

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES
THE FIRST NATIONAL CENTER
120 N. 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

**RESPONDENTS' MOTION FOR RECUSAL OF ADMINISTRATOR
AND FOR APPOINTMENT OF NEUTRAL HEARING OFFICER**

Respondents Southeast Investments, N.C. Inc. and Frank H. Black (collectively, "Respondents" and, individually, "Southeast" and "Black"), pursuant to Oklahoma Securities Commission Rule 660:2-9-2(e), move the Administrator to recuse as Hearing Officer in this proceeding and to appoint a neutral Hearing Officer in accordance with such rule, for the reasons that follow.

On April 23, 2013, the Supreme Court, issuing a writ of mandamus directed to a hearing officer of the Oklahoma Water Resources Board ("OWRB"), advised as follows:

Our case law and the applicable statutes collectively illustrate that the parties to [an administrative] proceeding have a clear legal right to a hearing that is not only fair and impartial, *but also avoids the appearance that fairness and impartiality are lacking. Johnson [v Bd. of Governors of Registered Dentists of State of Oklahoma, 1996 OK 41, ¶32, 913 P.2d 1339] . . . at ¶32, 913 P.2d 1339; Merritt [v. Hunter, 1978 OK 18 at ¶5, 575 P.2d 623]; 75 O.S. 2011 §§313, 316. Providing a fair and impartial hearing is the plain legal duty of the [agency], and by extension, its appointed hearing officer, and is not something subject to discretion. 75 O.S. 2011 §§313, 316. The mandate in 75 O.S. 2011 §316 requiring that a hearing officer shall withdraw from any individual proceeding in*

which he cannot accord a fair and impartial hearing or consideration is a clear indication that providing a fair and impartial hearing is an affirmative duty of the hearing officer, and if they are unable to do so, they are required to withdraw.

Arbuckle Simpson Aquifer Prot. Fedn. of Okla., Inc. v. Okla. Water Res. Bd, 2013 OK 29, 2013 Okla. LEXIS 36 at ¶ 15 (April 23, 2013)(emphasis added). The Court ordered the hearing officer appointed by the OWRB “to provide notice to all parties to the [administrative] proceeding of her *ex parte* communications [with a hearing witness], and to add the information she received to the record along with responses, if any, from the other interested parties.” *Id* at ¶ 16.

There is an important distinction between the *Arbuckle Simpson* proceeding and the instant proceeding. In *Arbuckle Simpson*, the agency, the OWRB, was not a party to the action. It was merely a neutral hearing arbiter amongst interested parties, Oklahoma citizens, who advanced conflicting positions and hence were the litigants. *See id* at ¶ 6. Here the Oklahoma Securities Department, an agency headed by the Administrator, is a party. It is the *de facto* prosecutor or plaintiff in this litigation. The Supreme Court makes clear that, had the OWRB been such a combatant in *Arbuckle Simpson*, the Court would have issued mandamus requiring recusal of the hearing officer. Indeed, Justice Watt, dissenting in part, opined:

I agree with the majority that the petitioner is entitled to an administrative hearing that is fair and impartial. Nevertheless, I depart from its conclusion that any appearance of such a proceeding can occur absent the disqualification of the hearing officer.

Id at Dissent ¶ 1. The mere appearance of impropriety, Justice Watt held, citing *Miller Dollarhide, P.C. v. Tal*, 2007 OK 58, ¶20, 163 P.3d 548, was sufficient to require disqualification. 2013 Okla. LEXIS 36 at Dissent ¶ 2. “Here,” Justice Watt noted, “the ‘appearance’ is that the communications at issue created favor of one party over the other.” *Id* at

Dissent ¶ 3. Again the hearing officer communication in question was communication with a witness, not a litigant.

The *Arbuckle Simpson* majority goes to great lengths to make clear that the OWRB was not a party to the proceeding in question. See *id* at ¶¶ 1, 2, 6, and 7. Equally clear, however, is that, if the agency *had been* a party, the majority would have agreed with Judge Watt that disqualification was required. The Supreme Court explained:

When an administrative board acts in an adjudicative capacity, it functions much like a court. *Bowen v. State ex rel. Oklahoma Real Estate Appraiser Bd.*, 2011 OK 86, ¶ 15, 270 P.3d 133; *Harry R. Carlile Trust v. Cotton Petroleum*, 1986 OK 16, ¶ 10, 732 P.2d 438, *cert. denied*, 483 U.S. 1007, 107 S. Ct. 3232, 97 L. Ed. 2d 738 and 483 U.S. 1021, 107 S. Ct. 3265, 97 L. Ed. 2d 764 (1987).

Because they function much like a court when conducting adjudicative proceedings, agencies and their representatives are bound by minimum standards of due process. In *Johnson v. Bd. of Governors of Registered Dentists of State of Oklahoma*, 1996 OK 41, ¶32, 913 P.2d 1339, we noted:

[we have] consistently held and due process requires every litigant receive a decision that is the result of "the cold neutrality of an impartial judge." *Sadberry v. Wilson*, 1968 OK 61, 441 P.2d 381, 382, 384 (Okla.1968); *Craig v. Walker*, 1992 OK 1, 824 P.2d 1131, 1132 (Okla.1992). Likewise, the Oklahoma Statutes require an agency member to "withdraw from any individual proceeding in which [the member] cannot accord a fair and impartial hearing or consideration." Okla.Stat. tit. 75, § 316 (1991). "When circumstances and conditions surrounding litigation are of such a nature that they might cast doubt and question as to the impartiality of any judgment the trial judge may pronounce, said judge should certify his disqualification." *Sadberry*, 441 P.2d at 384 (quoting *Callaham v. Childers*, 1940 OK 64, 186 Okla. 504, 99 P.2d 126, 128 (1940)). This is an objective standard and is not dependent on the judge's belief. *Merritt v. Hunter*, 1978 OK 18, 575 P.2d 623, 624 (Okla.1978).

Even though [judges] personally [believe] themselves to be unprejudiced, unbiased and impartial, they should nevertheless certify their disqualification

when there are circumstances of such a nature to cause doubt as to their partiality, bias or prejudice. *Merritt v. Hunter*, 1978 OK 18, ¶5, 575 P.2d 623. This rule applies equally to administrative boards acting in an adjudicatory capacity as it does to judges. *Johnson*, 1996 OK 41 at ¶33, 913 P.2d 1339.

Here there is no doubt about the agency's status as a *party*. As a result, ex-parte communications are statutorily prohibited. Thus:

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.

Okla. Stat. tit. 75 § 313.

Recent events in this proceeding give, at a minimum, "*the appearance that fairness and impartiality are lacking.*" *Arbuckle Simpson*, 2013 Okla. LEXIS 36 at [P15], citing *Johnson v. Bd. of Gov. of Reg. Dentists of St. of Okla.*, 1996 OK 41, ¶32, 913 P.2d 1339 (emphasis added). Thus:

- This proceeding was commenced on **March 26, 2013**.
- On **May 14, 2014**, almost fourteen months after commencement of this proceeding, the Department got around to taking Southeast's deposition through its principal, Respondent Black.
- Some three weeks later, on **June 10, 2014**, the Department filed a motion for leave to file its Supplemental Recommendation. That pleading alleged violations against Southeast that had never been alleged during the fourteen-month history of this proceeding.
- When the Department filed its "June surprise," the final evidentiary hearing in this already-protracted proceeding was set for **June 23, 2014**.
- Respondents adamantly opposed the Department's eleventh-hour conversion of this matter into a completely different case and made that clear in its objection to the filing of the Supplemental Recommendation, which objection was filed **June 19, 2014**.

- The day before Respondents' opposition to the Supplemental Recommendation was filed, i.e., on **June 18, 2014**, there were discussions between Respondents' counsel and Department counsel. In those discussions, the former made it clear to the latter (i) that Respondents opposed the postponement of the evidentiary hearing, but (ii) that Respondents would reluctantly acquiesce in a short continuance in return for the "conversion" of the Monday hearing into a status conference, at which conference counsel would have the opportunity to present argument on these issues to the Administrator.
- In the **June 18, 2014** counsel discussions described above, Department counsel proposed that the evidentiary hearing be continued to *August 12, 2014*. The undersigned counsel made clear that Respondents would *not* agree to such a lengthy postponement, but would agree that the evidentiary hearing would not go forward on June 23, 2014, the next Monday.
- After the telephone conference described above, the undersigned received an e-mail (at 5:08 P.M.) from Department counsel stating that "[p]ursuant to our conversation today, the parties mutually agree that no evidentiary hearing in this matter will occur next week." Although the undersigned did *not* in fact agree that "no evidentiary hearing would occur next week," he did agree that the evidentiary hearing would not go forward on *Monday, June 23, 2014*, while understanding that -- in all likelihood -- the hearing would not be re-set for the week of June 23.
- Respondents' **June 19, 2014** opposition to the Department's motion for leave to file the Supplemental Recommendation was filed at 3:00 PM. The objection was seven pages long and contained some 11 pages of pertinent exhibits. The objection raised serious issues that, Respondents believed, deserved to be taken seriously and which their counsel intended to discuss in argument to the Administrator on the following Monday, June 23, 2014.
- At 11:30 A.M. on **June 20, 2014**, the Administrator entered an order allowing the Department's Supplemental Recommendation to be filed, without opinion or explanation, and canceled the hearing set for June 23, 2014, without explanation or the opportunity to be heard even on *that* subject.
- The **June 20, 2014** order re-set the evidentiary hearing for August 12, 2014, the very date suggested by Department counsel on June 18, 2014.
- The uncanny timing of the events described above, and especially the unlikely coincidence that the Administrator would re-set the evidentiary hearing for the *very date* suggested by Department counsel, prompted Respondents' counsel to send the letter attached hereto as Exhibit "A." The Department's response, denying that there had been any ex-parte communications between Department counsel and the Administrator, is attached hereto as Exhibit "B."

- As the foregoing shows, the rescheduling of the evidentiary hearing for August 12, 2014 was not merely an administrative matter. Respondents strongly opposed that action because (i) they believed that they were due their “day in court;” (ii) they believed that the eleventh-hour amendment should not be allowed at all; and (iii) they believed that the Department should have been required either (a) to go forward with its then-existing claims, or (b) admit that those claims were meritless and dismiss this proceeding. Any ex-parte communications about these matters, Respondents maintain, were improper.

On the foregoing facts standing alone, *Arbuckle Simpson* and the cases cited therein require that the Administrator recuse and appoint a neutral hearing officer. The Administrator should do so for independent reasons as well. In “Respondents’ Response to Department’s Motion for Summary Disposition and Renewed Motion to Dismiss Supplemental Recommendation” filed today, Respondents set forth a Procedural History at pages 1 through 4 thereof. That history is incorporated herein. It is a description of a game played on an uneven playing field, a game in which every referee’s call goes for one team, no matter what actually happened on the field. The concluding paragraph of the procedural history is apt here as well:

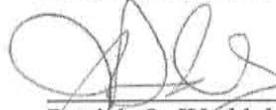
The events described [in the procedural history] represent a continuation of the bootstrap character of these proceedings that has permeated the same from the outset: if the original allegations turn out to be contradicted by the facts, just argue “some sort of nexus;” if the Department’s vicarious liability theory against the broker-dealer falls with the failure of the underlying misconduct allegation (as necessarily it must), just “discover” some entirely *new* violations to keep the broker-dealer in the dock. This bob-and-weave approach to the wielding of government power, Respondents respectfully suggest, ought not to be countenanced.

“Because they function much like a court when conducting adjudicative proceedings, agencies and their representatives are bound by minimum standards of due process.” *Arbuckle Simpson*, 2013 Okla. LEXIS 36 at ¶ 11. The record here reveals that those standards have not been met. Instead the prosecutor and judge have functioned as one, leaving the defendant to suffer the inevitable result.

WHEREFORE, Respondents pray for relief as aforesaid.

Dated: August 4, 2014

Respectfully submitted,



Patrick O. Waddel, OBA #9254
J. David Jorgenson, OBA #4839
SNEED LANG PC
One West Third Street, Suite 1700
Tulsa, OK 74103
(918) 588-1313
(918) 588-1314 Facsimile

*Counsel for Rodney L. Watkins, Jr.,
Frank H. Black and Southeast Investments,
N.C. Inc.*

EXHIBIT A

S N E E D  L A N G P C

Writer:
Patrick O. Waddel

E-mail:
pwwaddel@sneedlang.com

July 1, 2014

Via E-Mail and U.S. Mail

Ms. Jennifer Shaw
Enforcement Attorney
Oklahoma Department of Securities
120 North Robinson Ave., Station 860
Oklahoma City, OK 73102

Re: 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

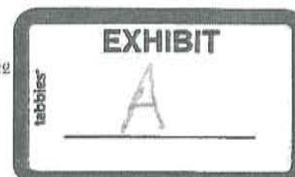
Dear Ms. Shaw:

By this letter we ask that the Department provide us with the information identified below within 15 days from the date hereof, which information is, in our judgment, made pertinent by 75 O.S. §§ 313 and 316.

(1) Please identify all ex-parte communications between all employees of the Department and the Administrator, Irving L. Faught, concerning the captioned proceeding or its subject matter from March 26, 2013 to date, which persons include without limitation all investigators for the Enforcement Division, Faye Morton, Jennifer Shaw, Amanda Cornmesser and Carol Gruis. "Identify" as used here means to state the date and time of the communication, to identify the parties to the communication, and to describe in detail the contents thereof. In particular, we are concerned about any such communications that occurred between 3:00 P.M. on June 19, 2014 and 11:30 A.M. on June 20, 2014.

(2) Please produce copies of all written communications covered by the preceding request, including without limitation all e-mails and other electronic communications, with the exception of:

(a) Documents filed in the captioned proceeding and any attachments to such filings;



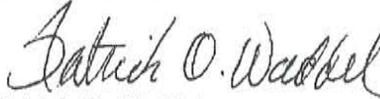
Ms. Jennifer Shaw, Enforcement Attorney
July 1, 2014
Page 2 of 2

(b) Documents that were copied to the undersigned counsel.

Recognizing that, with respect to nonwritten communications, the ODS Administrative Rules do not allow Interrogatories, we ask that the information requested in (1) above be provided in lieu of depositions of, at least, Ms. Shaw, Ms. Cornmesser, and Ms. Morton.¹ With respect to (2) above, please be advised that such request is made pursuant to Rule 660:2-9-3(b)(1).

Sincerely,

SNEED LANG PC



Patrick O. Waddel

POW:mjw

¹ We reserve our right to notice and take any such depositions, depending upon the adequacy of any responses to this request. By requesting the information here, we simply hope to avoid that necessity. We will, of course, need Ms. Gruis' deposition in any event.

EXHIBIT B

IRVING L. FAUGHT
ADMINISTRATOR



MARY FALLIN
GOVERNOR

STATE OF OKLAHOMA
DEPARTMENT OF SECURITIES

July 15, 2014

VIA First Class Mail and Electronic Mail

Patrick O. Waddel
1700 Williams Center Tower
One W. 3rd Street
Tulsa, OK 74103-3522
pwaddel@sneedlang.com

RE: ODS File 12-058

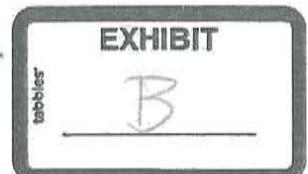
Dear Mr. Waddel,

The Oklahoma Department of Securities received your letter dated July 1, 2014, wherein you request the identification of all *ex parte* communications between Department employees and Irving Faught in connection with the referenced matter, with a specific focus on June 19 and 20, 2014. Please note that Faye Morton serves as Mr. Faught's assistant in the matter, as authorized by 75 O.S. § 313, and any communications between Ms. Morton and Mr. Faught are privileged. Otherwise, with respect to your numbered paragraphs, the Department responds as follows:

1. The Department employees involved in this matter do not have a record of their communications with Mr. Faught or Ms. Morton. It is the practice of the Enforcement Division to avoid *ex parte* communications with the Administrator or his assistant in connection with a case except for those questions expressly relating to procedural matters. Described below are the conversation we recall:

On April 21, 2014, after the deposition of Mr. Watkins, Ms. Cornmesser and I advised Mr. Faught that we had reached a settlement with both of your clients. We advised him that we would submit the proposed agreements to him for review once they were drafted. We told him generally what terms we had reached but we did not discuss the facts or merits of the case. Once the settlement agreements were drafted, I emailed them to Mr. Faught for his review as it is the practice of the Department to obtain the Administrator's approval on proposed Agreements prior to Respondents' review.

On June 18th, before Mr. Faught left the office, he inquired of Ms. Cornmesser and me whether we had yet received your response to the Department's motion to supplement. We advised him that we had not. I asked whether he wanted a proposed order in connection with the motion to supplement in the event he ruled in our favor and Mr.



Faught told me to go ahead and prepare an order. We did not discuss any contents of the proposed order.

Please note that on June 19th and 20th, both Mr. Faught and Ms. Morton were out of the office. There were no communications between the Department employees involved in this matter and Mrs. Morton during that time period. Additionally, Carol Gruis was also out the office on those days and has had no direct contact about this matter with Mr. Faught or Ms. Morton from the inception of the case.

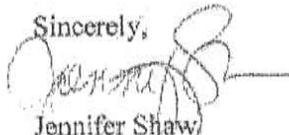
On June 19th, Melanie Hall, the Department's Deputy Administrator and Director of Enforcement, spoke with Mr. Faught and advised him that Ms. Commesser and I had prepared an order for his approval in connection with the motion to supplement should he rule in favor of the Department. Ms. Hall requested that, if Mr. Faught approved the order, he come into the office on June 20th to sign it. Mr. Faught agreed or said he would call Brenda London, the Department's paralegal, to authorize the use of his signature stamp. Ms. Hall made this request so that the parties could have direction on the scope of the hearing if it were to be held the next week and notice of when the hearing would be held if not that week. Ms. Hall's communication with Mr. Faught was purely procedural and did not touch on his decision.

Mr. Faught and I represented the Department's Invest Ed® STARS program at a teacher training seminar in Norman, Oklahoma on June 19th and 20th. On June 19th Mr. Faught inquired whether I prepared a proposed order and whether your response to the Department's motion to supplement had been received. I advised that I had prepared a proposed order and informed him at the time of inquiry that no response was received. We did not discuss the merits of the case. Later, after the Invest Ed® program, I received a phone call from Mr. Faught requesting that I email him a copy of the proposed order. We did not discuss the contents of the proposed order in either conversation.

On June 20th, Mr. Faught contacted Ms. London and requested that she authorize the proposed order with his signature stamp. Ms. Commesser and I only discovered that the order had been approved when Ms. London brought us a copy.

2. The only written communications between the Enforcement Division and Mr. Faught or Ms. Morton are the two emails I sent to Mr. Faught. The first email is dated April 23, 2014 and contained the proposed settlement agreements for Southeast Investments N.C., Inc. and Rodney Watkins. Although I did not copy you on that email, I advised you that Mr. Faught would review the proposed settlement agreements. The second email is dated June 19, 2014, and contains the proposed order. A copy of both emails are attached for your review.

Sincerely,



Jennifer Shaw
Enforcement Attorney

Brenda London

From: Brenda London
Sent: Monday, August 04, 2014 4:09 PM --
To: Irving Faught; pwaddel@sneedlang.com
Cc: Jennifer Shaw; Amanda Cornmesser; David Jorgenson (djorgenson@sneedlang.com); Holly Fisher (hfisher@sneedlang.com); Martha Welker (mwelker@sneedlang.com); Gerri Kavanaugh; Faye Morton
Subject: Rodney Watkins ODS 12-058
Attachments: RespondentsRespToODSMSD-RenewedMotionToDismissSuppRecommendation_12-058.pdf; RespondentsMotionForRecusal_12-058.pdf

Attached are filed stamped copies of the following: *Respondents' Response to Department's Motion for Summary Disposition and Renewed Motion to Dismiss Supplemental Recommendation*; and *Respondents' Motion for Recusal of Administrator and for Appointment of Neutral Hearing Officer*.

Thank you,

Brenda London, Paralegal
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(405) 280-7742 Facsimile
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