

**BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA**

IN THE MATTER OF DETERMINING THE)
MAXIMUM ANNUAL YIELD FOR THE)
ARBUCKLE-SIMPSON GROUNDWATER BASIN)

**STAFF’S RECOMMENDED
ORDER DENYING MOTION**

On November 8, 2012, the Oklahoma Farm Bureau Legal Foundation, Oklahoma Aggregates Association, Environmental Federation of Oklahoma, TXI and the Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. (collectively referred to the Protestants) filed a Motion to Recuse/Disqualify Hearing Examiner and to Stay Proceeding and Brief in Support (hereinafter the Motion to Recuse). On November 26, 2012, the Citizens for the Protection of the Arbuckle-Simpson Aquifer (CPASA) and numerous individuals filed a response in opposition to the Motion to Recuse (hereinafter the CPASA Response).

Title 75 O.S. § 316 provides in pertinent part:

...Any party may request the disqualification of a hearing examiner or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined promptly by the administrative head [defined in 75 O.S. § 250.3(1) as “an official or agency body responsible pursuant to law for issuing final agency orders”] of the agency....

Applying § 316 in these circumstances leads to the result that the Oklahoma Water Resources Board (OWRB) itself must decide the Motion to Recuse.

The OWRB has considered the Motion to Recuse and the CPASA Response, and has heard arguments from the Protestants and CPASA. For the reasons that follow, the OWRB now decides that the Motion to Recuse shall be and is denied.

In their Motion to Recuse, Protestants contend that the assigned Hearing Examiner must recuse herself because she communicated with staff and counsel of the OWRB following the hearing to determine the maximum annual yield (MAY) of the Arbuckle-Simpson Groundwater Basin. Protestants’ Motion must fail for several reasons. First, it is founded on the incorrect premise that the OWRB is a “party” to this proceeding; that position is foreclosed by the relevant statutes. Second, Hearing Examiners are, by regulation as well as longstanding agency practice, expressly permitted to rely on staff technical expertise in preparing proposed orders.

The Oklahoma Groundwater Law provides for the OWRB to make a determination of the MAY for each of the various groundwater basins in Oklahoma. *See generally* 82 O.S. §§ 1020.4 - 1020.6. After making applicable hydrologic surveys, the OWRB is to make a tentative MAY

and then hold hearings at which it “shall present evidence of the geological findings and determinations upon which the tentative maximum annual yield has been based. Any interested party shall have the right to present evidence in support or opposition thereto.” *Id.* § 1020.6(A). Such hearings are to be conducted pursuant to Article II of the Oklahoma Administrative Procedures Act (APA), which governs adjudications. *Id.* Following completion of the hearings, the OWRB is to make a final determination as to the MAY by issuing a final order, which is in turn subject to judicial review. *Id.* § 1020.6(C).

Article II of the APA governs adjudicatory proceedings. Among other things, it defines the record, 75 O.S. § 309(F), and describes the procedures agencies are to use in the conduct of hearings, *e.g.*, *id.* § 310. The Protestants’ Motion to Recuse rests on the first sentence, but ignores the second sentence, of the following language from Article II:

Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an individual proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member (1) may communicate with other members of the agency, and (2) may have the aid and advice of one or more personal assistants.

Id. § 313. Thus, two issues are presented by Protestants’ Motion. First is whether the Hearing Examiner’s communications with agency staff meet the definition of *ex parte* contacts; resolution of this issue hinges on whether the agency is a party to this proceeding. Second is whether, regardless of the agency’s status as a party, the second sentence permits the Hearing Examiner to rely on agency staff in preparation of a proposed order.

The language of the applicable statutes, as well as the agency’s longstanding interpretations thereof, foreclose Protestants’ argument that the OWRB is a party to this proceeding. Thus, the Hearing Examiner’s communications with OWRB staff do not meet the definition of *ex parte* contacts. First, 75 O.S. § 313 makes clear that there is a difference between the agency’s contact with those outside the agency and those within the agency. The second sentence of § 313 would make no sense otherwise. Second, the more specific Oklahoma Groundwater Law—which is the agency’s statutory mandate here—distinguishes the role of the OWRB from that of “interested parties.” This distinction has been maintained and further reinforced by the agency’s own regulations. *See* Oklahoma Administrative Code (OAC) § 785:30-9-3.

For example, at the hearing on the tentative MAY, the OWRB staff present evidence of the findings and determinations upon which the tentative MAY has been based. 82 O.S. § 1020.6(A); OAC § 785:30-9-3(e). In contrast, the statute and rule provide further that “any interested party” shall have the opportunity and right to present evidence “in support or opposition thereto.” This distinction between the participation and role of “interested parties” on

the one hand and the OWRB staff on the other is confirmed in the OWRB's rule on presentation of evidence and witnesses at hearings generally. OAC § 785:4-7-4 provides in pertinent part:

Each *party* shall have the right to call and examine witnesses, to introduce exhibits, to cross examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, to object to the introduction of evidence, to impeach any witness regardless of which party called him first to testify, to rebut evidence presented, and to call and examine an adverse party or witness as if under cross-examination. *Board members and staff may participate as appropriate, using their technical knowledge and experience for the primary purpose of developing a full, fair, accurate and complete hearing on all issues relevant to the hearing.* Questioning of witnesses will generally be permitted only by the *attorneys of parties* so represented, or by *parties* appearing on their own behalf, or by *members of the Board or its staff.* (Emphasis added.)¹

Thus, the statutes and regulations at issue distinguish between the OWRB and parties to the proceeding, making it evident that OWRB is not a party. Because OWRB is not a party, but rather the final decisionmaker, the Hearing Examiner's communications with agency staff do not meet the *ex parte* prohibition in 75 O.S. § 313. This conclusion is reinforced by the second sentence of that same statutory provision, which explicitly contemplates communications with agency staff.

Indeed, the communication and assistance that OWRB staff may provide a Hearing Examiner includes but is not limited to evaluating the evidence and giving advice and recommendations thereon in developing a proposed order and final order. For example, 75 O.S. § 310(4) provides that "[t]he agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." To that end, 75 O.S. § 313 makes sense: agency members "(1) may communicate with other members of the agency, and (2) may have the aid and advice of one or more personal assistants."² In addition, OAC § 785:4-3-4(c) provides that "[w]here deemed necessary, the Hearing Examiner may designate any Board staff member to assist the Hearing Examiner in the conduct of the proceedings or to aid the Hearing Examiner in an advisory capacity."

¹ In addition, proceedings on MAYs should be distinguished from proceedings in which the OWRB brings enforcement actions. In those situations, the staff acts as a prosecutor and pursues administrative action against a holder of a license for alleged violations of applicable law or regulations.

² Of course, the proposed and final orders must be based only on record evidence. *See* 75 O.S. § 309(H). But as is clear from the documents upon which Protestants rely in support of their Motion to Recuse, no extra-record evidence has been provided to the Hearing Examiner.

This interpretation is entitled to great deference and furthermore represents the pattern and practice of the OWRB in numerous MAY proceedings dating back to the 1980s. The Supreme Court of Oklahoma has held:

The continual construction of a statute by the agency charged to enforce it must be given great weight... Moreover, where the legislature has convened many times during a period in which an administrative agency has construed a statute, and where the legislature has not expressed its disapproval with that construction, the legislature's silence may be regarded as acquiescence in or approval of the agency's construction.

United Airlines, Inc. v. State Bd. of Equalization, 1990 OK 29, ¶ 28 (citations omitted). Agency interpretations of their own regulations are entitled to even further deference:

This Court will show great deference to an agency's interpretation of its own rules. When the terms of a regulation are amenable to more than one meaning, we ordinarily defer to the interpretation adopted by those charged with the duty of administration. When choosing between two or more possible meanings of a regulation, controlling weight may be given to long-continued administrative usage unless it is plainly erroneous or inconsistent with the language. (Footnotes and citations omitted.)

Estes v. ConocoPhillips Co., 2008 OK 21, ¶ 12.

In conclusion, the communications from the OWRB staff to the Hearing Examiner in this MAY proceeding were lawful and provided neutral assistance and evaluation of the evidence as permitted by the authorities cited above. Consequently, the Motion to Recuse is without merit and is denied.

IT IS SO ORDERED by the Oklahoma Water Resources Board in regular and open meeting this 18th day of December, 2012.

OKLAHOMA WATER RESOURCES BOARD

F. Ford Drummond, Chairman

ATTEST:

Tom Buchanan, Secretary

(SEAL)