NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York and Part 360 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, by	Rulings on Respondents' Motion to Recuse the ALJ, and Department Staff's Motion to Clarify or Dismiss Affirmative Defenses
Brian F. Conlon, and BCD Tire Chip Manufacturing, Inc.,	DEC Case No.: CO4-20150520-119
Respondents.	October 19, 2016

Proceedings

With the parties' consent, I attended a portion of the August 10, 2016 pre-hearing conference concerning the referenced matter. Based on the discussion, I issued a letter dated August 10, 2016, which provided the following schedule. Mr. Conlon's motion to recuse the Commissioner was due by September 9, 2016. Department staff's response was due by September 20, 2016.

With a cover letter dated September 9, 2016, Mr. Conlon timely filed his motion. The motion included a 12 page letter with over 25 attachments, and a flash drive. On the flash drive, Mr. Conlon included recordings of conversations with Department staff including the August 10, 2016 pre-hearing conference, as well as videos and photographs.

Subsequently, with a cover letter dated September 25, 2016, Mr. Conlon supplemented his September 9, 2016 motion with a six page letter and 36 attachments. Mr. Conlon also include a flash drive which included information similar to the first.

Department staff filed a timely response with a cover letter dated September 30, 2016.

With a cover letter dated October 3, 2016, Department staff filed a notice of motion, and motion to either clarify or strike affirmative defenses both dated October 3, 2016. The motion includes various attachments in support of the motion.

By email to the parties dated October 5, 2016, I acknowledged receipt of Department staff's motion. In the October 5, 2016 email, I suspended the time for Mr. Conlon to respond to Department staff's motion.

The parties' motions received to date are addressed below.

I. Mr. Conlon's Motions

In the September 9, 2016 motion, Mr. Conlon moved for the following relief:

> I am writing this letter to make 3 motions in this trial:
>
> 1. That the present Commissioner Basil Seggos recuse himself from ruling on this case.
>
> 2. That ALL Administrative Law Judges in the State of New York be recused from ruling on this case.
>
> 3. That the court venue be moved to an appropriate Federal Court Setting (September 9, 2016 motion at 1).

A. Recusal of the ALJ

Mr. Conlon noted that to prevail he would have to explain why New York State's administrative procedures cannot provide him with a fair trial and protect his due process rights as provided by the United States Constitution and the New York State Constitution. Mr. Conlon contended that this administrative forum "is without question NOT capable" (*id*. at 1-2) of providing him with a fair and impartial hearing. He argued that a conflict of interest will result when the Commissioner makes a final ruling in this matter because the Commissioner will be required to judge "his own actions or in-actions leading up to this complaint" (*id*. at 2). Mr. Conlon noted that the Commissioner administers the programs implemented by the Department and supervises the Department's employees. Mr. Conlon asserted that the results of this hearing will show that members of Department staff have "committed civil and criminal crimes, and that these crimes during the course of this proceeding may very well lead directly into the ALJ's office and the Commissioner's office" (*id*. at 2).

Mr. Conlon cites Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York (22 NYCRR) 100.3(e) which provides for the disqualification of a judge when the judge's impartiality might reasonably be questioned. Mr. Conlon asserted that the impartiality of the Department's ALJs and the Commissioner is in question due to lack of adverse rulings against staff in the Department's administrative hearings. To support this assertion, Mr. Conlon stated that he has a pending request dated August 30, 2016, made pursuant to the Freedom of Information Law (FOIL), before the Office of Hearings and Mediation Services requesting the number of rulings made against Department staff. Mr. Conlon stated that he believes that the number of rulings against the State is zero. Mr. Conlon stated further that the lack of a response to his FOIL request supports his assertion.[1]

Pages 4 through 8 of the September 9, 2016 motion provide a timeline of Mr. Conlon's interactions with the Department from June 2001 to the present. Mr. Conlon provided

[1] With an email dated September 7, 2016, Chief Administrative Law Judge James T. McClymonds responded to Mr. Conlon's August 30, 2016 FOIL request.

substantially the same timeline with his July 20, 2016 answer to the Department's June 29, 2016 complaint. With this submission, the last entry in the timeline is dated August 10, 2016, and briefly summarizes a portion of the discussion held during the pre-hearing conference convened on that date. Based on this timeline, Mr. Conlon argued that if the Commissioner were aware of the details concerning Mr. Conlon's interactions with Department staff since June 2001, the Commissioner may have directed Department staff to undertake such actions "to protect the Agency, his own job and possibly the entire Administrative Law system in NYS" (*id*. at 9). According to Mr. Conlon, if the Commissioner were to rule in his favor, the result would be "that the NYSDEC Agency and the State's Administrative Law System might need to be change[d], meaning loss of your own job by ruling for me" (*id*. at 10 [bracketed material supplied]).

In conclusion, Mr. Conlon stated, in full, that:

> I do not believe I can receive a fair trial in the NYSDEC Administrative Law System and there is NO WAY any reasonable person would say that I can. My defense in the prosecution of the entire system and its' employees, from engineers, right up to the Commissioner, the Attorney General, and if it reaches the Governor???? But to receive a fair trial, the venue will have to be moved to a Federal Court" (*id*. at 12).

In the September 25, 2016 supplement, Mr. Conlon noted that he had recently received a copy of my September 8, 2016 ruling concerning various requests and motions that Mr. Conlon had filed from July 29, 2016 to August 30, 2016. According to Mr. Conlon, the September 8, 2016 ruling was a "knee jerk reaction" (September 25, 2016 supplement at 2) to the recusal request and the audio recording of the August 10, 2016 pre-hearing conference. Mr. Conlon contended that the September 8, 2016 ruling concerning the audio recording of the August 10, 2016 pre-hearing conference misrepresented the regulatory provision at 6 NYCRR 622.8(d), and that Mr. Conlon had a legal right to record the August 10, 2016 pre-hearing conference. Mr. Conlon contended further that the September 8, 2016 ruling was a violation of his civil rights, which requires the ALJ's recusal.

In conclusion, Mr. Conlon stated, in part, the following:

> Does an ALJ that tries to misrepresent NYSDEC's own laws as shown above really belong in his job???? Judge Garlick ignored your own engineering reports and sent a decision to the former Commissioner stating facts that now Judge O'Connell and Jennifer Andaloro with staff contradict, tire chips are NOT an environmental or public hazard. Commissioner Martens then ruled in a decision resulting in the closure of my business. My argument has been that NYSDEC Staff, ALJ's and at least the former Commissioner himself have taken laws and twisted their meaning to suit their personal views and attack me personally.
>
> How can you, the Commissioner, now consider that an everyday NYS and US citizen could ever expect to receive a fair trial in NYSDEC Administrative law system. That being said, you must recuse yourself and if you feel that your corrupt staff has a case against me, forward this complaint to a US Court venue so

that I can receive a fair trial, publicly and in front of our entire nation, show just how corrupt NYSDEC really is. (*Id*. at 6.)

B. Department staff's Reply

With a cover letter dated September 30, 2016 from Ms. Andaloro, Department staff filed a memorandum of law opposing Mr. Conlon's motions. Department staff argued that motions should be denied in all respects.

With reference to the State Administrative Procedure Act (SAPA) § 303 and 6 NYCRR 622.10(b)(2)(iii), Department staff noted that any party may file a motion, with supporting affidavits, requesting that an ALJ be recused on the basis of personal bias or other good cause. In further support, Department staff cited *Matter of Crossroads Ventures, LLC*, Commissioner's Ruling, April 29, 2009. According to Department staff, there is a presumption that hearing officers are free from bias (*see Matter of Lauersen v Novello*, 293 AD2d 833 [3d Dept 2002]).

Department staff contended that the attachments to Mr. Conlon's motion do not show that the Commissioner or any ALJ has prejudged this matter, has a personal interest in this matter, or has any connection to this matter as an agency prosecutor. Department staff noted that a presiding ALJ cannot be disqualified simply because the ALJ is employed full-time by the Department (*see Matter of McCulley*, Ruling on Motion for Recusal of DEC Commissioner and Administrative Law Judge, December 4, 2006 *citing Matter of Whalen v Slocum*, 84 AD2d 956 [4th Dept 1981]).

Department staff refuted Mr. Conlon's contention about the lack of any adverse rulings made against Department staff. Department staff noted that Executive Order No. 131 states that the terms and conditions of an ALJ's employment cannot be based on whether an ALJ's rulings, decisions, or other actions either favor or disfavor the agency or the State.

With respect to the September 8, 2016 ruling, Department staff argued that the ALJ may take all measures necessary to maintain order and the efficient conduct of the hearing as provided by 6 NYCRR 622.10(b)(x). Staff argued further that disagreeing with the ALJ's ruling is not a basis for recusal. Department staff noted that Mr. Conlon had the opportunity to appeal from the September 8, 2016 ruling (*see* 6 NYCRR 622.10[d] and 622.6[e]), but did not.

Department staff noted that for the third time, Mr. Conlon has requested the transfer of this administrative enforcement proceeding to a federal forum. Staff noted further that all prior requests had been denied due to a lack of any legal authority to change the forum. Department staff observed that Mr. Conlon did not identify any authority in the submissions filed on September 9 or 25, 2016 that would permit a change in the venue.

C. Discussion and Ruling

Mr. Conlon seeks the recusal of the Commissioner and all the ALJs in New York State. The Commissioner has received a copy of Mr. Conlon's motion and Department staff's reply. The Commissioner, therefore, will consider that portion of the motion concerning his recusal.

To date, I have been the only ALJ assigned to this matter. Mr. Conlon cited no authority for me to consider the recusal of all ALJs in New York State. In any event, because a motion for recusal is addressed to the discretion of the assigned judge, any motion to recuse all other ALJs is premature. Accordingly, to the extent that Mr. Conlon's motion seeks recusal of ALJs other than me, the motion is denied as premature. Therefore, the following ruling concerns my recusal.

As noted above, SAPA § 303 provides that "[u]pon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding."

Section 622.10(b)(2) of 6 NYCRR provides that "[a]ny party may file with the ALJ a motion . . . requesting that the ALJ be recused on the basis of personal bias or other good cause" (6 NYCRR 622.10[b][2][iii]). The ALJ's determination on a motion for recusal is part of the hearing record (*see id*.; *see also* 6 NYCRR 622.17[b]). A denial of such a motion is appealable as of right to the Commissioner, either on an expedited, interlocutory basis, or after the completion of all testimony in a proceeding (*see* 6 NYCRR 622.10[d][1], [2][i]).

The courts have provided further guidance concerning the grounds for disqualification of an ALJ. An ALJ is disqualified from presiding in an adjudicatory proceeding where the ALJ suffers a personal bias, prejudice, or other disqualifying factor. These factors include an ALJ's prejudgment of the facts of a particular case (*see Matter of 1616 Second Ave. Rest., Inc. v New York State Liq. Auth.*, 75 NY2d 158, 162 [1990]), or a financial or personal interest in or relationship to one of the parties in the matter (*see Matter of Beer Garden, Inc. v New York State Liq. Auth.*, 79 NY2d 266, 278 [1992] [applying Judiciary Law § 14 to an ALJ exercising a quasi-judicial function in an administrative adjudicatory proceeding]). An ALJ is also disqualified where the ALJ previously served as the agency prosecutor in the case, whether actively or merely functionally (*see id*. at 278-279; *see also Matter of General Motors Corp. - Delco Prods. Div. v Rosa*, 82 NY2d 183, 188-189 [1993]). Moreover, the mere circumstance that an agency official is employed by the agency, without more, is not a ground for disqualification (*see Matter of Whalen v Slocum*, 84 AD2d 956 [4th Dept 1981]). Absent one of the above grounds for disqualification, whether recusal is warranted falls within the discretion of the decision maker (*see Matter of Murphy*, 82 NY2d 491, 495 [1993]; *People v Moreno*, 70 NY2d 403, 405-406 [1987]).

In the September 9, 2016 motion and the September 25, 2016 supplement, Mr. Conlon does not identify any ground for my disqualification in this case, nor does any such ground exist.

I have no personal bias or prejudice concerning either of the parties to this proceeding, nor do I have any personal knowledge of disputed evidentiary facts concerning the proceeding (*see Matter of 1616 Second Ave. Rest.* 75 NY2d at 161-162). The only knowledge I have of the matter is based upon the papers submitted and other communications by the parties.

The Department employs multiple institutional safeguards to protect the independence and impartiality of the ALJs within its employ. Consistent with separation of powers principles imposed upon agencies by procedural due process, statutes such as SAPA, and executive orders, the Office of Hearings and Mediation Services is an independent office within the Department, separate from the Office of General Counsel, other program Divisions, and the Regional Offices. The ALJs and Chief ALJ employed by the Office report on cases directly to either the Commissioner or his designee through the Assistant Commissioner for Hearings and Mediation Services, and not through the Department's General Counsel (*see Matter of Bath Petroleum Storage Inc.*, ALJ Ruling, Dec. 10, 2004, at 4-5). Thus, the prosecutorial and adjudicatory functions are completely separated within the Department.

Other procedural safeguards for ALJ independence include the requirement that ALJ rulings and hearing reports be made public and part of the record (*see* 6 NYCRR 622.17[b]). The Commissioner may reverse or modify an ALJ's findings of fact or conclusions of law, but must do so in a separate Commissioner decision or order on the record, and must provide written reasons for such reversal or modification (*see* 6 NYCRR 622.18[e]; *see also Matter of Simpson v Wolansky*, 38 NY2d 391, 394 [1975]). As noted by Department staff, an ALJ's impartiality and independence are further protected by Executive Order No. 131. Therefore, the alleged incentive to rule in the Department's favor does not exist. Accordingly, I otherwise deny Mr. Conlon's motion insofar as it seeks recusal of me as the ALJ in this matter.

Mr. Conlon also renewed his request to transfer this administrative proceeding to a federal forum. I have already denied this request (*see* September 8, 2016 ruling at 8).

II. Staff's Motion to Clarify or Strike Affirmative Defenses

With a cover letter dated October 3, 2016, Department staff filed a notice of motion, and motion either to clarify or to strike affirmative defenses both dated October 3, 2016 with supporting papers. As noted above, I suspended the time for Mr. Conlon to respond to Department staff's motion in an email to the parties dated October 5, 2016.

Discussion and Ruling

Department staff may move for clarification of affirmative defenses after receiving an answer on the grounds that the affirmative defenses are so vague or ambiguous that staff does not have notice of the facts or legal theory upon which the defense is based (*see* 6 NYCRR 622.4[f]). The clarification of affirmative defenses has been the subject of many rulings, among the more recent is *Matter of Route 52 Property, LLC, et al.*, Decision of the Chief Administrative Law Judge, March 14, 2012, at 10-12, *citing Matter of Truisi*, Chief ALJ Ruling on Motion, April 1, 2010, at 4, 6-7.

A motion that seeks clarification of affirmative defenses should not be an attempt to obtain, in effect, a bill of particulars, which are prohibited by Part 622 (*see Truisi*, at 7 n 2; 6 NYCRR 622.7[b][3]). If an affirmative defense provides staff with sufficient notice of the nature and the basis of the defense, staff must use available discovery devices to obtain any further detail concerning the defense (*see id*. at 6-7; *see also Matter of Bath Petroleum Storage, Inc.*, ALJ Ruling on Motion to Clarify Affirmative Defenses, Jan. 27, 2005, at 10, 12).

In the alternative to seeking clarification, Department staff has also moved to strike affirmative defenses. The applicable standard to motions to dismiss defenses is provided at CPLR 3211(b) (*see, e.g., Truisi*, at 10-11). Motions to dismiss affirmative defenses may challenge the pleading facially, in other words, on the ground that it fails to state a defense, or may seek to establish, with supporting evidentiary material if necessary, that a defense lacks merit as a matter of law (*see id*. at 10).

The initial question with respect to a motion to clarify or to dismiss affirmative defenses is whether the defense pleaded is actually an affirmative defense (*see id*. at 4-5; *see also* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:38). Where the defense is actually a denial pleaded as a defense, a motion to dismiss or clarify affirmative defenses is not appropriate (*see Truisi*, at 5, 11; *see also Rochester v Chiarella*, 65 NY2d 92, 101 [1985] [motion to dismiss not a vehicle to strike a denial]).

In this case, Mr. Conlon is representing himself, and he is not an attorney. Mr. Conlon did file a document entitled, *Answer to NYSDEC Complaint DEC Case No. CO4-204150520-119 by Brian Conlon*, dated July 20, 2016. As noted in staff's motion (at 5), the July 20, 2016 answer responds to each allegation stated in the July 6, 2016 complaint, but does not expressly identify any affirmative defenses. Nevertheless, staff has attempted to identify affirmative defenses from the responses stated in the answer (*see* Staff's motion at 6-19).

Because Mr. Conlon is not an attorney, he may not be aware of what an affirmative defense may be. In any event, the July 20, 2016 answer does not expressly identify any affirmative defenses. In addition, staff's attempt to characterize potential affirmative defenses, based on the responses provided in the answer, may not be accurate. Under such circumstances, the better use of the parties' resources is to initiate the discovery process so that the parties may obtain further details about the violations alleged in the July 6, 2016 complaint and the responses stated in the answer. I note that Mr. Conlon's July 20, 2016 answer also included a set of discovery requests. Others may be forthcoming from the parties.

Therefore, I deny, without prejudice to renew, either on a motion for order without hearing, or at hearing, if one convenes, Department staff's motion either to clarify or to dismiss affirmative defenses. If Department staff renews this motion, Mr. Conlon will have the opportunity to respond to the motion.

Appeals

Pursuant to 6 NYCRR 622.10(d)(2), Mr. Conlon may appeal from this ruling which denies his motion to recuse the ALJ on an expedited basis.[2] Mr. Conlon's appeal must be received before 3:30 P.M. on Thursday, November 10, 2016. Department staff may reply, and it must be received before 3:30 P.M. on Wednesday, November 23, 2016.

Send the original hard copy plus one additional copy of any appeal to Commissioner Basil Seggos, Attn: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, 625 Broadway, 14th Floor, Albany, New York, 12233-1010. In addition, send one hard copy of the appeal to Department staff at the same time and in the same manner as transmittal is made to the Assistant Commissioner. Department staff is direct to follow the same directions when filing the reply.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
October 19, 2016

[2] Department staff must seek leave to appeal from my ruling concerning the motion to clarify or to strike affirmative defenses (see 6 NYCRR 622.10[d][2][ii]).