BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, v. POWAY UNIFIED SCHOOL DISTRICT Respondent.	OAH CASE NO. N2007040130 RULING DENYING REQUEST FOR RECUSAL

On April 3, 2007, Michael S. Cochrane, Attorney for Petitioner, filed with the Office of Administrative Hearings (OAH) a Request for Recusal of OAH from the above entitled matter. Although the Request did not contain a Case No. it is assumed to be the same as that assigned to Petitioner's Complaint, which was filed and served simultaneously with this request.

DISCUSSION AND APPLICABLE LAW

Petitioner's Request for Recusal cites no legal authority and it is unclear whether the Request is intended as a peremptory challenge pursuant to California Code of Regulations section 1034, or as a challenge for cause. If intended as a peremptory challenge the Request fails on several levels. Section 1034 provides in pertinent part:

> (a) Pursuant to section 11425.40(d), a party is entitled to *one peremptory challenge* (disqualification without cause) of *an ALJ assigned to an OAH Hearing*. A peremptory challenge is not allowed in proceedings involving petitions or applications for temporary relief or interim order or in a proceeding on reconsideration or remand… In no event will a peremptory challenge be allowed if it is made after the Hearing has commenced.
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> (b) A peremptory challenge shall be:
> (1) Directed to the Presiding Judge;
> (2) Filed by a party, attorney or authorized representative;
> (3) Made in writing or orally on the record in substantially the following form:

"I am a party to [CASENAME] and am exercising my right to a peremptory challenge regarding ALJ [NAME], pursuant to Regulation 1034 and Government Code section 11425.40(d)";
(4) Served on all parties if made in writing; and
(5) Filed in compliance with the time requirements of subsections (c), (d), and (e) herein.
(c) ….
(d) ….
(e) ….
(f) A party may contact OAH to determine the name of the ALJ assigned to the Hearing.
(g) A Hearing shall not be continued by reason of a peremptory challenge unless a continuance is required for the convenience of OAH. If continued, the Hearing shall be rescheduled to the first convenient date for OAH.
(h) Nothing in this regulation shall affect or limit the provisions of a challenge for cause under sections 11425.40, 11430.60 and 11512(c) or any other applicable provisions of law.

If a peremptory challenge, the most significant and fatal deficiency in the Request is the fact that it seeks to challenge all ALJs in the OAH rather than a single ALJ assigned to hear the matter. In effect, Petitioner is attempting to assert multiple peremptory challenges when he is entitled to but one. Additionally, this matter has yet to be assigned to a particular ALJ for hearing. While other deficiencies are readily apparent it is not necessary to address them at this juncture.

On the other hand, if Petitioner's counsel intends the Request as a challenge for cause, it fails because counsel provides no factual basis for his generalized allegation that "any administrative law judge employed by OAH is incapable of being impartial, and that any OAH employee will likely issue rulings and decisions with the mindset of strategizing as a defendant rather than as a neutral, impartial judge."

Government Code section 11425.40, establishes the criteria for disqualification of the presiding officer.

§ 11425.40. Disqualification of presiding officer

(a) The presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding.

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(c) The provisions of this section governing disqualification of the presiding officer also govern disqualification of the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(d) An agency that conducts an adjudicative proceeding may provide by regulation for peremptory challenge of the presiding officer.

The case law in this area is well established that, with certain exceptions, bias is not to be presumed and a factual showing of actual bias is required. In *American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464, the appellate court, stated:

Due process, of course, requires a competent and impartial tribunal for administrative hearings. (Peters v. Kiff (1972) 407 U.S. 493, 501 [33 L.Ed.2d 83, 93, 92 S.Ct. 2163.]) (3) If, as appellant asserts, the public members of the board were biased, determination of matters before that tribunal would result in a denial of due process. In Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal.3d 781, 792-794 [171 Cal.Rptr. 590, 623 P.2d 151], our Supreme Court reaffirmed that disqualification of a judicial or administrative law officer for bias cannot be based solely on expressed or crystallized political or legal views, even if those views result in an appearance of bias. A party must generally allege concrete facts that demonstrate the challenged judicial officer is contaminated with actual bias or prejudice; bias and prejudice are never to be implied. Appellant has alleged no such facts in this case.

However, Andrews recognizes "some situations in which the probability or likelihood of the existence of actual bias is so great that disqualification of a judicial officer is required to preserve the integrity of the legal system, even without proof that the judicial officer is actually biased towards a party. [Citations.] In California, these situations are codified in Code of Civil Procedure section 170, subdivisions 1-4. They include cases in which the judicial officer either has a personal or financial interest, has a familial relation to a

party or attorney, or has been counsel to a party. The Legislature has demanded disqualification in these special situations regardless of the fact that the judicial officer nevertheless may be able to discharge his duties impartially. The evident and justifiable rationale for mandatory disqualification in all such circumstances is apprehension of an appearance of unfairness or bias. However, the instances addressed in section 170, subdivisions 1-4, are entirely distinct from a case in which bias itself is charged under subdivision 5 of that statute as the ground for disqualification. As explained above, the subjective charge of an appearance of bias alone does not suffice to demonstrate that a judicial officer is infected with actual bias." (Andrews, supra, p. 793, fn. 5.)

The court in Nissan Motor Corp. v. New Motor Vehicle Bd., supra, 153 Cal.App.3d 109, 116, thus held that since the challenge was to the impartiality of the board based on the participation of dealer members, who have a financial interest in the outcome of dealer-manufacturer disputes (American Motors Sales Corp. v. New Motor Vehicle Bd., supra, 69 Cal.App.3d 983, 987), proof of actual bias was not required under Andrews; the mere appearance of bias is sufficient to support a holding that an adjudicator cannot provide a fair tribunal when that adjudicator has a financial interest or economic stake in the controversy. (See also Chevrolet Motor Division v. New Motor Vehicle Bd., supra, 146 Cal.App.3d 533, 540.)

In our case, the challenge is not to the impartiality of the dealer members, whose financial interest has been recognized, but to the impartiality of the public members. Appellant offers no evidence of any financial interest these public members have in the outcome of the disputes, nor of any personal interest which would present a "probability or likelihood of the existence of actual bias . . . so great that disqualification . . . is required to preserve the integrity of the legal system," even without proof that such member is actually biased towards a party. (Andrews, supra, p. 793, fn. 5.) In the absence of any allegations of actual partiality, we find the simple interaction of the public members with the dealer members on other board business insufficient evidence of bias to overcome the presumption of honesty and integrity of adjudicators. (See Withrow v. Larkin (1975) 421 U.S. 35, 47 [43 L.Ed.2d 712, 723-724, 95 S.Ct. 1456].)

(4) Appellant focuses attention on the participation of the full board, including the dealer members, in the selection of hearing officers to hear dealer-manufacturer disputes. The claim seems to be that there is a financial interest involved, and so the mere appearance of bias is enough to establish that the tribunal is not impartial. Appellant has not articulated just what financial interest is involved. It has, of course, been recognized that the dealer members have a financial stake in the

> outcome of the dealer-manufacturer disputes. However, appellant has failed to make any showing that the hearing officers share that financial stake or that they have any financial stake of their own. In the case before us, the hearing officer in his statement of economic interest apparently reported that he had no reportable economic interests.
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> In the absence of any evidence at all, we refuse to conjure a financial stake on the part of a hearing officer which might present an appearance of bias sufficient to hold the tribunal unconstitutional. Moreover, appellant has failed to present any facts indicating actual bias of the hearing officer. On the record before us, we simply do not find that the dealer-members' participation in the selection of hearing officers results in the denial of an impartial tribunal for adjudication of dealer-manufacturer disputes in violation of due process.

Viewed as a challenge for cause, Petitioner's bare allegation provides no facts by which actual bias can be discerned. Further, Petitioner provides no evidence that "…the judicial officer either has a personal or financial interest, has a familial relation to a party or attorney, or has been counsel to a party."

Petitioner's Request for Recusal, whether intended as a peremptory challenge or challenge for cause, is legally and factually deficient and is denied.

ORDER

Petitioner's Request for Recusal of the OAH is denied.

Dated: April 19, 2007

SHERIANNE LABA
Presiding Administrative Law Judge
Special Education Division
Office of Administrative Hearings