). Whether to grant a motion to disqualify "rests in the discretion of the motion court" (Mayers, 126 AD3d at 6).

As an initial matter, I note that respondents have not cited a single instance in which an attorney was disqualified on the basis of his or her presence at a site inspection that was undertaken at the direction of a judge during discovery. My research failed to identify such a case. As noted above, the Site 3 inspection was undertaken at the direction of an ALJ and on notice to respondents (see Matter of Call-a-Head, ruling, Apr. 29, 2015, at 7 [directing the parties "to schedule a date . . . on which the inspection would occur"]). Given the unprecedented nature of respondents' motion and the transparency with which the Site 3 inspection occurred, Mr. Drescher's presence at the inspection provides no basis to disqualify him as staff counsel.

Respondents have also failed to establish that testimony from Mr. Drescher is necessary to establish any material fact in dispute. The complaint alleges 19 causes of action, each against one or more of the five respondents. The only cause of action that relates to Site 3, where the inspection at issue occurred, is the 19th cause of action. Specifically, by its 19th cause of action staff alleges that, on or about April 22, 2003, respondent Charles Howard Jr. "plac[ed] fill in the regulated tidal wetland and/or tidal wetland adjacent area" in violation of "ECL §25-0401 and 6 NYCRR §661.8 in combination with §661.5(b)(30)" (complaint ¶¶ 72, 105). Notably, staff seeks a penalty of $300,000 for the alleged violations at Sites 1 and 2, but only seeks a $7,500 penalty for the alleged violation at Site 3 (id. wherefore clause ¶¶ VI, VII).

Respondents assert that, the witness called by Department staff to testify in relation to the Site 3 inspection, Ms. DeMarco, "testified that she does not remember the inspection" (respondents' memorandum at 3 [citing hearing transcript at 471-479]). Respondents further assert that "there were only two DEC employees who attended an inspection of the real property located at 40 West 17th Road [i.e., Site 3]" (id.). Respondents argue that, these circumstances have "made the second inspector at the inspection [i.e., Mr. Drescher] a material and necessary witness to these proceedings" (id. at 4).

Contrary to respondents' assertions, Ms. DeMarco testified to the material facts at issue as they relate to the Site 3 inspection and the relevant allegations in the complaint. Ms. DeMarco testified that, on the date of the Site 3 inspection, she was employed by the Department as a marine biologist (tr at 402). She testified that during the inspection she observed fill, consisting of broken concrete and other materials, along the wrack line of the tidal wetland at Site 3 (id. at 428, 430). Several photographs that were taken on the day of the Site 3 inspection were received into evidence without objection, and Ms. DeMarco testified to the meaning and content of the photographs from the inspection (id. 427-430).

Respondents make no credible argument that Mr. Drescher's testimony regarding his observations during the Site 3 inspection would materially differ from or supplement Ms.

DeMarco's testimony in relation to any material fact in dispute. Ms. DeMarco, a marine biologist, testified to the location of the tidal wrack line and the existence of fill at the site. On cross examination, respondents did not challenge these observations. Rather, respondents' counsel focused on ancillary matters such as whether Ms. DeMarco recalled who directed her to inspect Site 3, how she traveled to the site and with whom, and whether she knew who had "title ownership" of the site (tr at 471-476). Such matters do not constitute material facts in dispute.[1]

Ms. DeMarco acknowledged that, on the basis of her observations of the fill during the Site 3 inspection, she had no way of knowing when the fill was placed at the site (tr at 482). The timing of the placement of fill at Site 3 is a material issue of fact in relation to the 19th cause of action. There is, however, nothing in the record to suggest that Mr. Drescher would, on the basis of his observations during the Site 3 inspection, know when the fill was placed at the site. Indeed, although Mr. Drescher accompanied Ms. DeMarco during the Site 3 inspection, Ms. DeMarco was the marine biologist assigned to conduct the inspection (id. at 424; Drescher affirmation, exhibit 1 at 1 [Mr. Drescher's May 31, 2005 letter to the ALJ, with copy to respondents' counsel, stating that he accompanied "one marine biologist and two staff members of the water program" to the site inspections on May 27, 2005]). Respondents provide no basis to conclude that Mr. Drescher's testimony is necessary to buttress or refute Ms. DeMarco's testimony as it relates to her observations of fill in the tidal wetland or the location of the tidal wrack line at Site 3.

Respondents have failed to meet their heavy burden to demonstrate that Mr. Drescher must be disqualified on the basis of his presence during the Site 3 inspection.

The other issues raised by respondents in support of disqualifying Mr. Drescher are also entirely lacking in merit. Respondents assert that Mr. Drescher's admission that he "rides his bicycle to the [Call-A-Head] Property on a regular basis and has trespassed on [Call-A-Head] Property on several occasions' [sic] . . . and has even removed [Call-A-Head]'s personal property for evidence in these proceedings makes Drescher a material witness in this proceeding" (respondents' memorandum at 4).

Breaking down respondents' various assertions, I find Mr. Drescher's bicycle riding habits of no moment in this proceeding. Mr. Drescher's use of a public right-of-way for riding his bicycle will not be at issue in this proceeding.

As to Mr. Drescher's purported trespassing on Call-A-Head property, the record before me indicates that significant time and effort has been expended on discovery. This matter has been ongoing for several years and the parties have periodically sought intervention from this office in relation to discovery, including requests for site access by the Department. On review of the record, particularly the rulings concerning discovery by the previously assigned ALJ and my own oversight of discovery in this matter, I conclude that respondents' assertions lack merit.

[1] Although ownership of Site 3 is a material issue of fact relating to the 19th cause of action, it is not in dispute (see answer ¶ 2 [admitting, inter alia, that Site 3 is "OWNED BY CHARLES W. HOWARD AS AN INDIVIDUAL," but denying that Mr. Howard engaged in any activity at the site in violation of the ECL]).

The affidavit of Charles W. Howard (Howard affidavit), sworn to August 30, 2016, offered by respondents in support of the motion, is often vague and conclusory, rather than factual. First, Mr. Howard complains of Mr. Drescher's bicycle riding near the Call-A-Head properties (Howard affidavit ¶¶ 2, 4). As noted above, this issue is of no moment in this proceeding.

Second, Mr. Howard accuses Mr. Drescher of having "stormed" into Call-A-Head facilities on several occasions (Howard affidavit ¶ 3). Mr. Howard further claims that the Department has no jurisdiction over Call-A-Head facilities and that Mr. Drescher entered Call-A-Head properties without authority (id.) and that Mr. Drescher would "leave the property with discovery and what he believed to be evidence against Call-A-Head" (id. ¶ 4). No dates are given, nor does Mr. Howard specify what "discovery" Mr. Drescher is alleged to have removed from the property.

These issues should have been raised by respondents long ago. They are unrelated to the testimony at the hearing on June 15, 2016, that respondents cite to as justification of this late-filed motion (see supra at 3). Moreover, Mr. Howard's statements are conclusory and lack specificity. Stripped of Mr. Howard's characterization of the events, the activities that Mr. Howard rails against in his affidavit appear to relate to long standing discovery efforts of the Department. Both the Department and respondents sought discovery in this matter and, at times, the parties sought oversight from this office with regard to discovery disputes. Nothing before me demonstrates that Mr. Drescher acted outside the bounds of the discovery process or the rulings of an ALJ.

Third, Mr. Howard asserts that "upon information and belief" Mr. Drescher has "organized the community against Call-A-Head" (Howard affidavit ¶ 5). This allegation is so lacking in probative force as to warrant no further comment (see Oswald v Oswald, 107 AD3d 45, 49 [3rd Dept 2013] [holding that an allegations set forth in an affidavit that are based "upon information and belief . . . are without probative value" (citations omitted)]). Nevertheless, I note that there is no prohibition against, nor would it be unusual for, Department staff to speak with neighboring property owners during an enforcement investigation.

Respondents' Point II: Mr. Drescher is Personally Involved

Although set forth as a separate basis for disqualifying Mr. Drescher, respondents' "Point II" fails for largely the same reasons as respondents' "Point I." Respondents here again argue that Mr. Drescher is a material witness and must be disqualified. As discussed above this argument is without merit.

Respondents state that, if the Department does not call Mr. Drescher, respondents intend to call him because his testimony "regarding his inspection of the 17th Road Property [i.e., Site 3] will reveal that nothing was uncovered at the inspection and therefore Drescher's testimony will be adverse to the DEC's prosecution of these proceedings" (respondents' memorandum at 11). As discussed above (supra at 4-5), there has already been testimony regarding the material issues of fact that would logically flow from a site inspection such as that undertaken at Site 3. There is no basis to presume that Mr. Drescher would provide testimony that would undermine that of

Ms. DeMarco with regard to the observations she made during the Site 3 inspection. Respondents' assertion that Mr. Drescher's testimony would "reveal nothing was uncovered at the inspection" is abject speculation.

Respondents also make various accusations against Mr. Drescher, such as declaring that he "has become an overzealous out-of-control prosecutor" (respondents' memorandum at 12). In support of this accusation, respondents cite to paragraph 8 of the Howard affidavit, which states that Mr. Drescher is a "material and necessary" witness and that he "has a personal interest including social and political pressures which infringe on the independent exercise of his judgment creating a conflict of interest in these proceedings." Although set forth in an affidavit, these statements are legal conclusions, not facts.

Respondents' assertion that Mr. Drescher is a material witness has already been discussed herein (supra at 4-5) and will not be addressed again.

Respondents fail to establish any basis to conclude that Mr. Drescher has a conflict of interest in this matter. As previously noted, the Howard affidavit states that "upon information and belief" Mr. Drescher has "worked with" Call-A-Head's neighbors to "rally them against Call-A-Head" (affidavit ¶ 5). This statement has no probative force (supra at 6). The Howard affidavit also states that Mr. Drescher "has personal acquaintances and affiliations in the Broad Channel and Rockaway areas" (id. ¶ 4). Regardless of whether this assertion is true, the existence of such acquaintances and affiliations does not provide a basis to disqualify Mr. Drescher.

Respondents' Point III: The Office of General Counsel Should Be Disqualified

Respondents argue that if the motion to disqualify Mr. Drescher is granted, the DEC Office of General Counsel should also be disqualified. Because I hold that respondents' motion to disqualify Mr. Drescher is without merit, there is no basis to disqualify the Office of General Counsel.

CONCLUSION

For the reasons discussed above, respondents' motion to disqualify Mr. Drescher and the DEC Office of General Counsel is DENIED.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

Dated: October 11, 2016
Albany, New York