BEFORE THE PUBLIC EMPLOYEE
LABOR RELATIONS BOARD

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

Petitioner,

vs.

03-PELRB-2009

PELRB Case No. 149-08

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

ORDER DENYING MOTION TO DISQUALIFY

THIS MATTER having come before the Public Employee Labor Relations Board upon the motion of Respondent to disqualify hearing examiner Pilar Vaile, and the Board, having heard argument on the motion by the parties and being otherwise fully advised;

IT IS HEREBY ORDERED that the motion to disqualify be and hereby is denied.

MARTÍN V. DOMÍNGUEZ
Chairman
Public Employee Labor Relations Board

Date: 04/06/09

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

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

Petitioner,

vs. **PELRB Case Number 149-08**

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

MOTION TO DISQUALIFY HEARING EXAMINER

COMES NOW the New Mexico Corrections Department (Respondent), through its counsel of record, K. Janelle Haught, and pursuant to NMAC 11.21.1.14 (2004) and states the following as the Respondent's Motion to Disqualify Hearing Examiner:

1. This matter was filed with the Public Relations Employees Board.
2. Should this matter be assigned to Hearing Examiner Pilar Vaile, the Respondent respectfully requests that she be disqualified to hear this matter.
3. Previously, in PELRB Case Number 150-07, the Hearing Examiner, Pilar Vaile, engaged in behavior that "a reasonable person would perceive as bias." See *City of Albuquerque v. Chavez*, ¶15, 123 N.M. 428, 941 P.2d 509 (holding that public entity has a right to a hearing examiner who meets an "objective appearance of fairness"

test). In *City of Albuquerque v. Chavez*, ¶15, 123 N.M. 428, 941 P.2d 509 (Ct. App. 1997) the New Mexico Court of Appeals "clarified when a hearing officer should disqualify himself or herself." See also *Motion to Disqualify Hearing Examiner* in PELRB Case Number 150-07 attached hereto as Exhibit A and incorporated herein (setting out facts showing objective appearance of bias against NMCD in that case).

4. NMCD alleges that this is a situation "where a reasonable person would have serious doubts about whether the hearing officer could be fair" and therefore "it is inappropriate for the Hearing Examiner to hear"[1] this case.

WHEREFORE, Respondent respectfully requests that the Hearing Examiner disqualify herself or be removed from this case by the board.

Respectfully submitted,

OFFICE OF GENERAL COUNSEL
NEW MEXICO CORRECTIONS DEPT.

K Janelle Haught
Deputy General Counsel
NMCD
PO Box 27116
Santa Fe, NM 87502-0116
(505) 827-8560

[1] *City of Albuquerque v. Chavez*, ¶15, 123 N.M. 428, 941 P.2d 509 (Ct. App. 1997).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy foregoing pleading was mailed to:

Petitioner, Rob Trombley,
AFSCME, 1202 Pennsylvania
NE, Albuquerque NM 87110,
on this 14th day of January, 2009.

K. Janelle Haught

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR REALTIONS BOARD

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

Complainant,

vs. PELRB Case Number 150-07

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

MOTION TO DISQUALIFY HEARING EXAMINER

COMES NOW the New Mexico Corrections Department (Respondent), through its counsel of record, K. Janelle Haught, pursuant to NMAC 11.21.1.14 (2004) and states the following as the Respondent's Motion to Disqualify Hearing Examiner:

1. This matter was originally heard on the merits on December 3rd and 4th, 2007.
2. Per the Hearing Examiner, the issue to be decided was whether "Mr. Fernandez [acted] in his capacity of a union steward or not." (Transcript of Proceedings 6:24 –25, December 3, 2007).
3. During the Complainant's oral closing argument at the hearing on the merits, the Hearing Examiner stopped Complainant's counsel and asked him questions. She noted: "I know it's not normal to – I know that normally I only ask questions of counsel during something like a motion to dismiss and when we're dealing with legal issues. But I want to hear your – how you would argue this." (Transcript of Proceedings 257:13 – 18, December 4, 2007).

Through asking questions during the Complainant's oral closing arguments, the Hearing Examiner assisted Complainant's counsel in crafting his arguments.

4. The Hearing Examiner issued a Report on the matter on February 6, 2008. In her Report the Hearing Examiner determined two issues: 1. whether Mr. Fernandez acted in his capacity of a union steward or not.; and, 2. whether the "Department violated the CBA/interfered with Sergeant Fernandez' performance of union business by failing or refusing to provide or allow a face-to-face meeting between Warden Moya and Sergeant Fernandez, attendant to directing an employee to pick up the Warden's response on a Step 2 grievance concerning that employee."

5. The Complainant failed to allege the second issue in the complaint it filed in the PPC. Per the Petitioner's Complaint, Enrique Fernandez alleges he was to attend an oral response regarding a contemplated action (as opposed to a face to face meeting regarding a grievance).

6. Nonetheless, the Hearing Examiner made a determination regarding an issue, which was not presented to the Board and in which there is no testimony or evidence to substantiate.

7. On April 25, 2008, the Respondent's Notice of Appeal and request for oral arguments were heard by the PERLB.

8. During the Respondent's oral arguments before the PELRB, the Hearing Examiner interrupted counsel for the Respondent, although the Hearing Examiner was not a party to the proceeding. The Hearing Examiner did not

interrupt counsel for the Complainant. See Affidavit of Sandy Martinez, attached hereto and marked as Exhibit 1.

9. After the oral arguments when the Board stated it was remanding the case, the Hearing Examiner again interrupted counsel for the Respondent when she was speaking to the Board. See Exhibit 1.

10. The Board remanded the case back to the Hearing Examiner to hear evidence on six issues. As of the date of this filing, the Board had not issued a written Order regarding the Remand.

11. Following the PERLB's oral order remanding the case to the Hearing Examiner, Sandy J. Martinez, a member of the audience, overheard the Hearing Examiner assure to counsel for the Complainant and Sam Chavez, AFSCME Council 18 Staff, that she would "get this case done quickly" or words to that effect. Counsel for Respondent was not included in the conversation. See Exhibit 1.

12. Nonetheless, on April 29, 2008, the Hearing Examiner issued subpoenas. The Hearing Examiner also set this matter for a Hearing on the remand on May 21, 2008.

13. The subpoenas issued by the Hearing Examiner on the remand were clearly not properly served and there was apparently no attempt to do so, giving the appearance the subpoenas were issued to harass Respondent.

14. The subpoenas issued by the Hearing Examiner were issued prior to the Board issuing a written Order regarding the remand.

15. Additionally, it appears the Hearing Examiner is attempting to try this PPC herself by issuing subpoenas, when it is the role of the Complainant and Respondent to determine whom they will call as witness and what evidence to present.

16. The Hearing Examiner has unabashedly demonstrated a cumulative bias in favor of the Complainant, based on paragraphs 2 through 15, above. As a result, the Hearing Examiner cannot fairly or impartially consider the issues in the remand.

WHEREFORE, Respondent respectfully requests that the Hearing Examiner be removed from this case.

Respectfully submitted,

OFFICE OF GENERAL COUNSEL
NEW MEXICO CORRECTIONS DEPT.

/s/

K Janelle Haught
Deputy General Counsel
NMCD
PO Box 27116
Santa Fe, NM 87502-0116
(505) 827-8560

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy foregoing pleading was faxed/mailed to opposing counsel:

Shane Youtz, Esq. /Brandt Milstein, Esq., 900 Gold Ave. SW, Albuquerque NM 87110

And

Robert P. Tinnin, Jr., 500 Marquette NW, Albuquerque NM 87102, on this 2nd day of May, 2008

/s/

K. Janelle Haught

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR REALTIONS BOARD

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

Petitioner,

vs. PELRB Case Number 150-07

NEW MEXICO CORRECTIONS DEPARTMENT,

Respondent.

AFFIDAVIT OF SANDY MARTINEZ

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

I, Sandy Martinez, being first duly sworn under oath, states the following:

1. My name is Sandy J. Martinez.
2. I am the Labor Relations Manager with the State Personnel Office.
3. I have served in this capacity since September 2006.
4. I attended the aforementioned PPC, which was heard on December 3rd and 4th, 2007.
5. On April 25th, 2008, I attended the Public Employer Labor Relations Board, in which the Notice of Appeal and request for Oral arguments were to be heard.
6. During the Respondent's oral arguments, the Hearing Examiner interrupted counsel for the Respondent. The Hearing Examiner did not interrupt counsel for the Petitioner.

STATE'S EXHIBIT
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7. After the oral arguments when the Board stated it was remanding the case, the Hearing Examiner interrupted counsel for the Respondent when she was speaking to the Board.
8. Immediately after the case was remanded by the Board, I overheard something to the effect that Ms. Vail informed both Mr. Youtz, Council for AFSCME Council 18 and Mr. Chavez, AFSCME Council 18 Staff, that she would "get this case done quickly" or words to that effect. Counsel for Respondent was not included in the conversation.
9. FURTHER AFFIANT SAYETH NAUGHT.

Sandy Martinez
Labor Relations Manager, SPO

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 1 day of May, 2008, by Sandy Martinez.

S.A. Zamora
Notary Public

My commission expires:
Oct 17, 2011