BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

OF THE CITY OF ALBUQUERQUE, NEW MEXICO

IN THE MATTER OF:

MARY I. PATRICK
Citation No. AR07057052

MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY HEARING OFFICER

This matter arises in the context of a citizen's administrative appeal to a City contract hearing officer of a citation issued under the City of Albuquerque's Safe Traffic Operations Program (STOP) Ordinance. City Ordinance 65-005; Amended 16-2006. The STOP Ordinance is a novel and controversial ordinance enabling the City to convert traffic offenses under the State or City traffic codes which are criminal in nature into purported civil "public nuisance" offenses which can then be "enforced" with much less legal process and substantially more financial penalty than otherwise allowed under the criminal traffic laws of the State or the traffic ordinances of the City.

The specific issue concerns Ms. Patrick's motion to disqualify the City's hearing officer on due process grounds of appearance of bias and conflict of interest. Significantly, the City's STOP Ordinance defines the "Hearing Officer" as "(a)n administrative hearing officer with authority from the Mayor to enforce and adjudicate matters under this article." The City hearing officer, who sits in place of a judge who would be obligated to render a fair legal opinion on a traffic violation and who would be a neutral judicial

officer, is in the case of the STOP Ordinance a City enforcement officer (". . . with authority from the Mayor to enforce. . . .") at the same time he purports to be a City adjudicative officer (". . . and adjudicate matters under this article").

Just as significant as the dual enforcement and adjudication roles of the Hearing officer is the ability of the City to pick and choose its hearing officers from an unlimited spectrum of candidates. The STOP Ordinance is entirely silent on the subject of *who* may be a hearing officer, apart from the qualification that the person acting as an "administrative hearing officer" must have "authority from the Mayor."

It is hardly surprising that the "appeal" process, including the selection and conduct of the City's hearing officers, has come under severe scrutiny and been subject to serious criticism and concern, both within and outside of the City government. Furthermore, it is undisputed that the City not only has the unlimited ability to select the hearing officer, but that the City pays the STOP Ordinance hearing officers and can discontinue the services of any hearing officers who are perceived as being overly fair to those appealing the City's citations. Combining all these factors, there can be little doubt that there is a substantial appearance of impropriety, the potential for bias, and the obvious possibility of a pecuniary interest in the hearing officers selected, retained, and paid by the City.

A leading case on the subject, *Haas v. County of San Bernardino*, 69 Cal. App. 4th 1019; 81 Cal. Rptr. 2d 900 (Ct. App. 4th Dist., 1999) addressed "whether the County's

unilateral selection, retention and payment of the hearing officer deprived Haas of a fair hearing by an impartial hearing officer in violation of his due process rights." *Haas*, at 1024. The Court first noted that "Due process rights to a fair tribunal apply to administrative hearings, as well as to court proceedings." *Haas*, at 1025. Acknowledging that courts "have held as a general rule that disqualification of a hearing officer is required only upon a showing of actual bias," the California appellate court nonetheless concluded that:

> there are 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.

Haas, at 1029.

Citing another California case in which a strong dissenting opinion advocates disqualification when the one side of a dispute chooses and pays the supposedly neutral hearing officer, *Linney v. Turpen*, 42 Cal. App. 4th 763, 776 (Ct. App. 1st Dist., 1996), the Court explains that a judge, or in this case a hearing officer, "shall be disqualified if . . . . a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." See, also, *City of Albuquerque vs. Joseph Chavez*, 123 N.M. 428; 941 P.2d 509 (Ct. App. 1997), citing *Reid v. New Mexico Board of Examiners in Optometry*, 92 N.M. 414; 589 P.2d 198 (1979).

Here the appearance of partiality is overwhelming, as the City's promulgation and enforcement of its controversial STOP Ordinance have been subjected to severe scrutiny

and criticism and the conflict is as apparent as it is obvious. The City's definition of the hearing officer as an "enforcement" officer leaves no doubt that the hearing officer is as supportive of the City's ordinance as the police officer who "prosecutes" the case before the hearing officer.

In *Haas*, the Court concluded that its decision disqualifying the hearing officer was based on a totality of circumstances:

> in which the hearing officer was unilaterally selected, retained, and paid by the party threatening deprivation of an adversary's constitutionally protected property rights . . . and there was a complete absence of any restrictions on the selection of the hearing officer to ensure a reasonable degree of impartiality. Under such circumstances, we conclude Haas was deprived of his constitutional due process right to a fair hearing conducted by an impartial hearing officer.

Haas, at 1032.

In considering a claim to have an impartial hearing examiner, courts start with a first principle: "No man shall be a judge in his own cause." *Bonham's Case*, 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610). The right to an impartial decision-maker is required by due process and those with a pecuniary interest in legal proceedings should not adjudicate those disputes. *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Disqualification because of interest has been extended with equal force to administrative adjudications. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

Two cases strongly support the contention that the STOP Ordinance Hearing Officer must be disqualified: *Teachers v. Hudson,* 475 U.S. 292 (1986) and *Tumey v. Ohio* 273 U.S. 510 (1927). In the Chicago Teachers Union case, *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1194 (7th Cir. 1984), an arbitrator who was to determine the propriety of certain dues deductions was not independent but was picked by the union from a list and paid by the union. In that case:

> [t]he arbitrator, unlike a federal judge, is not paid a salary that is independent of the number of cases he presides over, or of the goodwill of a litigant. The arbitrator is paid for each arbitration, and this gives him a financial interest in deciding cases favorably to the union--which hires him, and incidentally which pays him. "N]o man is permitted to try cases where he has an interest in the outcome."

Chicago Teachers Union, at p. 1195*,* quoting *In re Murchison,* 349 U.S. 133, 136. The Seventh Circuit's assessment of the procedure and determination that it violated the due process clause was affirmed by the Supreme Court in *Chicago Teachers Union, supra,* 475 U.S. 292.

Similarly, in *Linney*, the California Appellate Court discussed the propriety of a hearing officer who presided over an employment dispute:

> The hearing officer who will determine the propriety of the employee discharge at issue cannot be blind to the interest in that issue of the party which selected him or her and pays the fee, and has the ability to do so again in future cases. And it is not only the interests of the particular employer involved in a given case that may affect a hearing officer's attitude. A hearing officer seen by other employers as unduly indulgent of the interests of employees they wish to discharge, runs the risk he or she will not be selected by them either, or will not be selected as frequently as might otherwise be the case, and will suffer the adverse economic conse-

> quences. Therefore, regardless whether they act on it, hearing officers selected pursuant to Rule 6 have a financial interest in rejecting the claims of employees and upholding those of appointing officers. In contrast, the hearing officer has no incentive to "accord equal favor to one-time customers," such as appellant. (Kim, *Rent-A-Judges and the Cost of Selling Justice*, *supra*, 44 Duke L.J. 166, 177-178, fns. omitted.) Finally, like the arbitrator in *Chicago Teachers Union*, the decision of the hearing officer selected by the party that controls the process is "final." (S.F. Charter, § 8.341.)

Linney, dissent, J. Kline, at 784, 785.

The seminal case regarding pecuniary conflicts of interest is *Tumey v. Ohio*, 273 U.S. 510. In *Tumey* a mayor-judge was paid, in addition to his regular salary, a certain sum in each case in which he found the defendant guilty of a liquor law violation. The court found this a denial of due process:

> The mayor received for his fees and costs in the present case $ 12, and from such costs under the Prohibition Act for seven months he made about $ 100 a month, in addition to his salary. We cannot regard the prospect of receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest. . . . Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Tumey, at pp. 531-532.

The "possible temptation" rule announced in *Tumey* was first extended in *Ward v. Village of Monroeville, 409 U.S. 57 (1972),* where the mayor-judge had no direct pecuniary interest, but the fines he levied helped defray the costs of running the village government. A year later the doctrine was applied to a civil administrative proceeding in *Gibson v. Berryhill 411 U.S. 564 (1973),* where the *indirect* economic self-interest of

members of a state board of optometry was deemed to offend the due process clause. As stated by the Supreme Court in *Berryhill*, "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. *Tumey v. Ohio, 273 U.S. 510* (1927). And *Ward v. Village of Monroeville, 409 U.S. 57* (1972) indicates that the financial stake need not be as direct or positive as it appeared to be in *Tumey*. It is also true that “[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.” K. Davis, Administrative Law Text § 12.04, p. 250 (1972), and cases cited therein. *Gibson v. Berryhill*, 411 U.S. at p. 579.

> The fact that the income of hearing officers depends on the number of cases they hear and therefore the favor of the employers who select them presents a pecuniary conflict of interest at least as clear as those condemned in *Tumey* and its progeny. One such case that is particularly on point, because it discusses the manner in which a hearing officer's interest in securing future judicial business creates a pecuniary conflict, is the decision of the highest court of West Virginia in *State* ex rel. *Shrewsbury v. Poteet (1974) 157 W.Va. 540 [202 S.E.2d 628, 72 A.L.R.3d 368].* There a statutory scheme permitted creditor-plaintiffs a county-wide choice as to judge and provided that the judge selected could charge a $ 5 fee for his or her services. The court noted that under this fee system "the income of a Justice of the Peace is determined by the number of cases instituted in his court. It necessarily follows that the more cases he handles the more $ 5.00 fees he will receive." (*Id., at p. 631.)* Citing *Tumey*, the court noted that in order to make the statute constitutionally invalid it was not necessary to show actual abuse by a particular justice of the peace. (*Id., at p. 632)* "Although this case is civil rather than criminal, the principle expressed in *Tumey* applies.

Linney, at p. 788.

The same is true here, where the STOP Ordinance hearing officer is a contractor with the City of Albuquerque, and where the City pays and retains the officer. The hearing officer works directly for the City, and his earnings are based on securing enforcement and convictions under the City's lucrative civil administrative traffic enforcement scheme. It is apparent that such a hearing officer cannot possibly provide the fairness and neutrality that can be found in a court of law.

Finally, in the case now before the hearing officer, a telling factor is the hearing officer's apparent lack of comprehension about the basis for the charges brought before him. When Ms. Patrick's counsel pointed out that the City had utterly failed to present any proof that Ms. Patrick, the driver of the vehicle at the time of the alleged offense, the vehicle itself, a 2001 Pontiac 4-door sedan N.M license 352KMH, or the owner of the vehicle, Albuquerque Police Officer Dennis Patrick, constituted "public nuisances," the hearing officer asserted that the sole issue before him was whether there had been a traffic violation.

However, when asked about the subject and basis for the Ordinance, Assistant City Attorney Saul Ramos confirmed that the Ordinance was, in fact, a civil "public nuisance" ordinance, and that the process before the hearing officer was actually one of finding that there was a public nuisance violation and ensuring "abatement of a public nuisance." Surely, <u>proof</u> of a public nuisance violation, and the Hearing Officer's acknowledgment

of that requirement of proof, are preliminary matters essential to a fair and just determination of the case before the hearing officer.

For all the reasons set out herein, the City's STOP Ordinance enforcement hearing officer should be disqualified and the case heard by him on June 12, 2007, should be dismissed.

Respectfully submitted,

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I hereby certify that the foregoing was faxed and/or e-mailed to Chief Administrative Hearing Officer Roberto Albertorio and to Hearing Officer Marty Esquivel at the Office of Administrative Hearings and to Assistant City Attorney Saul Ramos on June 13, 2007.

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Paul Livingston