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IN THE DISTRICT COURT OF APPEAL FOR THE
THIRD DISTRICT STATE OF FLORIDA

BERNARD SPINRAD and
MARIEN SPINRAD,

Petitioners,

v.

WILLIAM GUERRERO,
CHRISTINA GUERRERO and
FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

Case No.: _____

L.T. Case No.: DOAH 13-2254

Hon. E. Gary Early, Administrative
Law Judge

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DIVISION OF
ADMINISTRATIVE
HEARINGS

ON PETITION FROM THE FLORIDA DIVISION
OF ADMINISTRATIVE HEARINGS

PETITION FOR WRIT OF PROHIBITION

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I. INTRODUCTION

Pursuant to Rule 9.030(b)(3), Fla. R. App. P., Petitioners BERNARD SPINRAD and MARIEN SPINRAD (collectively "SPINRAD") petition this Honorable Court for a Writ of Prohibition to prevent further action by the Administrative Law Judge, E. GARY EARLY ("ALJ") and reversing the Order denying disqualification announced on April 4, 2014, and rendered on April 7, 2014. (A:1).

For purposes of this Petition, Respondents WILLIAM GUERRERO and CHRISTINA BANG GUERRERO will be collectively referred to as "GUERRERO". Respondent FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION will be referred to as "DEP". References to the Appendix to this Petition will be designated "A:" followed by the number of the Appendix and page number. Because the entire trial has not yet been transcribed, Petitioners are unable to provide the Court with all references to the proceeding below. However, the Appendix contains the record as is necessary for purposes of granting the requested relief.

II. BASIS FOR INVOKING THE JURISDICTION OF THE COURT

An order denying a motion to disqualify a trial judge is reviewed by a petition for a writ of prohibition. *Bundy v. Rudd*, 366 So.2d 440 (Fla. 1978); *Sutton v. State*, 975 So.2d 1073 (Fla. 2008).

III. QUESTION PRESENTED

The question before this Court is whether the ALJ wrongfully denied SPINRAD's Motion to Disqualify. The facts are reasonably sufficient to create a well-founded fear in the minds of SPINRAD that they will not receive a fair trial. The well-founded fear is predicated upon: (a) the fact that there were apparent ex parte communications between the ALJ and DEP; (b) the ALJ repeatedly made statements indicating a bias and personal prejudice against SPINRAD and/or their counsel, creating an intolerable adversary atmosphere between the ALJ and SPINRAD's counsel; (c) the ALJ made comments and took actions indicating he had prejudged the case without hearing all the testimony and evidence; and (d) the ALJ specifically disputed one or more grounds raised in the Motion to Disqualify. (A:2). The fear of judicial bias is objectively reasonable.

IV. STATEMENT OF THE CASE AND FACTS

SPINRAD requested an administrative hearing challenging a proposed permit that was the culmination of a settlement between DEP and GUERRERO of a prior matter, DOAH Case No. 11-5307, which involved the same structures causing damage to SPINRAD. DEP had reversed its position regarding granting authorization for the project but the settlement reversed course again to permit the structures which had already been constructed.

A. Final Hearing

The Final Hearing commenced on November 18, 2013 and lasted for four (4) days, after which only two witnesses were completed, GUERRERO's engineering expert and DEP's District Director (who was taken out of turn). GUERRERO's biologist's testimony commenced on November 20, 2013 but was not concluded.

The Final Hearing recommenced on March 31, 2014 and was due to conclude on April 4, 2014. GUERRERO rested their case on April 1, 2014, after completing the testimony of Dr. Michael Dennis and WILLIAM GUERRERO. DEP then presented its case, consisting of Ralph Clark, a DEP employee as an "expert". Mr. Clark's testimony concluded on April 2, 2014.

Thereafter, in the afternoon of the seventh (7th) day of the hearing, SPINRAD first began presentation of their case. Prior to the inception of the SPINRAD case, the ALJ indicated that it did not appear there was sufficient time to complete the Final Hearing and he had wanted to afford SPINRAD the full opportunity to present their case. He indicated counsel should be prepared with their calendars. Notwithstanding, on Friday, April 4, 2014, the ALJ for the first time, imposed severely restricted time limitations on the direct and cross examination of witnesses and allotted time for rebuttal so that the Final Hearing would conclude on April 4, 2014. At the time, SPINRAD was in the midst of

offering expert opinion testimony from Dr. Paul Lin, a coastal engineer, whose testimony was intended to contradict the opinion testimony of GUERRERO's expert, Gary Ward, and DEP's expert, Ralph Clark.

The ALJ made it extremely difficult for SPINRAD to present their case and in the course of doing so, committed numerous errors. In this Petition, SPINRAD do not seek to complain of any of the harmful and erroneous errors made by the ALJ. SPINRAD merely seek a reversal of the Order Denying the Motion to Disqualify and mandating the issuance of a Writ of Prohibition prohibiting the ALJ from taking any further action in this case, and requiring reassignment by the Division of Administrative Hearings.

B. Ex Parte Communications

On Sunday, March 30, 2014, the night before the Final Hearing was to recommence, Respondent GUERRERO again moved to disqualify SPINRAD's counsel. (A:3). At the hearing, the ALJ indicated that SPINRAD's counsel would have until Monday, April 7, 2014 to file a reply and it would be addressed thereafter. SPINRAD's counsel had no indication that the ALJ would address the Motion to Disqualify on the morning of April 3rd. But in the morning of April 3, 2014, the ALJ ruled that he was denying the Motion to Disqualify SPINRAD's counsel. Surprisingly, on that morning of April 3, 2014, Mr. Jeff Brown, another attorney for DEP, "specifically" appeared before the court to address

GUERRERO's renewed Motion to Disqualify. (A:4, p. 4-6). Apparently, the ALJ had some sort of communication with Respondent DEP to enable DEP's special counsel to appear in connection with that motion, which was not designated to be heard.

Similarly, on April 4, 2014, SPINRAD learned that DEP forwarded a portion of a transcript with markings to the ALJ. The ALJ did not indicate that he had received any such document from DEP. (A:5, p. 3-8). It was incumbent upon the ALJ to disclose the transmittal of such information. But the ALJ failed to do so. Rather, DEP disclosed the existence of the communication, purportedly in error, to counsel on April 4, 2014. (A:5, p. 8-10).

C. Intolerable Adversary Atmosphere

During the course of the hearing, the ALJ consistently refused to admit SPINRAD's exhibits on the ground that they were not separately itemized on SPINRAD's exhibit list. The ALJ even refused to permit SPINRAD to use documents to refresh a witness' recollection, if it was not separately and specifically itemized on SPINRAD's exhibit list.

In accordance with the ALJ's consistently erroneous prior position, he excluded the expert report of Dr. Paul Lin, SPINRAD's coastal engineering expert. This expert report was separately filed and disclosed on November 17, 2013 prior to the commencement of the Final Hearing. (A:6). It was also listed on the exhibit

lists of both GUERRERO and DEP, which were incorporated in SPINRAD's exhibit list. (A:7). Upon its exclusion, SPINRAD's counsel advised the court that the per se exclusion of late filed exhibits was in error and cited supporting case law to the ALJ. The ALJ then took a recess, reviewed the case law cited and indicated that:

A. It was "unfortunate" that he did not have enough evidence to show that the late filing was intentional;

B. That he wished SPINRAD's counsel "spent as much time preparing for the trial as researching legal issues"; and

C. That he sympathized with counsel for GUERRERO and DEP.
(A:2, p. 8-10).

The record reveals numerous other comments and actions taken by the ALJ during the course of the hearing. For example, SPINRAD called Mr. Gus Rios as a witness during the trial to testify about the lack of an analysis of adverse environmental impacts. Mr. Rios is based in the Marathon Branch Office of the South District of DEP. Mr. Rios' office is located in the same complex in which the Final Hearing was had, the Marathon Governmental Complex. Notwithstanding, DEP required that Mr. Rios travel to Tallahassee to appear at the administrative hearing. At the conclusion of Mr. Rios' testimony, the ALJ chastised SPINRAD's counsel for making him travel to Tallahassee for his short

testimony, even though it was at DEP's insistence.¹ The record is replete with such comments.

D. The ALJ Prejudged the Case

After the reluctant admission into evidence of Dr. Lin's report, the ALJ indicated that any opinions rendered by Dr. Lin would be given "the weight I believe it's entitled to". (A:8, p. 151). The ALJ's tone, inflection and manner of comment exhibited that he would disregard Dr. Lin's testimony and the evidence.

In following this exhibited intention, the ALJ thereafter excluded relevant and material testimony offered by Dr. Lin to contradict the lengthy and laborious testimony given by both Gary Ward, GUERRERO's expert, and Ralph Clark, DEP's expert.

For example, Dr. Lin prepared a demonstrative aid comparing two documents already in evidence, the permit drawings and the Richmond survey showing the completed work, Petitioner's Trial Exhibits 134 and 74. Dr. Lin had superimposed the permit drawings upon the survey to demonstrate that the construction that had already taken place was not in accordance with the permit drawings and what was supposedly being authorized. The ALJ refused to permit Dr. Lin to refer to the demonstrative evidence, indicating he could ascertain such facts for himself. Respectfully, that is not an accurate statement. Admittedly, an

¹ SPINRAD is not in possession of the full transcript, but will supplement the record with same.

overlay of two separate exhibits to scale would assist the trier of fact.

Notwithstanding, the ALJ refused the demonstrative exhibit's use.

When SPINRAD's counsel made a proffer of the demonstrative aid, the proffer was rejected. Accordingly, during a break, SPINRAD's counsel gave a copy of the demonstrative evidence to the court reporter as part of a "proffer" outside the presence of counsel and the court. Upon learning of this, the ALJ instructed the court reporter to "destroy" the demonstrative exhibit, even though it was not part of the record and only proffered. He did not indicate that it should be returned.

Lastly, on April 4, 2014, the ALJ determined for the first time after eight (8) days of testimony, to limit the time attributable to SPINRAD's witnesses in terms of direct and cross examination. (A:5, p. 5-8). This effectively denied SPINRAD the opportunity to present their entire case. Apparently the ALJ had made up his mind already. SPINRAD reluctantly moved to disqualify the ALJ. (A:2). The motion was supplemented orally to include the DEP ex parte communication revealed that morning and SPINRAD's counsel advised that the written motion and affidavit had been filed. The ALJ addressed the ex parte communication. (A:9, p. 3). He then indicated "I find your motion - - -", but then thought better about it and indicated he would review the written motion. (A:9, p. 3). After a very short recess, the ALJ denied the motion as being legally insufficient. (A:9, p. 4).

V. ORDER AS TO WHICH REVIEW IS SOUGHT

SPINRAD seek review of the Order Denying Motion to Disqualify Presiding Administrative Law Judge rendered on April 7, 2014. (A:1).

VI. NATURE OF THE RELIEF SOUGHT

Prohibition is clearly recognized as the proper avenue for immediate review of whether a motion to disqualify a trial judge has been correctly denied. *Sutton v. State*, 975 So.2d 1073, 1076-77 (Fla. 2008).

SPINRAD respectfully request this Court to accept jurisdiction over this matter, grant this Petition for Writ of Prohibition, reverse the decision of the ALJ, vacate the Order Denying the Motion to Disqualify, remand with instructions and require reassignment by the Division of Administrative Hearings.

VII. STANDARD OF REVIEW

The appellate review of a decision of an administrative law judge on a motion for disqualification is de novo. *Dep't of Agric. & Consumer Services v. Broward County*, 810 So.2d 1056 (Fla. 1st DCA 2002); *Sume v. State*, 773 So.2d 600, 602 (Fla. 1st DCA 2000).

VIII. ARGUMENT IN SUPPORT OF THE PETITION

The ALJ Erred in Denying a Legally Sufficient Motion for Disqualification

Rules governing disqualification of trial judges are designed to keep the courts free from bias and prejudice. *Tableau Fine Art Group, Inc. v. Jacoboni*, 853 So.2d 299 (Fla. 2003). This Court's task is to determine the legal sufficiency of the motion based on whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. *Martin v. State*, 804 So.2d 360 (Fla. 4th DCA 2001). The facts alleged in the motion need only show a well grounded fear that the movant will not receive a fair trial. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1334 (Fla. 1990).

A. SPINRAD's Motion to Disqualify the ALJ Complies with the Requirements of Rule 2.160, Fla. R. Jud. Admin.

Compliance with Rule 2.160, Fla. R. Jud. Admin., is mandatory. *Carrow v. The Florida Bar*, 848 So.2d 1283 (Fla. 2nd DCA 2003). Rule 2.160(c), Fla. R. Jud. Admin., requires a motion to disqualify a trial judge to be in writing, specifically allege the facts and reasons relied upon for disqualification, and be sworn to by the party signing the motion. Rule 2.160(d) requires that the motion show that the party fears that he or she will not receive a fair trial based on a specifically described prejudice or bias of the judge.

SPINRAD's Motion to Disqualify was in writing, specifically alleging the facts and reasons relied upon for disqualification. (A:2). It was sworn to by Mr.

SPINRAD, as it was declared under the penalties of perjury and as such, it is sufficient. *Jimenez v. Ratine*, 954 So.2d 706 (Fla. 2nd DCA 2007). Similarly, the Motion showed that SPINRAD feared that he and his wife would not receive a fair trial based on the described prejudice and bias of the ALJ.

B. SPINRAD Has a Well Grounded Fear that He Will Not Receive a Fair Trial.

The facts alleged in the motion need only show a well grounded fear that the movant will not receive a fair trial. In determining whether the allegations are sufficient, the facts alleged must be taken as true and must be viewed from the movant's perspective. *MacKenzie v. Super Kids Bargain Store, Inc.*, *supra* at p. 1334. The fear of judicial bias must be objectively reasonable. *Parker v. State*, 3 So.3d 974, 982 (Fla. 2009).

Disqualification of a judge is required in any situation where the facts are reasonably sufficient to create a well-founded fear in the mind of the moving party that he will not receive a fair trial. *Martin v. State*, 804 So.2d 360 (Fla. 4th DCA 2001).

1. Ex Parte Communications are Sufficient to Create a Well-Founded Fear in the Mind of the Moving Party.

“Nothing is more dangerous and destructive of the partiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. **No matter how pure the intent of the party who engages in such**

contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by un rebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter-arguments." *Ross v. State*, 601 So.2d 1181, 1183 (Fla. 1992). (Emphasis supplied).

A judge's ex parte communication with a party presents a legally sufficient claim for disqualification. *Chace v. Loisel*, 39 Fla. Law Weekly D221 (Fla. 5th DCA 2014). The "most insidious result of ex parte communications is their effect on the appearance of impartiality on the tribunal; the impartiality of the trial judge must be beyond question." *Hanson v. Hanson*, 678 So.2d 522, 524 (Fla. 5th DCA 1996) (reversing judgment in favor of party whose attorney engaged in ex parte meeting with judge). Even the receipt of an ex parte letter warrants disqualification. *Dep't of Agric. & Consumer Services v. Broward County*, 810 So.2d 1056 (Fla. 1st DCA 2002) (reversing order denying motion for disqualification founded upon receipt of a letter from one of the litigants).

In the case sub judice, there is an indication of an unknown ex parte communication which caused DEP's "special counsel" to appear in connection with a motion that was not to be heard or argued at the time of his appearance, as well as the receipt of materials from Respondent DEP. At the beginning of the

hearing on April 3, 2014, the court discussed its ruling regarding a motion for protective order as to a subpoena issued by SPINRAD. The court then stated:

"I have also reconsidered my decision to hold off on ruling on the Motion to Disqualify the Silver Law Firm. I have reviewed that motion again and all of the exhibits. I find that under the circumstances of this case, under my prior rulings on this matter and under the burden of proof I am going to be applying, that there would be - - even if some communications had occurred, that there is no unfair informational value that would have been conferred on the Silver Law Firm.

I think the allegations in the motion itself are speculative and I am not inclined to open this up to a fishing expedition at this stage of the game. ... So I am going to deny the Motion to Disqualify. Ms. Silver, you don't need to file a response on Monday as we previously discussed.

MR. BROWN: Your Honor, this is Jeffrey Brown. May I address the matter briefly?

THE COURT: Yes.

MR. BROWN: I have been asked by the department specifically to appear to address the renewed Motion to Disqualify. Noting your ruling, we simply wanted to point out that although we do not join in the motion, we support the request for relief.

THE COURT: Okay.

MR. BROWN: And with that, assuming that matter does not come up again, my appearance will no longer be necessary." (A:4, p. 4-6).

Moreover, apparently, on April 3, 2014, DEP sent some information to the ALJ ex parte. It was not revealed until the morning of April 4, 2014 by counsel for DEP. (A:5, p. 8-10). Notably, the ALJ did not reveal the receipt of this ex parte communication and purportedly placed the documents on DEP counsel's chair. When raised in connection with the Motion to Disqualify, the court addressed the substance of what transpired. (A:9, p. 3).

These two communications are sufficient in and of themselves to warrant disqualification of the ALJ.

2. There was an Intolerable Adversary Atmosphere.

Throughout the course of the Final Hearing, the ALJ made numerous disparaging and adversarial comments directed to SPINRAD's counsel. After finding SPINRAD's clear noncompliance with Pretrial Order by the late filing of an exhibit prior to the commencement of the hearing in November of 2013 (T EX 178) (A:6), the court stated:

“I **unfortunately** don't have enough evidence to be able to demonstrate that it was intentional.” (A:8, p. 147)
(Emphasis supplied).

After sympathizing with the Respondents' counsel, the ALJ then found it necessary to indicate his opinion that:

“... if Petitioners had spent as much time preparing for trial and preparing information sufficient to put the other parties on notice of what they plan to do, as they did locating cases to excuse the deficiencies in their trial

preparation, we would be much better off in getting this case done efficiently and orderly. **Unfortunately**, that isn't the case." (A:8, p. 147-148) (Emphasis supplied).

Contrast that with the court's colloquy with Ms. Phillips:

"Your Honor, may I just make a few brief comments on behalf of my client?

THE COURT: Yes ma'am you may. You **absolutely** may.

MS. PHILLIPS: ... and I would just ask Your Honor that if on rebuttal we may have some leeway in addressing this exhibit in our rebuttal case, since we were unable to address it fully in our case in chief since we had relied on the ruling.

THE COURT: You certainly may. ...

THE COURT: And again, I **sympathize** with both the Department and the Guerreros' counsel in this case. I think it's an example of how not to present a case. ... As I said, I am sympathetic, but I would prefer to err on the side of caution here. ...

THE COURT: So despite my **dissatisfaction** with having to make this ruling, I am going to make it." (A:8, p. 148-150) (Emphasis supplied).

Clearly, the foregoing created at least the appearance of an adversarial atmosphere between the ALJ and SPINRAD, requiring disqualification. *Kielbania v. Jasperg*, 744 So.2d 1027 (Fla. 4th DCA 1997).

3. The ALJ had Prejudged the Case.

In light of the amount of time afforded to Respondents GUERRERO and DEP to present their cases, including laborious expert testimony, the ALJ's limitation of the amount of time afforded to SPINRAD to present their case indicates that the court had already made a determination of the merits of this proceeding, determining that it was not necessary to hear further evidence. That, combined with the refusal to hear relevant and material evidence on the SPINRAD's case, is sufficient grounds for disqualification. It is black letter law that although a judge may form mental impressions and opinions during the course of hearing evidence in the case, the judge is not permitted to prejudge the case. *Cates v. Seidenman*, 881 So.2d 56 (Fla. 4th DCA 2004); see also *Barnett v. Barnett*, 727 So.2d 311 (Fla. 2nd DCA 1999). The cumulative effect of the ALJ's conduct during the course of this hearing from the time that SPINRAD began presentation of their case gives rise to a well grounded fear that the ALJ has prejudged the case.

4. The ALJ's Comments and Refutation of the Facts Alleged Mandates Disqualification.

When SPINRAD's counsel orally moved to disqualify the ALJ and advised that a written motion had been filed even though the written motion did not contain all the grounds, the ALJ said, "I am going to - - -" without having even reviewed it. (A:9, p. 3). He also explained the circumstances regarding the ex parte fax to his office. (A:9, p. 3). This alone mandates disqualification. *Lee Memorial Health*

System v. State, Agency for Healthcare Admin., 910 So.2d 892 (Fla. 1st DCA 2005).

Similarly, where a judge begins to rule against the movant without giving the movant a chance to respond, the judge is subject to disqualification. *Nathanson v. Nathanson*, 693 So.2d 1061 (Fla. 4th DCA 1997). Certainly, the ALJ's action in beginning to issue his denial without even reviewing the motion, mandates disqualification. So, too, does his comment contesting a fact raised in the Motion to Disqualify.

IX. CONCLUSION

The Division of Administrative Hearings, as well as the courts of this State, must preserve the appearance of being a fair and impartial tribunal. Judges should take care to preserve the integrity of the judicial system. No person should be subjected to an atmosphere of intolerable court advocacy to deny a litigant the opportunity of a fair and impartial adjudication.

But unfortunately, that is what happened in the forum below. SPINRAD have effectively been deprived of a precious right, a right the legal system zealously guards. They have been subjected to great expense and emotional distress as a result of the demonstrated ex parte communications, the clear bias and prejudice of the ALJ and the prejudging of the case by the ALJ. Their view of the

legal system has been severely tarnished. This Court has the power to rectify this grave error and grant the relief requested in this Petition.

X. CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Petition is submitted in Times New Roman 14 point font.

/s/ Patricia M. Silver, Esq.

XI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April 2014, a true and correct copy of the foregoing was provided by electronic mail only to:

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