STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violation of Article 9 of the Environmental Conservation Law ("ECL") and Part 196 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

JAMES W. McCULLEY,

Respondent.

RULING ON MOTION FOR RECUSAL OF DEC COMMISSIONER AND ADMINISTRATIVE LAW JUDGE

DEC Case No. R5-20050613-505

Appearances of Counsel:

-- Briggs Norfolk LLP (Matthew D. Norfolk of counsel), for respondent James W. McCulley

-- Alison H. Crocker, Acting Deputy Commissioner and General Counsel (Randall C. Young, Senior Attorney, Region 6), for the Department of Environmental Conservation

PROCEEDINGS

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent James W. McCulley by service of a notice of hearing and complaint dated June 10, 2005. Respondent filed an answer dated July 1, 2005, in which he asserted seven affirmative defenses.

The dispute between the parties, as gleaned from the pleadings, concerns Department staff's allegation that on or about May 22, 2005, respondent operated a motor vehicle on a road known variously as "Old Mountain Road," "Old Military Road," or "Jackrabbit Trail" (hereinafter "Old Mountain Road"), located in the Towns of North Elba and Keene, Essex County. Department staff alleges that the land underlying the road is forest preserve, as defined by ECL 9-0101(6). Staff alleges, therefore, that respondent operated a motor vehicle in the forest preserve in violation of 6 NYCRR 196.1. Respondent, on the other hand, contends that the road is a public highway or town road as defined by the laws of New York. Accordingly, in addition to the

affirmative defenses asserted, respondent denies the violation charged.

Department staff filed a notice of motion and motion for dismissal of affirmative defenses and for an order without hearing with the Department's Office of Hearings and Mediation Services ("OHMS"). Department staff served its motion on respondent on September 20, 2006.

Based upon Department staff's consent, respondent's time to respond to the September 20, 2006 motion was extended until November 6, 2006. Respondent filed its response in papers dated November 2, 2006.

Prior to filing his response to staff's motion, respondent served upon OHMS and Department staff a notice of motion and attorney affidavit dated October 24, 2006 seeking recusal of the Commissioner and myself, as the presiding Administrative Law Judge ("ALJ"), in this administrative enforcement proceeding. Specifically, respondent seeks (1) disqualification and recusal of the ALJ, and removal of the above-captioned proceeding from OHMS to another New York State agency (with the exception of the Adirondack Park Agency), or to New York State Supreme or County Court, or to a private arbitration or mediation service agency for assignment of a new ALJ or hearing officer for hearing and adjudication, and (2) disqualification and recusal of Commissioner Denise M. Sheehan as the final agency decision maker in this proceeding. The grounds asserted for recusal of both the ALJ and the Commissioner are actual conflict of interest and appearance of impropriety. Respondent requests oral argument on the recusal motion.

Under cover of a letter dated October 25, 2006, respondent filed a revised and corrected notice of motion, and an affidavit of service. By letter dated October 30, 2006 and received October 31, 2006, Department staff opposes respondent's recusal motion and request for oral argument.

In a memorandum dated November 20, 2006, Commissioner Sheehan advised that she was recusing herself in this matter. Commissioner Sheehan stated:

> "This is to advise that I am recusing myself in the Matter of James McCulley because of my prior involvement in the matter during my tenure as Executive Deputy Commissioner to the Department of Environmental Conservation,

> and I am delegating the decision making authority to Deputy Commissioner Carl Johnson. This delegation is being made without prejudice to the recusal motion currently pending before Chief Administrative Law Judge James T. McClymonds."

By letter dated November 21, 2006, Assistant Commissioner Louis A. Alexander provided the parties with a copy of Commissioner Sheehan's recusal and delegation memorandum.

This ruling addresses only respondent's recusal motion. Department staff's motion to dismiss affirmative defenses and for an order without hearing will be addressed in a separate ruling.

DISCUSSION

Request for Oral Argument

Pursuant to 6 NYCRR 622.10(b)(viii), ALJs are authorized to conduct oral argument on motions. However, because the alleged grounds for disqualification, and the arguments in support thereof, are clearly and sufficiently addressed in the papers, and oral argument would not materially assist the determination on respondent's recusal motion, respondent's request for oral argument is denied.

Motion for Recusal

Section 622.10(b)(2) 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 State Administrative Procedure Act ("SAPA") also contains a provision concerning the recusal of a hearing officer. 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."

Positions of the Parties

Respondent notes that he has commenced a federal lawsuit in the United States District Court, Northern District of New York, against Commissioner Sheehan and the Department, among other defendants. In that lawsuit, respondent has alleged that the Department violated his civil and constitutional rights under both the United States and the New York Constitutions by commencing this administrative enforcement proceeding against respondent.[1]

Respondent has also filed in the New York Court of Claims a notice of intention to file claims against the State, the Department, Commissioner Sheehan, and various other Departmental officers and employees. In the Court of Claims proceeding, respondent intends to raise claims similar to those raised in his federal lawsuit.

Respondent contends that the Commissioner has direct prior involvement in, and knowledge of, the dispute between respondent and the Department concerning Old Mountain Road, and respondent's allegation of improper conduct by the Department and the Commissioner. Respondent also argues that the Commissioner has a conflicting interest in the outcome of this proceeding due to the civil rights claims asserted against the Commissioner in the federal litigation. Accordingly, respondent contends the Commissioner is actually biased against respondent, requiring her recusal in this proceeding.

With respect to the presiding ALJ, respondent contends that because the ALJ is designated by the Commissioner to preside over the proceeding, and will report directly to the Commissioner on this matter, the ALJ must be disqualified and recused. Respondent contends that as "an underling of the Commissioner, designated by her to preside over this matter, there is an unacceptable probability of actual bias on the part [of the] ALJ . . . ." Respondent asserts that the ALJ, as an employee of the Commissioner, has an incentive to rule in the Department's favor to assist the Commissioner in the federal lawsuit. Accordingly, respondent asserts that the ALJ has a personal interest and bias

[1] The federal proceeding has been stayed, on federal abstention grounds, until such time as this State administrative proceeding, and State court proceedings and appeals, are completed (see McCulley v New York State Dept. of Envtl. Conservation, US Dist Ct, ND NY, May 17, 2006, Kahn, J., 8:05-CV-0811).

in the proceeding requiring recusal.

Finally, respondent argues the proceeding must be transferred to another State agency for adjudication, because the Department has "too much at stake (or too much to lose)" in this matter.

In response, Department staff argues no basis exists for recusing the Commissioner or ALJ, nor for transferring the enforcement proceeding to another State agency. Staff contends that the ALJ's independence is adequately protected by Executive Order No. 131 (9 NYCRR 4.131), that the ALJ's employment is not contingent upon a decision favorable to the Department, and that respondent's allegations are insufficient to overcome the presumption of honesty and integrity accorded to administrative body members (citing Matter of Sunnen v Administrative Rev. Bd. for Professional Med. Conduct, 244 AD2d 790, 792 [3d Dept 1997], lv denied 92 NY2d 802 [1998]). Staff also contends that Department practices ensure that the Commissioner is not involved in any matter in which she may have an actual conflict of interest, and that respondent provided no basis for removing the matter from the Office of Hearings and Mediation Services. Staff note that United States District Judge Kahn specifically ordered completion of the Department's administrative enforcement proceeding before proceeding on the federal action.

Discussion

Although both the Department's regulations and SAPA require recusal of an ALJ on the basis of personal bias or other disqualifying cause, neither the regulations nor SAPA provide further definition of the grounds for recusal.

One New York court has held that ALJs "appear" to be subject to the Code of Judicial Conduct (see Matter of Crosson v Newman, 178 AD2d 719, 720 [3d Dept 1991]). The New York State Bar Association's Committee on Professional Ethics has expressly concluded that the provisions of the Code of Judicial Conduct governing judicial disqualification are applicable to ALJs (see 1991 Opns NY State Bar Assn Comm on Professional Ethics 617). In addition, the New York Court of Appeals has held that ALJs are subject to Judiciary Law § 14, which codifies common law grounds for disqualification of judges by reason of interest or consanguinity that parallel similar grounds in Canon 3(E) (see Matter of Beer Garden, Inc. v New York State Liq. Auth., 79 NY2d 266, 278 [1992]). Public Officers Law § 74 establishes a code of ethics applicable generally to officers and employees of State agencies and, therefore, to ALJs employed by such agencies. The

standards for disqualification contained in these various sources are therefore appropriately considered on this motion (see also Rules of the Chief Administrator of the Court, 22 NYCRR 100.3[E] [regulatory codification of Canon 3(E)]).

Upon consideration of the various grounds for disqualification contained in the above sources, respondent has not alleged, nor do I suffer from, any of the disqualifying grounds specified in the Canon or statutes. 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 Canon 3[E][1][a]; 22 NYCRR 100.3[E][1][a]; see also Matter of 1616 Second Ave. Rest., Inc. v New York State Liq. Auth., 75 NY2d 158, 161-162 [1990]). The only knowledge I have of the matter is based upon the papers submitted by the parties.

In addition, I have never served as a lawyer, prosecutor or a material witness in the matter in controversy, nor have I practiced law with any of the attorneys involved in the matter (see Canon 3[E][1][b]; 22 NYCRR 100.3[E][1][b]; Judiciary Law § 14; see also Matter of Beer Garden, 79 NY2d at 279). Neither I, my spouse nor minor children have any economic or other interest in this matter or the participating parties (see Canon 3[E][1][c]; 22 NYCRR 100.3[E][1][c]; Judiciary Law § 14; Public Officers Law § 74[2], [3][g]). Neither I, my spouse, nor other relative is a party to the proceeding, an officer, director, or trustee of a party, has an interest in the proceeding, or is likely to be a material witness in the proceeding (see Canon 3[E][1][d]; 22 NYCRR 100.3[E][1][d]; Judiciary Law § 14; Public Officers Law § 74[2], [3][g]).

The mere circumstance that the presiding ALJ is employed full-time by the Department, without more, is not a ground for disqualification (see Matter of Whalen v Slocum, 84 AD2d 956 [4th Dept 1981]). 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 the Commissioner or her 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 ALJs 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]; 9 NYCRR 4.131[II][E], [F]; see also Matter of Simpson v Wolansky, 38 NY2d 391, 394 [1975]). The Commissioner may not order or otherwise direct an ALJ to make any finding of fact, reach any conclusion of law, or to make or recommend any specific disposition of a charge or allegation, except by remand, reversal, or other decision on the record (see 9 NYCRR 4.131[II][E]).

As noted by Department staff, an ALJ's impartiality and independence is further protected by Executive Order No. 131. That order provides, among other things, that an ALJ's terms and conditions of employment may not be based upon whether an ALJ's rulings, decisions, or other actions favor or disfavor the agency or the State (see 9 NYCRR 4.131[II][C]). Thus, the alleged incentive to rule in the Department's favor does not exist.

Accordingly, because no disqualifying ground is identified or exists, that branch of respondent's motion as seeks recusal of the ALJ must be denied.

With respect to respondent's request that the Commissioner be recused, it is not clear that, as the presiding ALJ in this matter, the issue of the Commissioner's recusal is properly before me. In any event, to the extent respondent's request for recusal of the Commissioner is based upon her personal involvement in the matter prior to its referral to the Office of Hearings and Mediation Services, the request has been rendered academic by Commissioner Sheehan's recusal and delegation of decision-making authority to Deputy Commissioner Johnson. To the extent respondent's request addresses the office of the Commissioner generally, or Deputy Commissioner Johnson personally, I defer to the Deputy Commissioner's determination of the issue on appeal, if such an appeal is taken, and assuming the issue is properly before him on such an appeal.

To the extent respondent seeks removal of this matter from the Department to another State agency, State court, or private arbitration or mediation service, again, it is not clear whether the presiding ALJ has the authority to grant the relief

requested. Assuming without deciding that the presiding ALJ does have such power, I would deny the request. The Department is authorized by statute and regulation to conduct civil administrative enforcement proceedings (see ECL 3-0301[2][h]; ECL 9-0105[9]; ECL 71-4003; 6 NYCRR part 622; see also Matter of Portville Forest Products, Inc. v Commissioner of New York State Dept. of Envtl. Conservation, 117 Misc 2d 770 [1982]). It is often the case that the Department conducts enforcement proceedings during the pendency of federal or State court proceedings involving the same parties and subject matter, and in which the Department is either a plaintiff or defendant. No statutory provision or case law precedent supports the proposition that an agency is divested of jurisdiction to conduct an administrative enforcement proceeding merely upon the commencement of a lawsuit by a respondent in such a proceeding. Moreover, respondent offers no compelling support for his argument that the Department is divested of its jurisdiction in this particular case.

Ruling

Accordingly, for the reasons stated above, respondent's recusal motion is denied.

Appeal

As noted above, an ALJ ruling denying a motion for recusal may be appealed as of right to the Commissioner on an expedited, interlocutory basis (see 6 NYCRR 622.10[d][2][i]). Any ruling of an ALJ may also be appealed to the Commissioner at the conclusion of proceedings before the ALJ (see 6 NYCRR 622.10[d][1]).

Ordinarily, an expedited interlocutory appeal must be filed within five days after the date of the ruling, ten days if notification of the ruling is by ordinary mail (see 6 NYCRR 622.6[e][1], [b][2][i]). To avoid prejudice to any party, the ALJ is authorized to extend any time period provided by the regulations (see 6 NYCRR 622.6[f]).

Accordingly, if respondent wishes to pursue an expedited appeal at this time, any such appeal must be received at the office of Deputy Commissioner Carl Johnson (attention: Louis A. Alexander, Assistant Commissioner for Hearings), New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233, no later than the close of business on December 18, 2006. Moreover, a response to any appeal is authorized and must be received no later than the close

of business on December 29, 2006.

Any appeal and response sent to the Deputy Commissioner's Office must include an original and one copy. In addition, one copy of all appeal and response papers must be sent to opposing counsel and to me at the same time and in the same manner as to the Deputy Commissioner. Service upon the Deputy Commissioner of any appeal or response thereto by facsimile transmission (FAX) or e-mail is permitted as long as a hard copy follows by overnight delivery.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: December 4, 2006
Albany, New York

TO: Attached Service List (by facsimile and regular mail)