

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
120 NORTH ROBINSON, SUITE 860
OKLAHOMA CITY, OKLAHOMA 73102



In the Matter of:

Rodney Larry Watkins, Jr. (CRD #3091936);
Southeast Investments, N.C. Inc. (CRD #43035); and
Frank H. Black (CRD #22451);

Respondents.

ODS File No. 12-058

DEPARTMENT'S RESPONSE TO RESPONDENTS'
MOTION FOR RECUSAL OF ADMINISTRATOR AND FOR APPOINTMENT
OF NEUTRAL HEARING OFFICER

The Oklahoma Department of Securities (Department) hereby seeks denial of the *Respondents' Motion for Recusal of Administrator And For Appointment Of Neutral Hearing Officer* (Respondents' Motion) because, as a matter of law, the Administrator has statutory authority to conduct administrative proceedings brought under the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71 §§ 1-101 through 1-701 (2011), and sole authority under the Act to issue an order in resolution of an individual proceeding.

A. The Administrator should not recuse himself as Hearing Officer.

Under 660:2-9-2(f) of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (Rules), the Administrator has the authority to do all things necessary and appropriate to conduct an individual proceeding. Although the Administrator may appoint a hearing officer at any time to conduct the hearing, the final disposition of an administrative case rests with the Administrator. *See*

Administrative Procedures Act (APA), Okla. Stat. tit. 75, §311, and Section 1-604 of the Act. These provisions dictate that the Administrator be the sole person authorized by law to issue a final order, based either on his own evaluation of the evidence in a case or on an order proposed by a designated hearing officer. Even where a hearing officer proposes an order, the Administrator does not just rubber stamp the proposed order, but is charged with evaluating the evidence to make his own determination. See Section 1-604 of the Act and Section 311 of the APA.

The Administrator has been the Hearing Officer since the inception of this case – almost a year and a half ago. At no time did the Respondents express concerns or request the recusal of the Administrator as Hearing Officer, until now. To appoint a new hearing officer seven days prior to the hearing, particularly without any evidence of bias on the part of the Administrator, is nonsensical. This is merely another delay tactic by the Respondents.

B. Respondents have failed to show any bias on the part of the Administrator.

The fact that an agency may participate in the investigation, prosecution and adjudication of matters before it is not a violation of the due process clause. See *Wilson v. Oklahoma Horse Racing Com'n*, 1996 OK 3, ¶13, citing *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). An administrator of an agency is presumed to be capable of fairly judging a controversy. *Wilson* at ¶13.

“[A] presumption exists that administrative decision-makers act honestly and impartially, and the party challenging the partiality of the decision-maker has the burden to overcome the presumption.” See *Financial Solutions v. Carnahan*, 316 S.W.3d 518 (2010) (Commissioner of Securities issued an order against a securities firm for fraud

under Missouri's Securities Act and denied a motion to disqualify him). That court found that the Commissioner of Securities was an administrative decision-maker who was biased only if he made an unalterable prejudgment of adjudicative facts. That was not the case in *Financial Solutions*, nor is it here.

Respondents seem to be concerned that a status conference they requested on the Motion to Supplement Recommendation was not held. Counsel for the Department was not involved in the conversations wherein Respondents requested the status conference and had no input on whether it would be held. The Administrator has discretion to rule on the briefs filed by the parties and both parties had the opportunity to fully brief their argument. See Rule 660:2-9-3(c)(3). Respondents have failed to show any bias or impartiality on the part of the Administrator.

Respondents also seem to be concerned that the Administrator is biased against them because he agreed to the hearing date of August 12, 2014, a date proposed by counsel for the Department *ex parte*. Proposing a hearing date is merely a procedural matter that, as will be described in more detail below, is commonplace and an acceptable communication. Respondents have presented no evidence to overcome the presumption that the Administrator will act honestly and impartially.

In connection with their claim of bias, Respondents rely on *Arbuckle Simpson Aquifer Protection Federation of Oklahoma v. The Oklahoma Water Resources Board*, 2013 OK 29, an Oklahoma case that is factually irrelevant to this matter. In *Arbuckle*, a hearing officer communicated with third party witnesses *post-hearing* about the factual merits of the case. There have been no communications between the Administrator and counsel for the Department about the factual merits of this case.

On June 18, 2014, all parties agreed by phone that the hearing set for June 23, 2014, would not occur. The Department wrote a confirmation email to Respondents relaying the exact conversation between the parties. Now, Respondents say they did not agree with the content of the email, yet, they never communicated their disagreement to the Department. The Department also proposed to Respondents a new hearing date of August 12, 2014. Respondents' counsel expressed that he needed to communicate with his co-counsel about the proposed date. After that telephone call, the Department did not receive any communications from the Respondents regarding the proposed hearing date.

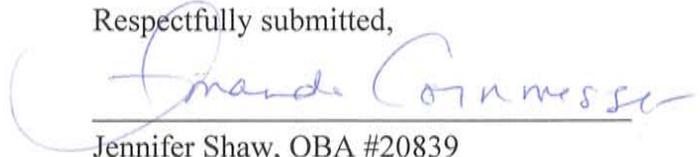
Following the Department's proposal to Respondents of August 12, 2014 as the new hearing date, the Department drafted a proposed order with the new date and emailed it to the Administrator for his review. This administrative or housekeeping communication is routine in administrative cases. *See Arnold v. Lebel*, 941 A.2d 813, 821 (2007) (hearing officer may communicate with agency staff members about hearing schedules and procedural matters). Further, the *Arnold* court stated that as long as a hearing officer does not discuss the *contested* facts of a specific case, he or she may discuss general policy concerns.¹ *Id.* at 822. In this matter, the Department merely proposed a hearing date seven weeks later to give both parties time to finish discovery.

CONCLUSION

To date, no rulings have been made by the Administrator to show any partiality to either party in this matter. There is no legal basis to disqualify the Administrator as the hearing officer in this case. The Respondents' Motion should be denied.

¹ The Department would note that the parties agree there are no contested facts in this case.

Respectfully submitted,



Jennifer Shaw, OBA #20839

Amanda Cornmesser, OBA # 20044

120 North Robinson, Suite 860

Oklahoma City, Oklahoma 73102

Telephone: (405) 280-7700

Facsimile: (405) 280-7742

Email: jshaw@securities.ok.gov

acornmesser@securities.ok.gov

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 6th day of August, 2014, a true and correct copy of the above and foregoing *Department's Response to Respondents' Motion for Recusal of Administrator and for Appointment of Neutral Hearing Officer* was emailed and mailed with postage prepaid thereon, addressed to:

Patrick O Waddel, OBA #9254
1700 Williams Center Tower
One W 3rd St
Tulsa OK 74103-3522
pwaddel@sneedlang.com
Attorney for Respondents



Brenda London, Paralegal

Brenda London

From: Brenda London
Sent: Wednesday, August 06, 2014 10:04 AM
To: Irving Faught; pwaddel@sneedlang.com
Cc: Martha Welker (mwelker@sneedlang.com); Amanda Cornmesser; Jennifer Shaw; Faye Morton
Subject: Rodney Watkins ODS 12-058
Attachments: ODSRespToRespondentsMotionForRecusal_12-058.pdf

Attached is the *Department's Response to Respondents' Motion for Recusal of Administrator and for Appointment of Neutral Hearing Officer* filed with the Administrator.

Thank you,

Brenda London, Paralegal
Oklahoma Department of Securities
First National Building Suite 860
120 North Robinson
Oklahoma City OK 73102
(405) 280-7700
(405) 280-7742 Facsimile
blondon@securities.ok.gov