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Joey D. Moya

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO

COMMUNITIES FOR CLEAN WATER,
Petitioner,

-v-

NEW MEXICO WATER QUALITY CONTROL COMMISSION,
Respondent.

S-1-SC-37717
No. __________

VERIFIED PETITION FOR AN ORIGINAL PEREMPTORY WRIT OF MANDAMUS

I. PRELIMINARY STATEMENT.

Petitioner herein, Communities for Clean Water ("CCW"), comprises six New Mexico community organizations that stand to be affected by the operations of Los Alamos National Laboratory ("LANL"): (1) Tewa Women United of Santa Cruz; (2) Honor Our Pueblo Existence of Española; (3) Concerned Citizens for Nuclear Safety of Santa Fe; (4) Amigos Bravos of Taos; (5) Partnership for Earth Spirituality of Albuquerque; and (6) New Mexico Acequia Association of Santa Fe.

Respondent, the New Mexico Water Quality Control Commission ("WQCC"), is a commission established under the Water Quality Act, NMSA 1978, § 74-6-1 *et seq*. The WQCC oversees a program of ground water discharge

permits, which are issued by the New Mexico Environment Department ("NMED") and are subject to review by the WQCC. NMSA 1978, § 74-6-5(O-S). Other parties in interest include the U.S. Department of Energy ("DOE") and Triad National Security, LLC ("Triad"), which are parties to the WQCC proceeding giving rise to this Petition.

CCW herein petitions the Court for a peremptory writ of mandamus, requiring the WQCC to vacate decisions by the NMED Hearing Officer who was disqualified to act and the NMED Secretary's decision based upon the invalid rulings and recommendations of that disqualified Hearing Officer.

II. FACTUAL BACKGROUND.

1. A permit review proceeding, WQCC No. 18-05(A), is pending before the WQCC in which CCW is Petitioner and Respondents are DOE, Triad, and NMED. This WQCC proceeding concerns the NMED groundwater discharge permit number 1132 ("DP-1132"), which NMED issued on August 29, 2018, in NMED proceeding GWB 17-20(P), after a hearing. DOE and Triad are Permittees under DP-1132. The permit purports to regulate discharges to ground water from the LANL Radioactive Liquid Waste Treatment Facility ("RLWTF").

2. No discharges are planned from the RLWTF. CCW has opposed issuance of DP-1132, because there would be no discharge; the Water Quality Act only authorizes a permit for a discharge, NMSA 1978, § 74-6-5(A); the permit

would not become effective unless there is a discharge, NMSA 1978, § 74-6-5(I). But, under NMSA 1978, § 74-6-12(B), issuance of permit DP-1132 would exempt the RLWTF from regulation under the New Mexico Hazardous Waste Act, NMSA 1978, § 74-4-1 *et seq.*

3. Since DP-1132 was issued, CCW has discovered facts that are undisputed and clearly establish that the August 29, 2018 NMED order issuing DP-1132, and the orders of the Hearing Officer upon which the NMED order is premised, must be vacated. The sequence of events, which are uncontradicted, is as follows:

4. On September 20, 2017, NMED appointed Ms. Erin Anderson as Hearing Officer for DP-1132 pursuant to 20.1.4.100(E)(2) NMAC, which requires a "fair and impartial proceeding" and forbids the Hearing Officer from acting when he or she has a "financial interest." 20.1.4.100(E)(3)(a)(ii). Ms. Anderson is a member of the Bar of the State of New Mexico and was a NMED employee.

5. A hearing on the proposed permit was set for April 19, 2018. CCW had moved to dismiss the proceeding for the reasons stated above.

6. On April 18, 2018, Ms. Anderson denied CCW's motion by a one-paragraph order containing no explanation. Exhibit 1 attached hereto.

7. The hearing was held before Ms. Anderson on April 19, 2018. There was testimony that there is no current discharge from the RLWTF and no plan to

discharge. Exhibit 2, attached hereto, Hearing Transcript at Tr. at 74-75, 79, 101, 112-13, 119, 208-209, 211-212, 215-16. Therefore, after her denial of the Motion to Dismiss, there was evidence taken at hearing that supported the Motion.

8. CCW renewed its request for dismissal in its post-hearing submission on June 4, 2018. Exhibit 3 attached hereto.

9. Ms. Anderson issued a draft report on July 19, 2018; she again rejected CCW's argument without explanation. Exhibit 4 attached hereto. Note well that, as will appear below, her draft report was issued during the application period for the position she accepted as attorney for a party to this matter. *Infra* at ¶ 14.

10. On August 3, 2018, CCW filed comments on the Hearing Officer's draft report, again seeking dismissal based on the lack of any discharge. Exhibit 5, attached hereto.

11. The Hearing Officer issued her final report on August 29, 2018, again rejecting CCW's argument without explanation. Exhibit 6, attached hereto.

12. The NMED Secretary ruled the same day, adopting the Hearing Officer's decision *in toto* without explanation and issuing the permit. Exhibit 7, attached hereto.

13. CCW petitioned the WQCC to review issuance of DP-1132 on September 28, 2018.

14. In January 2019 CCW learned that Ms. Anderson had been hired as an attorney for the National Nuclear Security Administration ("NNSA") at LANL. *See* Exhibit 8, attached hereto, containing, as Exhibit 'B' the emails between CCW Co-counsel Lindsay Lovejoy, Jr., and Silas DeRoma, counsel for the NNSA, a division of the DOE, who entered an appearance in the permit proceeding.

15. When pressed for an explanation, Mr. DeRoma, counsel for NNSA, wrote back, stating that the NNSA, a component of DOE, had published a job opening for an attorney at LANL on June 15, 2018; applications were invited until July 26, 2018. *Id.*

16. Mr. Butzier, counsel for DOE and Triad, stated on brief that, sometime before her draft report was issued on July 19, 2018, Ms. Anderson applied to NNSA for the attorney's position. Exhibit 10, attached hereto, DOE/NNSA/Triad Response to Motion to Vacate (Feb. 19, 2019) at 3.

17. Thus, from that date, Erin Anderson and NNSA were in direct negotiations about her employment by NNSA, including her compensation and other benefits. Nothing about these negotiations was disclosed at the time by Ms. Anderson, NNSA, DOE, NMED, or any of their attorneys.

18. On September 18, 2018, less than three weeks after NMED issued the permit, NNSA offered Ms. Anderson a job in its Los Alamos law office. Exhibit 8.

19. She accepted and started on November 25, 2018. Exhibit 8.

20. When CCW learned in January 2019 about Ms. Anderson's employment at LANL, CCW moved the WQCC to vacate the decisions by Ms. Anderson and the NMED order. Motion to Vacate and Remand (Feb. 4, 2019), Exhibit 9, attached hereto.

21. Ms. Anderson's participation as Hearing Officer for DP-1132, while, at the same time, seeking a job with a party to the proceeding, the NNSA, violated the Rules of Judicial Conduct, 21-001 *et seq.* NMRA, and CCW's rights to Due Process. U.S. Const., amend. V, XIV, Sec. 1; N.M. Const., Art. II, § 18. Ms. Anderson was disqualified to act, and the decisions that she made while disqualified must be vacated, as well as the NMED Secretary's decision predicated thereon.

22. The WQCC on April 9, 2019 voted to deny CCW's motion to vacate these decisions and on May 14, 2019 refused to reconsider the matter. Exhibit 11 (transcript of April 9, 2019 arguments on Motion to Vacate and Remand and WQCC discussion and decision) and Exhibit 12 (May 14, 2019 meeting of the WQCC discussing possible reconsideration of the decision to deny the Motion to Vacate and Remand), attached hereto.

23. Its written order was entered on June 5, 2019. Exhibit 13, attached hereto. The Order entirely misapprehends the law in regard to the necessary action to be taken when a hearing officer is corrupted during the adjudication process.

The Order states that CCW failed to establish that it would had been unable to raise the issue in proceedings before the Hearing Officer. Ex. 13 at ¶ 6. Obviously, CCW could not raise the issue of the Hearing Officer's disqualification during the NMED proceedings, because the corruption had not been disclosed by the parties and lawyers who participated in it or knew about it. The Order also states that CCW failed to establish that bias on the part of the Hearing Officer had an effect upon the Secretary's decision. Ex. 13 at ¶ 7. But it is conclusively established that bias at one stage of a proceeding cannot be cured at a later stage, such as on review. As a matter of law, neither of these considerations are proper when the Hearing Officer has been disqualified and the rulings and written decisions of that officer are, therefore, corrupt.

24. Not only did the corruption of the Hearing Officer deny CCW and its members the right to Due Process of Law under the United States Constitution, it is patent upon the facts of this matter that the Hearing Officer in this matter, Ms. Anderson, applied for a position with one of the parties, NNSA, and did not immediately recuse herself from further participation in the hearing process. Moreover, counsel for the NNSA and NMED knew that the Hearing Officer had taken a position with the NNSA but did not immediately inform counsel for CCW.

Thus, the present situation raises matters of serious public concern and calls for the intervention of this Court by issuance of a writ of mandamus to the WQCC

directing immediate vacation of DP-1132 and remand to the Secretary of NMED for such action as may be appropriate.

III. AS A MATTER OF LAW THE PERMIT MUST BE VACATED AND REMANDED TO THE SECRETARY.

A. On the uncontradicted facts, Ms. Anderson was disqualified.

Erin Anderson was under a legal and constitutional duty to act as an impartial decision-maker concerning proposed DP-1132. For a judicial or administrative decision-maker to seek or to obtain employment by a party to a proceeding before him or her, as Ms. Anderson did, disqualifies him or her from functioning as an impartial decision-maker and denies Due Process of Law.

The right to a fair and impartial public hearing is critically important to members of the public who are interested in the environmental impact of a proposed permit:

> The public hearing is a persuasive proceeding, imposing the burden of persuasion upon the permit applicant. The public hearing provides opponents to a permit application an opportunity to present contrary evidence and testimony, to cross-examine expert witnesses, to present their own expert testimony, to argue their objections to the permit, and to obtain a decision based on the evidence. Public hearings are intended to give the public an opportunity to challenge a permit application and create a record to appeal an adverse decision. *See* § 74-6-5(O)-(Q). As review proceedings are based exclusively on the record and arguments made at the public hearing, a party having shown the existence of a substantial public interest in the permit application is dependent upon the public hearing to make its record in support of any necessary appeal.

Communities for Clean Water v. N.M. Water Quality Control Comm'n, 2018-NMCA-024, 30, 413 P.3d 877, 886. Moreover, on judicial review, courts defer to the hearing officer's determinations as to the credibility and weight of the evidence, applying the same standards as govern review of the rulings of a trial judge. *See, e.g., Citizens for Alternatives to Radioactive Dumping v. La. Energy Servs.* (In re La. Energy Servs.), 2010 N.M. App. Unpub. LEXIS 20, at 5-6, 7. It is not uncommon for the NMED Secretary to accept the hearing officer's proposed decision without any change, as it did in this case.

Adjudicative hearings, such as were conducted here, are invested with Due Process protections under the United States and New Mexico Constitutions. U.S. Const., Amend. 5, 14; N.M. Const. Article II, § 18. The Supreme Court has held that the fairness and impartiality of the adjudicator are a Due Process right. *See, e.g., Marshall v. Jerrico, Inc*., 446 U.S. 238, 242-243 (1980); *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978); *Mathews v. Eldridge,* 424 U.S. 319, 344 (1976). The Due Process Clause is a matter of supreme federal law, binding on the WQCC and on this Court. U.S. Const. Art. VI Cl. 2.

An adjudicator must "observe the utmost fairness," striving to be "perfectly and completely independent, with nothing to influence or control him but God and his conscience." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1667 (2015) (quoting from *Address of John Marshall, in Proceedings and Debates of the*

Virginia State Convention of 1829-1830, p. 616 (1830)). *See also United States v. Manton*, 107 F.2d 834, 846 (2d Cir. 1938). An unbiased adjudicator:

> preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) *(quoting from Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

This Court has emphatically sustained the right to a fair and impartial tribunal in administrative adjudications. This Court also holds that fairness requires *not only* the absence of actual bias *but also* the appearance of impartiality—meaning the absence of any "indication of a possible temptation to a average man sitting as a judge to try the case with bias for or against any issue presented to him":

> At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. *See Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943). In addition, our system of justice requires that the appearance of complete fairness be present. *See Wall v. American Optometric Association, Inc.*, 379 F.Supp. 175 (N.D.Ga.1974), *aff'd*, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134 (1974). The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue

> presented to him. *See generally Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1974).
>
> These principles apply to administrative proceedings as well as to trials. *Matter of Protest of Miller, supra*. When government agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960). The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed. *National Labor Relations Board, supra*.

Reid v. New Mexico Bd. of Examiners of Optometry, 1979-NMSC-005, ¶¶ 7-8, 92 N.M. 414, 589 P.2d 198; s*ee also Lujan v. City of Santa Fe*, 89 F.Supp. 3d 1109, 1133, 1146-47 (D.N.M. 2015), discussing the objective test for bias stated in *City of Albuquerque v. Chavez*, 1997-NMCA-054, ¶ 18, 123 N.M., 428, 941 P.2d 509 ("A hearing officer should disqualify himself or herself for bias whenever a reasonable person would have serious doubts about whether the hearing officer could be fair.").

Since a Hearing Officer serves in a judicial role, the Court may look to the code of conduct for judicial officers. The Code of Judicial Conduct for New Mexico states:

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
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> *　　*　　*

> (2) The judge knows that the judge . . . is:
>
> *   *   *
>
> (a) a person who has more than a de minimis interest that could be substantially affected by the proceeding . . .

Rule 21-211 NMRA. The Code of Judicial Conduct also states:

> A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality, or if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

Rule 21-313(A) NMRA. An offer of employment, and employment itself, are plainly "more than a de minimis interest that could be substantially affected by the proceeding" and are "things of value," and here such interests were subject to being affected by the outcome of the proceeding and were ultimately conferred upon Ms. Anderson by a party, the DOE, through its component, NNSA. Rules 21-211 and 21-313(A) have been violated.

Disqualification follows when a decision-maker has a <u>possible temptation</u> to benefit by favoring one of the parties. The Supreme Court has stated that, on motion to disqualify, the only issue is whether the situation "would offer a possible temptation to the average judge to lead him [or her] not to hold the balance nice, clear, and true." *Aetna Life Insurance v. Lavoie*, 475 U.S. 813, 825 (1986).

Thus, a financial interest in the result disqualifies. "[N]o judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the

outcome.'" *Aetna Life Ins.,* 475 U.S. at 822 (*quoting from In re Murcheson*, 349 U.S. 133, 136 (1955) (Disqualification required when judge has pending claims similar to those ruled upon); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (Disqualification required where "the adjudicator has a pecuniary interest"); *Stivers v. Price*, 71 F.3d 732, 742 (9th Cir. 1995) (Pecuniary interest disqualifies); s*ee also Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (Even less than a direct or positive financial stake is disqualifying of both judges and administrative adjudicators); *Tumey v. Ohio*, 273 U.S. 510 (1927) (Judge disqualified where he receives costs of prosecution in event of conviction.); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (Judge disqualified where his office benefits from convictions.); s*ee also* K. DAVIS, ADMINISTRATIVE LAW TEXT § 12.04, p. 250 (1972) (stating that a financial stake need not be direct or positive; the prevailing view is that "most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.").

Counsel for DOE and Triad admitted on the record before the WQCC that Ms. Anderson had a temptation to be biased in this case. Exhibit 11, WQCC Tr. at 15 (April 9, 2019).

A decision-maker who seeks employment by a party plainly has a disqualifying financial interest. In *In re Al-Nashiri*, 2019 U.S. App. LEXIS 11067 (D.C. Cir. April 16, 2019), a military judge presided over a criminal case and,

without disclosing the fact, sought and obtained employment by the Justice Department, which was a party. The defendant learned of the judge's new position and petitioned for mandamus, seeking *vacatur* of all actions taken by the military judge from the beginning of his discussions of employment with the Justice Department. The Court of Appeals for the District of Columbia Circuit held that the judge had been disqualified.

In doing so, it confirmed that, first, disqualification is required by Due Process standards: "It is axiomatic, of course, that due process demands an unbiased adjudicator, and the Supreme Court has therefore identified several circumstances in which 'the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable'." *Al-Nashiri,* slip op. at 17. Second, other sources of law also call for disqualification, including the Model Code of Judicial Conduct: "These assembled sources of rules governing judicial conduct—including . . . the American Bar Association's Model Code of Judicial Conduct . . —all speak with one clear voice when it comes to judicial recusal: judges 'shall disqualify' themselves in any 'proceeding in which [their] impartiality might reasonably be questioned'." 28 U.S.C. § 455(a); Code of Conduct for United States Judges, Canon 3(C)(1); American Bar Association, Model Code of Judicial Conduct, Rule 2.11; Rule for Courts-Martial 902(a). *Al-Nashiri,* slip op.17-18.

Third, it specifically held that, when seeking employment by a party, a judge is conclusively disqualified from presiding:

> To begin with, it is beyond question that judges may not adjudicate cases involving their prospective employers. The risk, of course, is that an unscrupulous judge may be tempted to use favorable judicial decisions to improve his employment prospects—to get an application noticed, to secure an interview, and ultimately to receive an offer. And even in the case of a scrupulous judge with no intention of parlaying his judicial authority into a new job, the risk that he may *appear* to have done so remains unacceptably high. Simply put, 'a judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case.'

Al-Nashiri, slip op. at 19.

The *Al-Nashiri* court held that the duty to recuse arises immediately when contacts are made concerning employment:

> "[T]he Judicial Conference's Committee on Codes of Conduct has opined that "[a]fter the initiation of any discussions with a [potential employer], no matter how preliminary or tentative the exploration may be, the judge must recuse . . . on any matter in which the [prospective employer] appears." Judicial Conference of the United States Committee on Codes of Conduct, Advisory Opinion No. 84: Pursuit of Post-Judicial Employment (April 2016), *in Guide to Judiciary Policy*, vol. 2, pt. B, at 125, 125 (2019).

Al Nashiri, slip op. at 19. Thus, Ms. Anderson was immediately disqualified when she and NNSA initiated discussions about her possible employment.

B. Proof Of Biased Decision-Making Is Not Required.

Ms. Anderson's discussions with NNSA and DOE establish that she was legally biased when she made decisions in DP-1132. There is no need, and no

occasion, to search the record for evidence of actually biased decision-making. *See City of Albuquerque v. Chavez*, 1997-NMCA-054, ¶ 18, 123 N.M. 428, 941 P.2d 509 ("We do not agree with Chavez that a party must show actual bias."). The Supreme Court has observed that the record rarely discloses a judge's motivation for a decision, and it is useless to search for signs of actual bias:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief.

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883 (2009). Instead, Due Process requires that courts apply an "objective standard" in establishing disqualifying bias:

> In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See *Tumey*, 273 U.S., at 532, 47 S. Ct. 437, 71 L. Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236; *Mayberry*, *supra*, at 465-466, 91 S. Ct. 499, 27 L. Ed. 2d 532; *Lavoie*, 475 U. S., at 825, 106 S. Ct. 1580, 89 L. Ed. 2d 823. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712.

Caperton, 556 U.S. at 883-84. Thus, "[t]he failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." (*id.* 886). For there is no process whereby the WQCC or any court can review the record and determine whether Ms. Anderson's decisions were biased, and the Due Process clause does not allow such a pointless review but, instead, depends upon a showing of a personal interest, which is clearly present here. The WQCC's June 5, 2019 Order (Exhibit 13, at ¶ 7) asserts the need for proof of actual improper influence, but the Supreme Court and this Court have rejected that contention. The WQCC does not understand the law or chooses not to follow it. Its decision must be vacated.

By following the objective standard, the constitutional and legal rules for disqualification ensure the appearance of impartiality as much as actual impartiality, therefore protecting public confidence in decision-making:

> It is, of course, entirely possible that Spath's orders were the product of his considered and unbiased judgment, unmotivated by any improper considerations. But that is beside the point: "[a]ppearance may be all there is, but that is enough." *Microsoft Corp.*, 253 F.3d at 115. As the Supreme Court has explained, '[t]he problem . . . is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.' *Liljeberg*, 486 U.S. at 864-65. Spath's job application, therefore, cast an intolerable cloud of partiality over his subsequent judicial conduct. Al-Nashiri thus has a clear and indisputable right to relief.

Al-Nashiri, slip op. at 23-24. The idea that Ms. Anderson, presiding in this case, could apply for a job working for DOE, and, simultaneously, draft her

recommended decision in this case <u>without</u> any concern for how DOE might react to it—is preposterous. In this regard, the D.C. Circuit said:

> The challenge [the judge] faced, then, was to treat the Justice Department with neutral disinterest in his courtroom while communicating significant personal interest in his job application. Any person, judge or not, could be forgiven for struggling to navigate such a sensitive situation. And that is precisely why judges are forbidden from even trying.

Id. at 22. Erin Anderson tried anyway. It was a huge mistake—one that the Commission was obligated to undo. The Commission failed in its duty, and it falls to this Court to do justice. The now-public spectacle of a NMED Hearing Officer, secretly discussing employment with a party before her, and accepting such employment three weeks after rendering a decision favorable to that party, followed by the WQCC's rejection of another party's protests of such misconduct, will, and should, cause the public legitimately to question the impartiality of the State's administrative processes. Disqualification is required.

C. *Vacatur* of the Disqualified Hearing Officer's Orders is Required.

Ms. Anderson's disqualification requires the *vacatur* of her orders and of the decision of the NMED Secretary, which adopted Ms. Anderson's final report. If a judge "should have been recused from the . . . proceedings, then any work produced" by that judge "must also be 'recused'—that is, suppressed." *In re Brooks*, 383 F.3d 1036, 1044 (D.C. Cir. 2004). Thus, in *In re Al-Nashiri*, the disqualified judge had made many oral rulings and "issued approximately 460

written orders." *Al-Nashiri,* slip op. at 25. The court stated:

> Requiring Al-Nashiri to proceed under the long shadow of all those orders, even if enforced by a new, impartial military judge, would inflict an irreparable injury unfixable on direct review. Al-Nashiri thus has no adequate remedy for Spath's conduct other than to scrub Spath's orders from the case at the earliest opportunity.

Id. Relief also required vacatur of any orders reviewing rulings of the recused judge:

> Additionally, because "ordinary appellate review" on the merits cannot "detect all of the ways that bias can influence a proceeding," *Al-Nashiri I*, 791 F.3d at 79, we shall vacate any CMCR orders that reviewed now-vacated Spath orders, including the CMCR's October 11, 2018, opinion affirming Spath's rulings regarding Al-Nashiri's defense counsel.

Id. at 29. Thus, the Secretary's order adopting Erin Anderson's recommendation must itself be vacated.

The WQCC's June 5, 2019 order implies that the Secretary's order might somehow be sustained as though untainted by the Hearing Officer's corruption. But the Secretary's order adopts everything that the Hearing Officer said, *verbatim,* obviously relying on her supposed integrity and not knowing of her dishonesty. Any claim that the Secretary's order could be reviewed independently, without considering the Hearing Officer's invalid decision *on which it relies,* is refuted by the record.

Further, it was long ago held that the availability of *de novo* reconsideration of a decision by a corrupt official does nothing to purge the constitutional

violation: "Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance." *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972).

D. Relief May Not Be Delayed, As It Causes Irreparable Injury To Compel A Party To Complete Corrupted Proceedings.

Judicial action may not await appellate review, because parties would be irreparably injured by further proceedings, when the proceeding has been corrupted because the decision-maker was disqualified. The D.C. Circuit said:

> While "[t]he ordinary route to relief . . . is to appeal from [a] final judgment, . . . [w]hen the relief sought is recusal of a disqualified judicial officer, . . . the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable. *Cobell v. Norton*, 334 F.3d 1128, 1139, 357 U.S. App. D.C. 306 (D.C. Cir. 2003). After judgment, no amount of appellate review can remove completely the stain of judicial bias, both 'because it is too difficult to detect all of the ways that bias can influence a proceeding' and because public 'confidence . . . is irreparably dampened once 'a case is allowed to proceed before a judge who appears to be tainted.'" *Al-Nashiri I*, 791 F.3d [71], 79 [D.C. Cir. 2015](*quoting In re School Asbestos Litigation*, 977 F.2d 764, 776 (3d Cir. 1992), *as amended* (Oct. 23, 1992)).

Al-Nashiri, slip op. at 24-25. In other words, the violation is unfixable by appellate review. All the orders by the disqualified judge, and orders that were based on his or her orders, must be vacated promptly.

CCW requests that remedy here. To be sure, there has been a waste of time and effort. But it would be an even bigger waste of resources, and perpetuate a

Due Process violation, to proceed before the WQCC to review the permit, when it is known that the proceeding was corrupted, so that it can never be fixed by reviewing it, and must ultimately be overturned.

E. Denial of an Impartial Tribunal Calls for Mandamus Relief.

Mandamus is available in New Mexico to require a state commission to protect a clear legal right:

> At the request of a person beneficially interested, mandamus lies to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law. NMSA 1978, §§ 44-2-4, -5. The act to be compelled must be ministerial, that is, an act or thing which the public official is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 89 N.M. 313, 316-17, 551 P.2d 1360, 1363-64 (1976). Mandamus is the proper remedy where the public official refuses or delays to act, and it will compel action if the law requires the official to act one way or another. *Id.* at 317, 551 P.2d at 1364.

Lovato v. City of Albuquerque, 1987-NMSC-086, ¶6, 106 N.M. 287, 289, 742 P.2d 499, 501. *See also: New Mexico Building & Construction Trades Council v. Dean,* 353 P.3d 1212, 1215, 2015 N.M. Lexis 158 (2015); *State ex rel. King v. Lyons,* 2011-NMSC-004, ¶ 21, 149 N.M. 330, 248 P.3d 878; *Cook v. Smith*, 1992-NMSC-041, 114 N.M. 41, 834 P.2d 418; *State ex rel. Four Corners Exploration Co. v. Walker*, 1956-NMSC-010, ¶ 7, 60 N.M. 459, 292 P.2s 329.

When an issue of public importance is raised, and an early decision is necessary, this Court will take jurisdiction of an original petition for mandamus in accordance with its constitutional authority.[1] *See: State ex rel. League of Women Voters v. Herrera,* 2009-NMSC-003, ¶¶ 11-13, 145 N.M. 563, 203 P.3d 94; *State ex rel. Sandel v. New Mexico Public Utility Commission*, 1999-NMSC-019, ¶ 11,127 N.M. 272, 980 P.2d 55.

Specifically, denial of an impartial tribunal impels the Court to take jurisdiction of an original mandamus petition:

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[1] As this Court has stated in *State ex rel. Clark v. Johnson*:

> Our state Constitution provides that this Court will "have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions." N.M. Const. art. VI, § 3. In seeming contradiction, NMSA 1978, Section 44-2-3 conveys upon the district court "exclusive original jurisdiction in all cases of mandamus." However, as one scholarly commentary has noted, this apparent conflict:
>
> > has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction . . . [and SCRA 12-504(B)(1)(b)] has given force and effect to the policy behind the statute, by requiring that an original petition which could have been brought in a lower court must set forth "the circumstances necessary or proper to seek the writ in the supreme court."
>
> DuMars & Browde, *supra,* at 157 (quoting the predecessor to SCRA 1986, 12-504) (footnotes omitted). Such "circumstances" which justify bringing an original mandamus proceeding in this Court include "the possible inadequacy of other remedies and the necessity of an early decision on this question of great public importance." *Thompson v. Legislative Audit Comm'n,* 79 N.M. 693, 694-95, 448 P.2d 799, 800-01 (1968).

State ex rel. Clark v. Johnson, 1995-NMSC-048, ¶16, 120 N.M. 562, 569.

> The constitutional right to a fair and impartial tribunal is critical to the fair administration of justice and a litigant must be afforded the right to excuse a judge for cause. *Beall v. Reidy,* 1969-NMSC-092, ¶ 9, 80 N.M. 444, 457 P.2d 376 ("[A] prejudiced or biased judge who tries a case would deprive the party adversely affected of due process of law."); *Los Chavez Cmty. Ass'n v. Valencia Cnty.,* 2012-NMCA-044, ¶ 21, 277 P.3d 475 ("The purpose of [Article VI, Section 18] is based on due process considerations—to secure to litigants a fair and impartial trial by an impartial and unbiased tribunal." (internal quotation marks and citation omitted).

Quality Auto. Ctr., LLC v. Arrieta, 2013-NMSC-041, ¶ 31, 309 P.3d 80, 87, 2013 N.M. LEXIS 290, ¶ 31-32,. *See also: In re Eastburn*, 1996-NMSC-011, ¶ 12, 121 N.M. 531, 914 P.2d 1028.

The D.C. Circuit in *Al-Nashiri* issued mandamus, determining that

> mandamus provides "an appropriate vehicle for seeking recusal of a judicial officer during the pendency of a case, as 'ordinary appellate review' following a final judgment is 'insufficient' to" remove the insidious taint of judicial bias." [*In re Mohammed*], 866 F.3d 473, 475 (D.C. Cir. 2017) (*quoting Al-Nashiri I*, 791 F.3d [71] at 79).

Al-Nashiri slip op. at 16. *See also: Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 860 (1988). Relief cannot wait for an appeal:

> The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

Berger v. United States, 255 U.S. 22, 36 (1921). See also *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003)(As for "seeking the recusal of a judicial officer

by petition for a writ of mandamus, every circuit to have addressed the issue has found it proper.").

F. A Peremptory Writ Of Mandamus Should Issue.

A peremptory writ of mandamus is called for when no valid excuse can be given for failure to perform an act. *State ex rel. State Highway Commission v. Quesenberry*, 1964-NMSC-043, ¶ 5, 74 N.M. 30, 390 P.2d 273. Here, the Petitioner moved the WQCC to vacate the decisions made by the disqualified Hearing Officer, and decisions predicated upon those unlawful decisions. In open meeting on April 9, 2019, the WQCC voted to deny Petitioner's Motion to Vacate. In a second meeting on May 14, 2019, the WQCC voted down a motion to reconsider. Its order, June 5, 2019, denies relief on the invalid theory that CCW must prove that the Hearing Officer was actually motivated to rule by her interest in prospective employment and, in addition, that the Secretary's order was improperly influenced. The WQCC's ruling sustains a denial of Due Process and the violation of the ethical standards contained in the New Mexico Rules. The WQCC's improper action demands this Court's intervention by issuance of a writ of mandamus.

IV. CONCLUSION AND REQUESTED RELIEF.

This matter possesses great public significance. Public confidence in the fairness and impartiality of New Mexico's administrative agencies should not be

sacrificed to the interests of decision-makers who seek out and obtain financial rewards from parties appearing before them. The NMED decision that is before the WQCC on review is corrupt and may not stand. This matter must be remanded so that NMED—the agency that gave rise to this invalid decision—may eliminate the corruption and deal with the permit application in a lawful manner.

Respectfully submitted:

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VERIFICATION

STATE OF NEW MEXICO
COUNTY OF SANTA FE, ss.)

Joni Arends, Executive Director, Concerned Citizens for Nuclear Safety, a member of Petitioner Communities for Clean Water, being first duly sworn, deposes and states upon oath that all representations in the foregoing Verified Petition for Peremptory Writ of Mandamus, are true as far as she knows or is informed and that the Verified Petition is true, accurate and complete to the best of her personal knowledge and belief.

____
Joni Arends

SUBSCRIBED AND SWORN TO before me this 6th day of June, 2019, by Joni Arends