

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, NEW MEXICO
COUNCIL 18, AFL-CIO,

and

ANDREW GILMORE,

Complainants,

v.

PELRB No. 105-16

LUNA COUNTY,

Respondent.

**ORDER DENYING MOTION TO
DISQUALIFY BOARD CHAIR DUFF WESTBROOK**

THIS MATTER came before the Public Employee Labor Relations Board (“Board”) at a special meeting on April 1, 2016, to consider Luna County’s *Motion to Disqualify Thomas Griego and Board Chair Duff Westbrook* (“Motion”), filed on March 31, 2016. Counsel for both AFSCME and Luna County were present at the Board’s April 1, 2016 meeting and briefly addressed the Motion. The Board finds as follows:

There is a “presumption of honesty and integrity in those serving as [administrative] adjudicators.” *Jones v. New Mexico State Racing Comm’n*, 1983-NMSC-089, ¶ 13, 100 N.M. 434, 671 P.2d 1145 (citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464 (1975) (internal quotation marks omitted)). “The burden of overcoming the presumption of impartiality rests on the party making the assertion [of bias.]” *Am. Fed’n of State v. Bd. of Cty. Comm’rs of Bernalillo Cty.*, 2015-NMCA-070, ¶ 10, 352 P.3d 682, cert. granted sub nom. *AFSCME Council 18 v.*

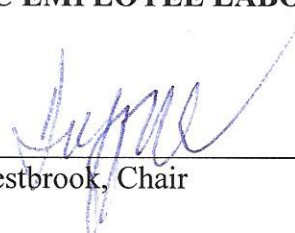
Bernalillo Cty. Comm. (N.M. June 19, 2015) (internal quotation marks and citation omitted)). An allegation of prejudice or bias “must be evident from the record and cannot be based on speculation or inference.” *Id.* ¶ 10 (internal quotation marks and citation omitted). Any assertion that the undersigned cannot be fair and impartial simply because of prior involvement in lawsuits against Luna County – none of which concerned a labor dispute – is speculative and is insufficient to warrant disqualification. The undersigned affirms that he can be a fair and impartial adjudicator and specifically affirms that he neither has personal knowledge about the facts or circumstances of the present case nor a personal interest in the outcome of the matter.

For these reasons, the Board finds the Motion is not well taken and should not be granted. Therefore, by a unanimous vote of 3-0, the Board hereby orders as follows:

IT IS HEREBY ORDERED that the Luna County’s Motion to Disqualify Board Chair Duff Westbrook is **DENIED**.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Date: 4-11-16



Duff Westbrook, Chair

STATE OF NEW MEXICO
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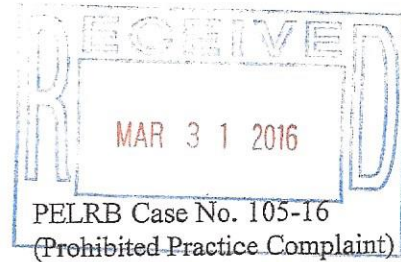
ANDREW GILMORE,

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Respondent.



03-31-16P:4:51 RCVD

**MOTION TO DISQUALIFY THOMAS GRIEGO
AND BOARD CHAIR DUFF WESTBROOK**

COMES NOW, Respondent, Jonlyn M. Martinez, and hereby moves this Board for an Order disqualifying Thomas Griego and Board Chair Duff Westbrook from participating in this matter. As grounds for this Motion, the Respondent states the following:

1. On March 9, 2016, the Notice scheduling the presentation of the Complainant's Request for Pre-Adjudication Injunctive Relief was sent to the Luna County Manager and the representative for the Complainant.
2. The Notice was not sent to counsel for the Respondent, despite the fact that the Complainant's Prohibited Practice Complaint lists the undersigned as counsel for Respondent in the body of the Complaint.
3. By way of explanation for the failure to provide the Notice to counsel for the Respondent the Executive Director stated:

PELRB 105-16 is a new filing and it would not have been proper for me to assume that because you represented the County in an earlier proceeding that you represent them in this one as well.

See email from Executive Director dated March 21, 2016, attached hereto as Exhibit A. This contention is interesting in that it required the Executive Director to elect not to send the undersigned the appropriate notice despite the fact that the Complaint at issue specifically listed her as counsel for the Respondent.

4. Counsel for the Respondent did not learn of the hearing in this matter scheduled for March 25, 2016, until March 21, 2016. *See email to Executive Director dated March 21, 2016*, attached hereto as Exhibit A.

5. On March 21, 2016, counsel for the Respondent informed the Executive Director that she could not attend the scheduled hearing because March 25, 2016, is in fact Good Friday. *Id.* Counsel for the Respondent asked whether a formal motion to vacate the proceeding would be required. *Id.* In addition, the Luna County Commission has closed Luna County for business on March 25, 2016.

6. In response to this correspondence, the Executive Director stated the following:

The request for a prehearing injunction is of an emergent nature that must be heard immediately. The earliest convenient time for the Board to do that is at its next meeting, this Friday. If it is not heard then, it cannot be heard until next month. Please note that pursuant to our rules I have requested that the County abate the disciplinary proceeding pending resolution of the PPC, which would render the injunction unnecessary in my opinion, but so far, it has not agreed to do so. You may appear via telephone, if that will help; otherwise I can only suggest that you formally move the Board to postpone hearing the request for injunction and I will present your motion at the March 25 Board meeting. Please let me know how you prefer to proceed.

Id.

7. Based on this statement, Mr. Griego sought to force the County of Luna to take his suggested course of conduct due to its counsel's unavailability.

8. Next, counsel for the Respondent requested a religious accommodation with regard to the hearing scheduled for March 25, 2016. *Id.*

9. In a response sent by email on March 23, 2016, at 4:16, Mr. Griego stated as follows:

My request for the County's disciplinary proceedings to be held in abeyance has nothing to do with your availability or unavailability. That request is made, as stated in my letter of March 10, 2016, pursuant to NMAC 11.21.3.21 and would have been made in any case. Good Friday is not a State or Federal Holiday and as you say you are a practicing Catholic, as am I, you surely know that the appropriate period of time to observe silence at home, for devotional reading and private prayer is between the hours of noon and 3 o'clock in the afternoon. Any personal devotion you may have beyond that is just that – personal devotion for which I do not believe I must make an accommodation. That said, unavailable is unavailable and I do not wish to prejudice your client's position by compelling the County to attend a hearing without benefit of counsel since you are so adamant that you will not attend, even by telephone. Accordingly, I will inform the Board at the meeting this Friday of the circumstances and have instead scheduled a Special Board Meeting for the sole purpose of hearing the union's request for pre-adjudication injunction for 9:30 a.m. on Friday, April 1, 2016 so that the matter will not be heard on the 25th as you requested. Please understand that I am scheduling this Special Board meeting on April 1st because of your unavailability on March 25th regardless of the reason and not because I recognize any obligation to make a religious accommodation.

Thomas J. Griego
Executive Director, PELRB

Thus, Mr. Griego refused the request for a reasonable request for a religious accommodation and provided unsolicited advice on how to practice the Catholic faith.

Notably, the website for the New Mexico Public Employee Labor Relations Board indicates that "The Labor Relations board offices will be closed from 12:00 pm - 5:00 pm on Friday, March 25, 2016." Moreover, Mr. Griego referred to his letter of March 10, 2016, correspondence which he knew he failed to provide counsel for the Respondent.

10. Based on the foregoing, Mr. Griego has intentionally failed to provide the

undersigned with relevant notices and correspondence that he sent directly to the Respondent. In addition, Mr. Griego failed to grant a reasonable request for a religious accommodation in violation of the New Mexico Human Rights Act, NMSA 1978, § 28-1-1 et seq. Based on Mr. Griego's conduct and statements, he has demonstrated a bias against the undersigned. Therefore, both the undersigned and the Respondent as that he be prohibited from participating in any matter concerning the undersigned or the Respondent.

11. In addition, Board Chair, Duff Westbrook, has brought multiple lawsuits against Respondent Luna County which did not terminate in his favor. *See Complaint brought by Sanders and Westbrook on behalf of Bostwick and Borde*, attached hereto as Exhibit B, *Decision of Tenth Circuit Court of Appeals in Bostwick and Borde*, attached hereto as Exhibit C, *Pretrial Order in Kretek v. Board of County Commissioners of Luna County*, attached hereto as Exhibit D, and *Jury Verdict*, attached hereto as Exhibit E. Further, Mr. Westbrook has personally deposed the Complainant, Andrew Gilmore. *See cover page of 30(b)(6) Deposition of Luna County Detention Center, Andrew Gilmore*, attached hereto as Exhibit F.

12. New Mexico law provides that the during the term for which he is appointed, a board member shall not hold or seek any other political office or public employment or be an employee of a labor organization or an organization representing public employees or public employers. NMSA, 1978 § 10-7E-8 (C). Mr. Westbrook has been a member of the Board since 2005. However, during that time he has been the owner of an organization which has represented public employees.

POINTS AND AUTHORITIES

The United States Supreme Court has interpreted the Establishment Clause to allow, and sometimes to require, the accommodation of religious practices: "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987). Moreover, "in commanding neutrality the Religious Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705, 114 S. Ct. 2481, 129 L. Ed. 2d 546 (1994). Moreover, the Religious Freedom Restoration Act provides that governments should not substantially burden religious exercise without compelling justification. *See* 42 U.S.C. § 2000bb. No showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Sherbert v. Verner*, 374 U.S. 398, 406-07, 83 S. Ct. 1790, 1795 (1963), *quoting Thomas v. Collins*, 323 U.S. 516, 530 (1944). In the present case, the notice of the hearing was sent on March 9, 2016. The hearing was scheduled for March 25, 2016, sixteen days later. The Executive Director argued that the hearing cannot be rescheduled because the "request for a prehearing injunction is of an emergent nature that must be heard immediately. The earliest convenient time for the Board to do that is at its next meeting, this Friday. If it is not heard then, it cannot be heard until next month." Waiting sixteen days to conduct the hearing can hardly be considered "immediately."

Moreover, the Board's convenience cannot be considered a compelling justification to substantially burden religious exercise. Delaying the hearing a few days and holding it at the next opportunity the Board is available was a reasonable request under the circumstances.

In a similar case, *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 233, 13 A.3d 1227, 1229 (2011), the plaintiff, an Orthodox Jew, sought a continuance or suspension of his trial because a 2-day Jewish holiday fell during the scheduled 10-day trial. *Id.* The plaintiff's religion barred him and his attorney from conducting business on those two days. *Id.* The trial court denied the plaintiff's motions, and, as a result, the plaintiff and his counsel were absent for two days of the trial. *Id.* The appellate court found that the trial court abused its discretion in denying the plaintiff's requests. *Id.* It was determined that the trial court's articulated rationales failed to reasonably accommodate the plaintiff's right to engage in religious conduct and to meaningfully participate in his trial. *Id.* Instead of granting the request, Mr. Griego rescheduled the hearing for April 1, 2016, and then inappropriately took it upon himself to provide unsolicited advice on how to practice the Catholic faith. This conduct violates both federal law and the New Mexico Human Rights Act.

The Respondent seeks the disqualification of both Mr. Griego and Chairman Westbrook in this matter. Such a request is most analogous to a request that a judge recuse herself from presiding over a case. Appellate Courts review the denial of a motion to recuse for an abuse of discretion. *State v. Ruiz*, 2007 NMCA 14, P 13, 141 N.M. 53, 150 P.3d 1003 (filed 2006); *State v. Cherryhomes*, 114 N.M. 495, 500, 840 P.2d 1261, 1266 (Ct. App. 1992). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless

we can characterize it as clearly untenable or not justified by reason." *State v. Rojo*, 1999 NMSC 1, P 41, 126 N.M. 438, 971 P.2d 829 (filed 1998) (internal quotation marks and citation omitted). "In determining whether an objective observer would conclude that a judge's impartiality was questionable, an appellate court should look to see how the judge arrived at the decision not to recuse and then should review the judge's actions for bias." *State v. Riordan*, 2009 NMSC 22, P 11, 146 N.M. 281, 209 P.3d 773. When there is no objective evidence of bias on the part of the court, it is proper for the court to remain on the case. *Id.* The issue of whether a judge is required to recuse for an appearance of impropriety after being threatened by a defendant is "whether an objective, disinterested observer, fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal." *State v. Riordan*, 2009-NMSC-022, P11, 146 N.M. 281, 209 P.3d. 773 (internal quotation marks and citations omitted).

A claim of bias, including a claim of an appearance of bias, cannot be based on mere speculation. *See United Nuclear Corp. v. Gen. Atomic Co.*, 96 N.M. 155, 246-48, n.156, 629 P.2d 231, 322-24, n.156 (1980) (rejecting speculative claims of bias as insufficient to warrant disqualification of a judge under Article VI, Section 18 of the New Mexico Constitution and Rule 21-300 NMRA (formerly Canon 3©)(1) of the Code of Judicial Conduct)). "Voluntary recusal is reserved for compelling constitutional, statutory, or ethical reasons because a judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." *State v. Hernandez*, 115 N.M. 6, 20, 846 P.2d 312, 326 (1993) (alteration omitted) (emphasis added) (internal quotation marks and citation omitted); see also Rule 21-300(B)(1) ("A judge shall hear and decide matters assigned to the judge except those in which disqualification is required."). As set forth above, Mr. Griego has already engaged in inappropriate behavior

directed at the Respondent and their counsel. In addition, Chairman Westbrook has been involved in unsuccessful lawsuits against the Respondent and has actually deposed the Complainant. Therefore, the appearance of bias cannot be overcome. Thus, disqualification is required. Moreover, NMSA, 1978 § 10-7E-8 (C) appears to mandate Chairman Westbrook's disqualification herein.

CONCLUSION

Based on the foregoing, the Respondent requests that Mr. Griego and Chairman Westbrook be disqualified from participating in this matter and any matters in which the Respondent is a party. In addition, Mr. Griego should be disqualified from presiding over any matter involving the undersigned.

Respectfully submitted,

LAW OFFICE OF JONLYN M. MARTINEZ, LLC

By 

JONLYN M. MARTINEZ

Attorneys for Respondent

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I certify that a copy of the foregoing was sent electronically to all counsel of record on March 31, 2016:

