

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION**

ALASKA COMMUNITY ACTION ON)
 TOXICS, ALASKA CENTER FOR THE)
 ENVIRONMENT, ALASKA SURVIVAL,)
 COOK INLETKEEPER, DEFENDERS)
 OF WILDLIFE, THE NATIVE VILLAGE)
 OF EKLUTNA, PRINCE WILLIAM)
 SOUNDKEEPER, RESURRECTION BAY)
 CONSERVATION ALLIANCE, AND)
 TOM KLUBERTON,)

Requestors,)

v.)

ALASKA DEPARTMENT OF)
 ENVIRONMENTAL CONSERVATION,)
 DIVISION OF ENVIRONMENTAL)
 HEALTH,)

Respondent.)

OAH No. 10-0278-DEC
 Alaska Railroad Pesticide Permit
 (Permit No. 10-SOL-01)

ORDER DENYING DISQUALIFICATION AND CHANGE OF JUDGE

The Alaska Railroad Corporation’s July 1, 2010 request that the chief administrative law judge reverse Judge Friedman’s denial of the motion to disqualify is denied. The railroad has not shown that wholly past membership in one of the requestor groups by virtue of making small monetary contributions constitutes grounds for disqualification.

Membership in an organization could create a conflict or result in actual or perceived bias that would require disqualification under the code of hearing officer conduct. That code requires state administrative law judges to refrain from hearing cases in which they have a conflict, as well as to perform the hearing function impartially and to avoid impropriety or the appearance of impropriety.¹

Judge Friedman’s disclosure indicates that over a period of years ending, most likely, in July 2009, he made contributions to and was a member of one of the requestor groups. His membership lapsed several months before he became an administrative law judge and almost a year before he was assigned to this matter. He apparently was not an active member in the sense

¹ 2 AAC 64.030(b)(2)&(3); 2 AAC 64.040.

of attending meetings or events, or serving as an officer or board member. There is no evidence that “membership” in this organization represents anything other than recognition of a certain minimum contribution level.

Without more, this wholly past contribution-based membership in an organization with a broad community focus does not constitute a conflict or result in actual bias or a reasonable perception of bias when that organization later becomes involved in a specific dispute. Indeed, a perception of bias is no more reasonable under these circumstances than it would be, for instance, regarding a judge who pays the \$60 per year to be a “member” supporter of the Anchorage Museum, an organization that helps to educate about and preserve the history of the Alaska Railroad, or who in the past sat on the Alaska Railroad Corporation Citizens Advisory Board. Past alignment with the general aims of an organization does not, without more, create a conflict or show that a judge cannot be impartial in specific future disputes.

The railroad’s July 1, 2010 request to change the administrative law judge is denied as untimely. Notice of the assignment of Judge Friedman to assist the Commissioner of Environmental Conservation with consideration of the request for adjudicatory hearing, and with the conduct of the hearing if one is granted, was given by email on June 15, 2010. Under AS 44.64.070(c) the period in which each side could request a change of judge expired June 21. By its very nature, a request to change the judge for no reason (a preemptory “bump”) is not a disqualification for cause and thus is not dependent upon first receiving disclosures from the judge. The railroad’s assumption that the five-day “bump” period did not begin to run until Judge Friedman issued his disclosure notice to the parties on June 22, therefore, is mistaken.

The railroad purported in its motion to disqualify to reserve the right to exercise the AS 44.64.070(c) “bump” until after a ruling on the motion was made. There is no basis in AS 44.64.070 for such a reservation. To the contrary, the statute imposes a short, five-day “bump” period running from the notice of assignment. A party must quickly exercise its election to “bump” the judge, irrespective of other events occurring in the case, or forfeit that election. This is consistent with the fact that cases heard by the office of administrative hearings are supposed to proceed quickly.² Moreover, even if the railroad, instead of trying to reserve the “bump,” had purported to exercise it in the alternative to disqualification for cause (which the railroad did

² See AS 44.64.060 (requiring cases heard by the office to proceed from hearing request to proposed decision in 120 days or less in most instances).

not), the “bump” would have been untimely because the motion to disqualify was not filed until June 23, two days after the right to exercise the election expired.

Accordingly, the railroad’s two July 1, 2010 requests are denied and this matter remains assigned to Judge Friedman.

DATED this 8th day of July, 2010.

By: Signed _____
Terry L. Thurbon
Chief Administrative Law Judge

CERTIFICATE: The undersigned certifies that on July __, 2010, this order was **emailed** to the following:

- (1) Austin Williams and Vicki Clark, Trustees for Alaska, counsel for requestors;
- (2) Phyllis Johnson, general counsel of the Alaska Railroad Corporation;
- (3) Susan Reeves and Brian Stibitz, Reeves Amodio LLC, co-counsel for the Alaska Railroad Corporation;
- (4) Jennifer Currie, Assistant Attorney General, counsel for the Division of Environmental Health.

Courtesy copies were **emailed** to ALJ Jeffrey A. Friedman; Gary Mendivil, Department of Environmental Conservation, Commissioner’s Office; and Cameron Leonard, Assistant Attorney General.

Neil Roberts

[This document has been modified to conform to the technical standards for publication.]