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FILED
Jerry Potter
29 North Bounty Lane
Key Largo, Florida 33037
(305) 852-5959
MAY 27 12: 00

DIVISION OF
ADMINISTRATIVE
HEARINGS

Sent via U.S. Mail

May 27, 2011

Claudia Llado
Clerk of the Division
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

RE: U.S. POSTAL RETURN

Dear Ms. Llado:

Yesterday, May 26, 2010 I mailed a copy of the Petition for Writ of Certiorari that I filed on Wednesday May 25, 2011 with the 3DCA.. A cover letter was included in that mailing. This letter is to explain what happened after I mailed it.

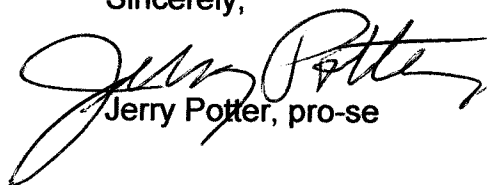
On May 27, 2011 the package (folder) was returned to me. It had the following message affixed to the address portion of the mailed folder. It read:

"We regret that your mail was not collected or is being returned to you due heightened security requirements. All mail that bears postage stamps and weighs more than 13 ounces MUST be taken by the customer to a retail associate at a Post Office."

Today I have been advised by telephone by U.S. Postal to return to the package to a Postal employee for inspection and questions. It will be re-mailed today and I have included this letter to you for information as to any inconvenience this delay may have caused you. Especially since we now are entering the holiday week end. Prior to this notification I was not aware of this rule.

A photo copy of the front of the folder the way it was returned to me is enclosed for your review.

Sincerely,


Jerry Potter, pro-se

Jerry Potter
29 North Bounty Lane
Key Largo, Florida 33037
(305) 852-5959

FILED

2011 MAY 31 P 12:00

May 26, 2011

Sent via U.S. Mail

DIVISION OF
ADMINISTRATIVE
HEARINGS

Claudia Llado
Clerk of the Division
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

RE: DOAH Case No.: 10-9417 Appeal

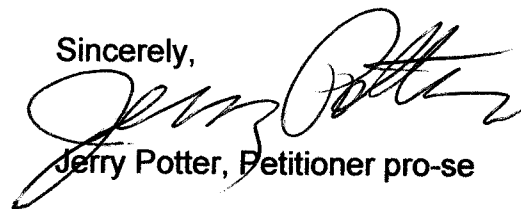
Dear Ms. Llado:

Please find Petition for Writ of Certiorari that was filed with the State of Florida District Court Of Appeal, Third District on May 25, 2011. The 3DCA case in the above numbered case. This 3DCA case number assigned is 3D11-1388.

Included is a copy of the Petition for Writ Certiorari with appendix. Please file it in the appropriate manner in the DOAH case and should you have any questions please contact me at the telephone number listed above immediately.

Thank you for your attention to this matter.

Sincerely,



Jerry Potter, Petitioner pro-se

Copies: DEP & Respondent Ellenthal's

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, THIRD DISTRICT

JERRY POTTER,

Petitioner,

3rd DCA CASE No. 3D11-1388

Lower Tribunal Case No.
DOAH 10-9417

-vs-

IRA and JUDITH ELLENTHAL & THE
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

DIVISION OF
ADMINISTRATIVE
HEARINGS

2011 MAY 31 P 12:00

FILED

PETITION FOR WRIT OF CERTIORARI

JERRY POTTER, Petitioner pro-se
29 North Bounty Lane
Key Largo, Florida 33037
(305) 852-5959

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PETITION FOR WRIT OF CERTIORARI

Petitioner Pro Se Jerry Potter (Potter/Petitioner) hereby files this Petition for a Writ of Certiorari pursuant to Florida Rules of Appellate Procedure 9.100 to review the decision of the Administrative Law Judge denying the Petitioner's Motion for to Disqualify/Recuse the successor Administrative Law Judge in the above numbered and styled case. The above -referenced case is from the State of Florida Division of Administrative Hearings (DOAH).

BASIS FOR INVOKING THE JURISDICTION OF THE COURT

The Petitioner's basis for invoking the jurisdiction of this Court is as follows:

- I. THE FLORIDA CONSTITUTION, Section 21 titled "Access to Courts," Provides that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."
- II. THE FLORIDA CONSTITUTION , Article V, Section 4, titled "District Courts of Appeal," provides that:
 - (b) JURISDICTION.
 - (2) The District Courts of Appeal shall have the power of direct review of Administrative action, as prescribed by general law.
- III. Florida Statute Section 120.68, titled "Judicial review," provides for Direct Review of Administrative Action, as stated:

- (1) A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy.
- (2) (a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the date of the order being appealed.

IV. Florida Rule of Appellate Procedure 9.030(b), titled:

“Jurisdiction of District Courts of Appeal,” states that:

Appeal Jurisdiction. District Courts of Appeal shall

review, by appeal

(C) Administrative Action if provided by general law.

V. Florida Rule of Appellate Procedure 9.100, titled

“Original Proceedings,” provides that:

(a) **Applicability.** This rule applies to those proceedings that invoke the jurisdiction of the courts described in rules 9.030 (a) (3), (b) (2), (b) (3), (c) (2), and (c) (3) for the issuance of writs of mandamus, prohibition, quo warranto, **certiorari**, and habeas corpus, and all writs necessary to the complete exercise of the courts jurisdiction; and for review of non-final administrative action . . .

(c) Exceptions: Petitions for Certiorari; Review of Non--Final Administrative Action.
The following shall be filed within **30 days** of rendition of the order to be reviewed: . . .

(3) A Petition for review of non-final Administrative action under the Florida Administrative Procedure Act Florida Statutes Chapter 120].

6. Moreover, a petition for writ of certiorari is the appropriate method of challenging the denial of a motion to disqualify by an Administrative Law Judge. The appeal is only recourse when injury will occur to petitioner and also to at least protect the appearance of fairness in the legal system, this extraordinary remedy is warranted for the sake of the appearance of Justice, if not justice itself, and the public's interest in the integrity of the judicial process. For this reason, the writ will issue where there is this method to produce a prima facie showing that justice itself and that appearance of Justice is necessary.

7. Here, the decision below to be reviewed in a non-final order of a successor Administrative Law Judge of the Division of Administrative Hearings under the Administrative Procedure Act, Florida Statutes Chapter 120, entered on 4/25/11.

See: **§ 38.05 F.S.A.; Rule 1.432(e). See Canon 3C and D,**
Code of Judicial Conduct for the judge's duty to disclose disqualifying facts.

The judge is required to tell the parties of any adverse interest, this successor ALJ did not disclose to the Parties that he shared office with now recused initial ALJ and initial ALJ had say in the successor's assignment (transfer) to the case.

The Order attached, was issued on April 25, 2011 which denied Potter's Motion to Recuse/Disqualify the successor ALJ as hearing officer assigned ?? (transferred) to preside over the above listed case. The non-final Order is appealed to this court (within whose jurisdiction Petitioner resides) under Florida Constitution Article V, Section 4 (b)(2). Florida Statutes Sections 120.68 (1) and (2) (a), and Florida Rules of Appellate Procedure 9.030(b)(1) (c) and 9.100 (a) and (c) (3).

Furthermore, review of the final agency decision (not yet referred to the agency by the Administrative Law Judge and therefore not yet able to be entered by the agency) would not provide an adequate remedy (since, unless reversed. The ALJ would be able to continue to preside as hearing officer to Petitioner's detriment in subsequent proceedings below, including but not limited to further discovery, pre-hearing pleadings, the final evidentiary hearing and post-hearing pleadings).

8. Petitioner has timely filed this Petition Writ of Certiorari on May 25, 2011 after the successor ALJ's April 25, 2011 Order was issued by the successor ALJ.

9. This Petition for Writ of Certiorari is the only means left in which petitioner has available to correct this intolerable situation. At least to protect the appearance of fairness in the legal system, this extraordinary remedy is warranted if only; a quote from a recent case from, sister court, 4DCA, in 2006:

“for the sake of the appearance of Justice, if not justice itself, and the public's interest in the integrity of the judicial process.”
(In decision of Health Care and Retirements Corporation of America v. Bradley,
944 So. 2d 510)

THE FACTS ON WHICH THE PETITIONER RELIES

10. On or about October 1, 2010, Potter filed a Petition* for Formal Administrative Hearing with the Department of Environmental Protection (DEP), DEP's OGC Case No.: 05-2240, the issue is challenging the issuance of permit for rebuilding/replace existing dock and two (2) boat lifts to Petitioner's neighbor Ira and Judith Ellenthal. The existing dock did not have any boat lifts at the time the letter(s) of authorization (exemption) was issued, in 2003 and 2004, by DEP, to the applicant's. The applicant's who are the out of state owners of property (residence) owned and located at 35 North Bounty Lane, Key Largo, Florida. It as not yet been explained the long period of time from the issuing of the exemption to beginning construction in early July 2010. Other agencies, U. S. Army Corps of Engineers (ACOE), State of Florida Department of Community Affairs (DCA), DEP, and local Monroe County Building Department (MCBS). Some delay was encountered by the local agency requesting a new survey because the drawing submitted did not match the aerial photo's of the existing location. After that new survey was submitted and accepted by the MCBBD biologist on or about July 1, 2010, the MCBBD did issue the building permit to applicants on July 8, 2010. Construction began shortly thereafter.

*This petition was filed after the Petitioner did observe construction activity, in and around the area of the applicant's dock around July 10 /12. This was observed from the petitioner's own residential dock.

After some delays, due to family medical issues, the Petitioner therefore was unable to get to review the file from DEP for conformation as to what was being constructed and what authority until (date on or about July 28, 2010. One extension of time was requested from OGC to properly prepare the petition and a Petition was filed on September 27, 2010 with DEP and then with DOAH on October 1, 2010.

11. Immediately after filing the initial above-referenced Petition for Formal Administrative Hearing with DEP on September 27, 2010, DEP then filed on October 1, 2010 with the Division. On October 6, 2010 the counsel for DEP filed a with DOAH's clerk's office a Motion to Bifurcate the proceeding to determine the timeliness of the Petitioner's filing of his petition. (in essence a Motion to Dismiss).

11. The issue in the timeliness was centered around the Petitioner looking At a file at the DEP Marathon office on several occasions. This was acknowledged By the petitioner but what was left out by the DEP Counsel was that in addition To looking through just the applicant's file at the Marathon office the Petitioner Was also looking at many other files that all had dock, boatlift exemption's issued by the Marathon DEP office. One other was a consent order that was issued by DEP on a property for illegal filling and destruction of mangroves during the Construction of a swimming pool. That property was located at 31 N. Bounty Lane, immediate to the north of the petitioner and that 31 N. Bounty lane property Is located immediately to the south of the Applicant in this case on appeal the Ellenthal's project. For example the cases are:

DOAH Case No. 06-1474 Consent order case, case closed*

DOAH Case No. 09-0845 Boat Lift to existing dock;
applicant withdrew application after survey
did show riparian violation, dock over size.

DOAH Case No. 09-5120 Dock and two boat lifts,
Settled agreement by all parties.

DOAH Case No. 10-9417 Dock and two boat lifts,
on going (file writ of cert. with 3dca; 5/23/11.)

*case close due to ALJ Order claiming Petitioner did not
Respond in time for EOT (no response)

The issue in #06-1474 above cited case are property lines in the consent case.

The issue in all the rest are riparian lines issues.

12. The Petitioner did have occasion to look at the Ellenthal file on other occasions, these inquiries were evident early in this case as the Petitioner early on by submitting a drawing showing exactly what the Petitioner was looking for. It was filed in DOAH case 10-9417, this instant case, it was a copy of a survey That shows four (4) residential lots depicted as reading from left to right lot 17, 16, 15, and lot 14. (petitioner is lot 13 and is not shown anywhere on the Survey, despite the FAC requirement to do so. This drawing was sent to the DOAH clerk's office on October 29, 2010, it was titled: (appendix p. 11-17)

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE

THIS RESPONSE WAS ACCOMPANIED BY AFFIDAVIT

The petitioner attempted to explain that in case DOAH Case No. 09-0845 (Boat Lift to existing dock;) on April 30, 2010 the petitioner in that case also Potter, had his surveyor enter lands to conduct a survey of lot 14's boat lift and Shore line, a composite of that surveyor's findings is shown as (appendix p. 9) It was completed by Fred Hilderbrandt of Island Surveying with offices in Key West, and his letter stated that the applicant from lot 14 dock is oversize and has riparian line issue's on both the north and south side of his property. That is why the applicant and owner of lot 14 withdrew his application on May 4, 2010.

How that enters into this case, it is clearly established with the filing of more than one affidavit to the effect that the petitioner did not see the whole file, in the Ellenthal case, at any time during any of his several visits to look at the file. One time the file did not have any papers in the file at all other than a request to DEP's office of maps/surveying to determining the location of state owned lands in the area of this property (applicant's).

13 The drawing submitted was titled exhibit 1, when one looks at the drawing it clearly shows that the three (3) properties, that would be lots 16, 15 & 14 all have had their riparian lines moved to the south to give those three lot owners a more sizable portion of the waterfront rights than what each would get if they were more correctly divided between all and including the petitioner's lot which is not

shown but is located where lot 13, in block 6 would be, the next lot. To mention that the proper way is to apportion the riparian owner's shore line proportionally to the area that is where docks and boat lifts are to be constructed on state lands.

14. This motion to show cause was ruled on November 2, 2010, granting the Motion to Bifurcate and after a telephonic hearing to determine a hearing on the matter of timeliness, it was set for December 12, 2010, in the DEP office located in Marathon, Florida.

15. In the case history the applicants, Ira and Judith Ellenthal who do not reside in Monroe County, but have a main residence which is located in the state of Connecticut. The applicant's never made any appearance in the case up to this ruling by the initial ALJ. The did not respond to the initial ALJ's initial order. The closest the case has had to any appearance on their behalf was mentioned by DEP counsel in their response to the initial order. Counsel stated on page 2, last two sentences of the last paragraph. The Department's response stated the following:

Counsel for the Department has on several occasions attempted to confer with the Applicants, Ira and Judith Ellenthal, but was not able to reach them until just before filing this response. As such, the applicants have indicated that they will also be filing a separate response to the initial order a few days after this response.

Furthermore it is interesting how they were hiding from any entry into the case, there actions indicate to the petitioner that they are going to let DEP argue on the

fact that DEP issued the exemption. Below is the certificate of service that was attached to DEP counsel response on October 12, 2010.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed to Jerry Potter, 29 North Bounty Lane, Key Largo, Florida 33037; to Ira and Judith Ellenthal, 35 North Bounty Lane, Key Largo, Florida 33037; and to Sean Kirwan, Glen Boe & Associates, Inc., 5800 Overseas Highway, Suite 4, Marathon, Florida 33050, on this 12th day of October, 2010.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed to Jerry Potter, 29 North Bounty Lane, Key Largo, Florida 33037; to Ira and Judith Ellenthal, 21 Shorehame Club Rd., Old Greenwich, CT 06870; and to Sean Kirwan, Glen Boe & Associates, Inc., 5800 Overseas Highway, Suite 4, Marathon, Florida 33050, on this 27th day of October, 2010

16. There are two issues with this, first to this date the applicant's have never filed a notice of appearance or responded to the Initial Order. The first time the petitioner was aware that the Applicant's were going to participate as a party and defend* their receipt of the 2003/2004 exempt authorization from the Department was when applicant Judith Ellenthal "appeared by telephone" at the December 9, 2010 evidentiary hearing on the issue of timeliness of the filing of the petition. The petitioner was not prepared in any manner for this "SURPRISE ENTRY" as a party at a hearing in which the applicant knew I would be there and also knew that the petitioner would not be prepared to spontaneous questions and answer session as the Petitioner is pro se and not trained or skilled in the answer and questioning part of a live witness under oath.

17. If this was not enough, the other party, DEP, did not have office manager

Gus Rios present. The Petitioner specifically asked DEP employee a during a visit To the DEP Marathon office just prior to the December 9, 2010 hearing if Mr. Rios Was going to be here (Marathon, DEP office) that day, they responded yes. Mr. Rios was not present.

18. The ISSUE OF ENTERING THE CASE, ALL PARTIES ARE TO FILE WITH THE ALJ A RESPONSE TO THE INITIAL ORDER. The Ellenthals Did not do this. DEP counsel did state in counsels response to the initial order that The applicant's did say they were: (emphasis supplied) dated: 1012/10

“filing a separate response in a few days in response to the initial order of the ALJ”

Now on December 9, 2010, almost two (2) month's later they (applicant's) are Now participating in a hearing unannounced to the petitioner. The petitioner is Sure that he is the only person that was in attendance that did not know that the Applicant was going to be present. The petitioner was totally unprepared for this surprise.

19. A further example that will show the disdain that the applicant's shows for the proceeding in which they are involved in. May be they already know the result. At some point after the “certificate of service” was diligently mailed with each filing made by the petitioner, the address was of the applicant's Key Largo, Florida residence. The address is 35 North Bounty Lane, Key Largo, Fl. 33037. After maybe 2-3 weeks the petitioner's mail would come back stamped by the U.S.

Postal Service as "REFUSED DELIVERY" this continued with out any one notifying the Petitioner of the applicant's Connecticut residential address. The petitioner only found out, still having the mail refused sent back to him, when the applicant Judith Ellenthal did file a Motion to Quash on February 8, 2011, that motion did have the applicant's return address. The clerks office has the new address for the applicant, it is not known when the clerks office received it or from whom. DEP did not have it around the end of October, but did have the new address around November 8, 2010. Even the successor ALJ office had it.

20. The ALJ Office did not have it in early November 2010, and did have the correct address for the applicant's in Connecticut, in the last part of November. Whereas the petitioner did not receive it an only after the applicant's Motion to Quash was filed with the Connecticut address listed in the Certificate of Service.

18. When the hearing was called order by the initial ALJ on December 9, 2010, Petitioner asked to speak before the parties are sworn in. The petitioner had Recently, within the last couple of days before the hearing found out information from the Florida Bar Web Site that an article that was published in 2003 titled "Meet the DOAH Administrative Law Judge's" it was Compiled by Director and Chief Judge Robert S. Cohen and Administrative Law Judge Linda M. Rigot, it was dated September 2006, and was the first of two (2) parts. It did give a bio of several ALJ's, the initial ALJ was Bram D. E. Canter what the summary of the

article stated is shown below:

Name: BRAM D. E. CANTER

Year Admitted to The Bar: 1978

Year Employed at DOAH: 2005

Prior Profession,,1 Experience:

Assistant General Counsel,

Department of Environmental Regulation (1981-84);

Other information was given, the part that caught the Petitioner's eye was the fact that the Department of Environmental Regulation has essentially "morphed" into what is known today as the State of Florida Department of Environmental Protection. The job title of the initial ALJ was that the initial ALJ was if fact assigned to the Office of General Counsel. That happens to be a party in this case. The petitioner did feel uncomfortable with a former employee of the same office of the party to this case was a clear cut case of "conflict of interest," this was presented verbally to the initial ALJ with a court reporter present at the beginning of the hearing, before any testimony was taken. The Petitioner made an Oral Motion that the initial ALJ should be recused/disqualified due to the conflict of interest, the above explanation was verbally made to the initial ALJ. The petitioner explained that the hearing should not go forward, the initial ALJ overruled and proceeded to deny the oral motion immediately and go forward with the hearing. The only response made by the petitioner was a request that the Order denying The Petitioner's motion be placed in written form.

19. On December 10, 2010 the next day the initial ALJ issued first an Order denying the Motion for Recusal/Disqualification. The same day, but filed after the denial of the Motion for Recusal/Disqualification Order, the initial ALJ issued the Order not allowing any further discovery for the petitioner. This initial ALJ had to know that he was going to be gone, but issued the Order anyway, that was clearly anticipation on the part of the ALJ knowing that DEP failed miserably at the hearing and the only discovery that was to be conducted in the case would be by the petitioner, it was not necessary to issue an order to prohibit the Department from conducting any discovery, what discovery could DEP or the applicant's perform to prove the case, Where is the DEP lead permit agent Matt Culver, he may not even live in Florida after 7-8 years. Where are any of the other agents that know about a authorization that was issued in 2003/2004?

THE DECEMBER 9, 2010 HEARING

20. The hearing lasted a little over 2 hours. There is no transcript available from the December 9, 2010 hearing for this issue in this appeal. A partial transcript was submitted by the Petitioner from the cross examination of the DEP witness Jean Murphy. It shows that the agent (administrative assistant) from the DEP Marathon office did confirm that when she hands a file to someone that Ms. Murphy has essentially does not have any knowledge of what is in the file, what should be in the file, how many pages are in each respective file, -14-

and also would not know if any of the required pages to be in any one file were in fact missing or could even be still on the agent for DEP that is handling that specific case "desk". DEP has not produced any person that handled the application to refute what the Petitioner has filed verification to already in the record.

21. On December 20, 2010 the Petitioner file a Motion for Reconsideration of the Denial of the December 9, 2010 oral motion, and the written Order, confirming the denial in written form on December 10, 2010. This motion now had more that the conflict of interest element, the initial ALJ in his written Order Denying the Petitioner's Motion had now chosen to litigate the issue raised in the verbal motion which essentially proves the prejudice by the initial ALJ. After the Christmas holidays were over and the first Order issued in this case in 2011 was the granting of the Petitioner's Motion for reconsideration of the recusal/disqualification. After one (the Oral) two (the written) and three (granting the reconsideration) attempts by the petitioner the initial ALJ is out.

22. The successor ALJ did file a notice of "TRANSFER" on the same day of the granting of the motion by the initial ALJ.

23. The successor ALJ was the new ALJ now in the Ellenthal case, and the Petitioner had good feelings because of all of the ALJ's that have handled the previous cases, the now assigned successor ALJ seemed to be the fairest to all parties. That is purely biased opinion that the petitioner had of the successor ALJ

only form dealing in the case 09-5120. The other good thing was that case did finish with a settlement that all parties could agree to.

24. On February 4, 2011 the successor ALJ held a case status Motion Hearing Telephonic conference call to be attended by all parties. The successor ALJ did file prior to on January 27, 2011 a "Notice of Telephonic Status Conference" to be held on February 4, 2011.

25. At the February 4, 2011 Motion Hearing Telephonic Conference applicant's did not call into the hearing. The purpose of the hearing was to determine a new hearing date on the petitioner's hearing to determine the time-lines of Potter's petition.

26. This would be the first contact with the successor ALJ. The main point was getting a date for the next hearing and the issue on notice. When the Petitioner was explaining his version of what constitutes "constructive notice" the ALJ disagreed and said "there is case law that says when you see something that does constitute "notice", the petitioner stated that is not his understanding and that it must be "clear" and the **petitioner would further produce the case law at the appropriate time.** The petitioner advised the successor ALJ that he does not agree with that version. The petitioner then asked where the applicant's is, that this was to be a mandatory appearance, and the applicant is not appearing. The successor ALJ stated that he heard something that they may not be able to make it, and

any way DEP counsel is here and speak for them. The Petitioner immediately Advised the ALJ that the Department counsel cannot represent the applicant. The successor ALJ then "clarified" and stated what he meant to say was "that their interest's are similar and nearly the same". The conference ended shortly afterward, the applicant's did not attend. The successor ALJ did not adequately answer the petitioner's concerns.

27. On February 7, 2010 the successor ALJ set the Hearing on timeliness for March 25, 2011.

28. On March 23, 2011 the Petitioner filed a Unopposed Motion for Continuance of the Hearing on timeliness of the Petition. Settlement discussions had started between parties and seemed to be going in the right direction.

29. Three status reports later on April 8, 2011 the petitioner was requested by the applicant to file a joint unopposed, after calling DEP counsel who was not able to be contacted, a message was left by the petitioner. It was during the filing of this benign Motion that the case turned, partially that during this same time frame the petitioner found a survey* in the Monroe County file that was previously missing during his last request to review the MC files. *(see paragraph 32 below)

30. The petitioner did understand that both counsel for DEP and the applicant were not being truthful and honest in the previous several weeks of settlement discussions. During the afternoon of April 8, 2011 the Petitioner was charged

with the filing of the Unopposed status report and because it was a Friday the petitioner decided to call the successor ALJ's administrative assistant to advise of the pending arriving on Friday a joint status report would be filed in a few hours. (courtesy call)

31. When the petitioner called the successor ALJ's judicial assistant it was approximately 12:50 p.m. when the recording came on and advised that the judicial assistant was busy or on the phone and leave your case number for either ALJ Bram Canter or David Maloney cases and she would follow up on the message depending on the information left. The petitioner had now just been told that the successor ALJ was now the "office partner of the recused/disqualified initial ALJ." The petitioner did call the JA later to advise that the status report would be filed shortly, and it was.

32. The tie in between what the petitioner found out in the Monroe County Building department file later and what the Petitioner did file on April 8, 2011

See paragraph 1 below:

* Petitioner Jerry Potter files this Status Report on behalf of the Applicant and Petitioner on the on-going Settlement and or Agreement discussions, The Petitioner and Applicant's have made progress to the point the Applicant's now agreed to have ready for submittal a new, revised or amended drawing prepared by their surveyor and/or engineer. Applicant advised Petitioner in last call, after several others today, that no date is now available of when to expect the "new" drawing will be completed. He is in the field and will not be able to return the applicants phone call until late today.

Neither the Department nor the applicant has notified the petitioner that the new

drawing has been submitted to the Department which would make the timeliness issue moot, because the drawing would have to be changed and resubmitted.

The applicant did submit a drawing to the petitioner by e-mail and the petitioner did file it with the DOAH clerks office on one of the petitioner's filings.

33. The pattern of the behavior by successor ALJ is now clearer in the successor acting as co-counsel on the issue of "constructive" notice quashing subpoena's. Continuing of the order issued by the initial ALJ to prohibit the Petitioner from proving his case that the petition is timely, this is basically to Deny the Petitioner due process, it is only presented to show the prejudice of Not only the initial ALJ, but his office mate, the successor ALJ.

33. As mentioned earlier, the Petitioner was involved in case 10-5120 which had an issue of dock oversized and riparian line issue on the north side, the subliminal issue of the case was the departments making it extremely difficult for the petitioner and not making files available to the petitioner under the public records act FS119. Many times the petitioner had to call Bonnie Hazleton, the Ombudsman for DEP when you need to get access to public records and certain Employees of the respective agency make it difficult, Ms. Hazleton is the queen in getting them for the inquiring minded person. The successor ALJ was well aware of the petitioner's problems in getting information from the State of Florida Department of Environmental Protection Marathon Office. The successor

ALJ did issue the following order in the Case DOAH #10-5120 on 11/02/09 it stated in paragraph 2 of that Order: (ALJ in both cases: 10-5120 and 10-9417)

"2. The file reflects difficulties encountered by Petitioner in accessing the complete files of the Department of Environmental Protection (DEP) alleged by Petitioner to have led to the speculative and conjectural nature of the allegations in the petition. The parties are urged to co-operate in scheduling Petitioner's review of non-confidential matters in the DEP files in a timely manner if Petitioner decides to file amended petitions.

DONE AND ORDERED this 3rd day of November, 2010, in Tallahassee, Leon County, Florida."

34. The issue here is the Petitioner has the same problem in case 10-5120 and now in case 10-9417 the petitioner is stating in the appeal of the successor ALJ Order denying the Petitioner's Motion for Recusal/Disqualification shows that the same issue in the appeal case was happening in the 10-5120 case. The reliability of getting anything out of the Marathon office is questionable. If the agents have made errors the bigger the errors the harder it is to get the proof.

35. Consider just recently: DOAH case 10-5120, DEP issued an exemption for a dock that had to be reduced in size, and had to have a new survey that somehow created enough room for the dock to fit within the required Florida Administrative Code (FAC) rule of 25 foot set back from riparian lines. The Applicant in that case William Spitznagel had to get a demo permit from MCBDD to reduce the size of the dock.

36. Next consider the case of DOAH 09-0845, in June of 2005 DEP issued

to lot 14 mentioned in paragraph #12 above at the beginning. It will be repeated:

The petitioner attempted to explain that in case DOAH Case No. 09-0845 (Boat Lift to existing dock;) on April 30, 2010 the petitioner in that case also Potter, had his surveyor enter lands to conduct a survey of lot 14's boat lift and Shore line, a composit of that surveyor's findings is shown as (appendix) It was completed by Fred Hilderbrandt of Island Surveying with offices in Key West, and his letter stated that the applicant from lot 14 dock is oversize and has riparian line issue's on both the north and south side of his property. That is why the applicant and owner of lot 14 withdrew his application on May 4, 2010.

If something errors were found in case 10-5120, many errors in case 09-0845, and now we have case 10-9417 where is this case going to end up. May be like case DOAH # 06-1474, that was decided by a procedural error by petitioner, the ALJ stated in his Order that the petitioner did not respond in time with a filing or EOT request. ORDER CLOSING FILE CASE CLOSED, November 13, 2006.

37. Despite having issued an order in the DOAH case # 09-5120 discussed in paragraph 33 above, which leads to the issue with the Marathon DEP handing up files with errors for issuing authorization letters for exemptions for which the applicant can not prove they are entitled to. Then in the case in which this instant case the same issue the files are incomplete or missing and the petitioner has stated his case, the applicant can not prove they are entitled to the exemption which is the subject of this administrative hearing and now the successor ALJ is going against his own order in recognizing a problem with the DEP Marathon office.

38. After the petitioner called persons in the clerks office several times on or about April 15, 2011 the Petitioner did speak with Robert Williams as Clerk of

the Division was not available at the time petitioner called. Mr. Williams advised the petitioner that when it is necessary to transfer a case the four ALJ (environmental) decide amongst themselves who gets the case. The procedure of allowing a recuse/disqualified ALJ to participate in the selection of his or her replacement is not proper and as a result the successor is **improperly assigned**.

39. This matter was referred to the Chief Judge of the Division for correction and the method the successor ALJ now assigned and subject of this writ is incorrect and as stated in paragraph 7 above.

40. Much the same when the initial ALJ (see paragraph 18 above) was shown to be a former attorney with the Department of Environmental Regulation in 1984 and worked in or with the same office as the DEP Counsel in the instant case. The initial ALJ was **improperly assigned** to be a DOAH's environmental ALJ to handle environmental cases which he is.

When a judge or his law partner was attorney for one of the parties in the action before the judge became a judge, he is disqualified and this prohibition extends to ancillary and supplemental proceedings.

See State ex rel. Ambler v. Hocker, 34 Fla. 25, 15 So. 581 (1894).

41. The question of judge's disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality **rather than the judge's perception** of his ability to act fairly and impartially. See:

State ex rel . Brown v.Dewell, 179 So 695 (Fla 1938);

Wargo v. Wargo, 669 So2d 1123 (Fla 4DCA 1996);

Livingston v. State, 441 So2d 1086 (Fla 1983).

42. This Court has also expressed the view that:

“Every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge.” It is the duty of courts to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. See: Dickenson v. Parks, 104 Fla. 577, 582-84, 140 So. 459, 462 (1932). State ex rel. Mickle v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (1930).

43. It has been said that Florida Rules of Judicial Administration must be followed in any motion to disqualify a trial judge must comply with the requirements of the Florida Rules of Judicial Administration. If the motion does not comply with these requirements, the writ will not issue. Tampa Street Railway & Power Company v. Tampa Suburban Railroad Company, 30 Fla. 595, 11 So. 562 (1892). The successor ALJ in the Order denying the Petitioner’s motion does circumvent the issues raised and never addresses them. The successor ALJ does

see 4/25/11 Order it says:

“While the rule does not directly control a motion to disqualify an administrative law judge from an administrative proceeding, it is instructive. The rule provides: **Determination – Successive Motions.** If a judge has been previously disqualified on motion for alleged prejudice or partially under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion. (Emphasis added).”

Then the successor ALJ stated the following:

“The undersigned cannot rule that he is in fact not fair or impartial in this case. Accordingly, the motion is denied.”

2010 FLORIDA STATUTES TITLE V JUDICIAL BRANCH JUDGES: GENERAL PROVISIONS

38.10 Disqualification of judge for prejudice; application; affidavits; etc.—Whenever a party to any action or proceeding makes and files an affidavit stating fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated in the manner prescribed by the laws of this state for the substitution of judges for the trial of causes in which the presiding judge is disqualified. Every such affidavit shall state the facts and the reasons for the belief that any such bias or prejudice exists and shall be accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. However, when any party to any action has suggested the disqualification of a trial judge and an order has been made admitting the disqualification of such judge and another judge has been assigned and transferred to act in lieu of the judge so held to be disqualified, the judge so assigned and transferred is not disqualified on account of alleged prejudice against the party making the suggestion in the first instance, or in favor of the adverse party, unless such judge admits and holds that it is then a fact that he or she does not stand fair and impartial between the parties. If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

History.s. 4, ch. 7852,1919; RGS 2674; s.1, ch.9276,1923; CGL 4341; s.3, ch. 83-260; s.212,ch.95-147

44. In Florida a Statute 38.10 shown above the successor ALJ quotes from The Florida Rules of Judicial Administration specific rule 2.330 which does not Apply to Administrative Law Judges, but the successor stated that it is instructive. If it is instructive, since he selected this Florida Statute he the successor ALJ must No be held to the requirements of the Florida Statutes 38.10 which is shown above And under line section last sentences states:

unless such judge admits and holds that it is then a fact that he or she does not stand fair and impartial between the parties.

AND SINCE THE SUCESSOR ALJ SKIRTED THE ISSUE AND STATED IT A DIFFERENT WAY SAYING:

“The undersigned cannot rule that he is in fact not fair or impartial in this case. Accordingly, the motion is denied.”

The petitioner will quit parsing words and translate for the ALJ what the meaning Of the written two lines above:

THE SUCESSOR ALJ BY SAYING HE CANNOT RULE THAT HE IS IN FACT NOT FAIR OR IMPARTIAL IN THIS CASE.....

BY ASSOCIATION TO THE MEANING OF NOT BEING ABLE TO RULE THAT HE IS **NOT FAIR**, THE TRUE MEANING IS THAT THE SUCCESSOR IS TRYING TO EVADE STATUTE 39.10 THAT IS THERE FOR PROTECTION FOR PEOPLE LIKE THE PETITIONER AGAINST PREJUDICED ALJ'S LIKE THE SUCCESSOR ALJ.....

THE SUCCESSOR ALJ IS TRYING TO INSINUATE THAT HE IS FAIR, BUT IF THE SUCCESSOR ALJ STATES THAT HE IS FAIR HE THEN MUST COMPLY WITH FS 38.10 WHICH THE SUCESSOR ALJ HAS FAILED TO DO AND IN DOING SO HAS SHOWN HIS PREJUDICE JUST LIKE THE INITIAL ALJ DID WHEN THE INITAIL ALJ FILED WRITTEN DENIAL OF THE PETITIONER'S MOTION FOR DISQUALIFICATION/RECUSAL.

RULE 2.330. DISQUALIFICATION OF TRIAL JUDGES

(a) **Application.** This rule applies only to county and circuit judges in all matters in all divisions of court.

45. The successor ALJ did deprive the Petitioner the opportunity to prove his case (deny due process) on the timeliness of Potter's petition when the successor ALJ issued the Order on February 18, 2011. In paragraph 3 page 1 it is shown below: (emphasis is supplied)

"3. The Order issued by Judge Canter on December 10, 2010, that governs post-hearing procedure remains in effect, including paragraph 6; that **no further discovery shall be conducted until it is determined that the petition was timely filed; and,**" [goes on to #4 paragraph next] end quote.

Paragraph 6 referred to the initial ALJ's Order that was issued **after** the initial ALJ was presented with an Oral motion for recusal/disqualification on December 9, 2010 and additionally was able to hear testimony that was favorable to the Petitioner's argument.

(SEE TRANSCRIPT as filed with DOAH clerks office on 3/10/11
Now removed from docket since originally filed 3/10/11.)

THE COURT: Mr. Potter.

MR. POTTER: Yes.

p3

2
5 CROSS EXAMINATION

6 BY MR. POTTER:

7 Q: Miss Murphy, if someone requests the file, and since
8 they're mentioning the Ellenthal file, right now, if you were
9 to go get it, how many pages would be in that file?

10 A: I don't know.

11 Q: So how can you tell if you don't know how many pages
12 are there? There is no way of telling if it's complete or
13 not, or is there any way you can tell when you have a file in
14 your hand and you're walking out, say that the person is [con't next page]

15 coming in an hour, or two hours, and you bring it out ahead of
16 time, so it's like you usually do, which is appreciated. And
17 you bring a file out and you have no way of knowing if that
18 file has five pages, or twenty-five pages, or if it you
19 have no way of knowing what's in the file, you just bring the
20 file out?

21 A: That's correct

[The Petitioner reserves the right to supplement the case law on "constructive Notice" unavailable at this time, must go to law library.]

46. Petitioner did not have time with Easter week end and out of town family in town to celebrate a family member's birthday, and the law library is over 100 Miles round trip. The Successor ALJ further showed his prejudice to "rush to Deny" the Petitioner's Motion to Disqualify before he could submit the case law.

Case law that was omitted due to the Petitioner not getting to the law library is mentioned below: See 4/18/11 Motion #4 Wherefore clause. First case law shown is Chestnut, the second is Wentworth

Chestnut v. School Bd. of Hillsborough County, 378 So. 2d 1237, 2DCA 1979.

"Prior to this hearing Mrs. Chestnut's counsel requested issuance of subpoenas to compel attendance of witnesses deemed necessary to present her side of the dispute. This request was denied." (no emphasis needed)

1st paragraph of Judge HUGH E.STARNES, Associate Judge's. Opinion (no emphasis needed)

"The only issue we need decide is whether Mrs. Chestnut was entitled to have witnesses subpoenaed, to cross-examine witnesses presented by the agency, to make legal objections during the proceeding, and to have a record of the proceedings maintained. If she was entitled to these procedural rights and did not receive them, then obviously the fairness of the proceeding was impaired." (no emphasis needed)

From 2nd paragraph of Judge HUGH E.STARNES, Associate Judge's. Opinion

The case summary in the opening paragraph states: (emphasis supplied)

The District Court of Appeal, Starnes, Hugh E., Associate Judge, held that dismissed employee was entitled to have witnesses subpoenaed, to cross-examine witnesses presented by the agency, and to make legal objections during the administrative proceeding as well as to have a record of the proceedings maintained; thus, inasmuch as such procedural rights were

denied, the fairness of the proceeding was impaired and employee was entitled to another hearing.

47. Later in the same meeting is when the Successor ALJ brought up the issue of once you receive something in writing there is case law that, that does constitute "constructive notice," the Petitioner responded that he did not agree and would get the Case law, (See paragraph #26 above) here is the case law:

The successor ALJ denied the Petitioner's Motion before the petitioner got it.

Wentworth v. State of Florida DEP, 771 So 2d 1279, 25, 4DCA 2000.

On the last paragraph of page 1 the 4DCA said:

"We write primarily to address the issue of notice. In particular, we agree with DEP's determination that the objecting neighbors' entry into these administrative proceedings was timely even though Wentworth had already begun to build the dock."

48. The same situation must be applied in DOAH # 10-9417, DEP issued the Letter of Authorization in 2003-2004 no construction started until July of 2010. That is when the Petitioner called DEP to find out what was going on. Petitioner obtained a copy of the DEP file on or about July 28, 2010. Wentworth like the applicants in the above case number did not publish for publication in a newspaper.

The 4DCA then stated:

See Fla. Admin. Code R. 62-110.106(10)(a). Due process considerations in this case run not only to Wentworth, in his attempt to obtain consent to build the dock, but also to his neighbors who would be substantially affected by the construction.

Wentworth received the notice of the agency action granting him consent to use sovereign submerged lands, but his neighbors did not. The September 23 letter from DEP contained the following:

NOTICE OF RIGHTS OF SUBSTANTIALLY AFFECTED PERSONS (next page below)

Neither the Vogels nor the Urbans received written notice, and Wentworth did not arrange for publication of the notice. It was uncontroverted that the Urbans and the Vogels promptly disputed Wentworth's right to build the dock as soon as they had actual notice. The Vogels and Urbans challenged the permit on grounds that the dock structure violated width, elevation, square footage, plank spacing and light penetration requirements of Florida Administrative Code Rules 18-20.004 and 62-341.427 and that there was no valid consent to use sovereign submerged lands in violation of Florida Administrative Code Rule 62-341.215. After an administrative hearing and a review of the recommended order, DEP, for the most part, ruled in the petitioners' favor and approved Wentworth's permit with certain modifications. We find no error in DEP's resolution of the issues presented on the merits.

Without summary letters, telephone calls, and other conventional communications, the wheels of government would surely grind to a halt. The vast majority of an agency's free-form decisions become conclusive because they are not challenged in Section 120.57(1) or (2) proceedings. Yet the agency's rules must clearly signal when the agency's free-form decisional process is completed or at a point when it is appropriate for an affected party to request formal proceedings.... [A]n agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57.

Since persons whose substantial interests are affected by a Department decision may petition for an administrative proceeding within the time provided in this rule (at subsection (3) above) after receipt of notice of agency action, and since receipt of such notice can occur at any time unless notice is given or published as prescribed in this rule, the applicant or other person requesting a particular action by the Department cannot justifiably rely on the finality of the Department's decision unless the notice has been duly published or otherwise provided to all persons substantially affected by the decision. Fla. Admin. Code R. 62-110.106(10)(a).

(No emphasis needed)

49. This concludes the petitioner's argument on the successor ALJ position on the subject of constructive notice. Constructive notice is what the 4DCA said above. Now I am sure the successor ALJ wants to hold on to the possibility that the applicant can knock the Petitioner out of the case by holding on to the "procedure" argument of the Petition filed by Potter was not timely. One must consider the facts:

- 1) the petitioner has stated over and over again with affidavit additionally Supplied, that the petitioner did not receive a complete file. -29-

- 2) Why is the Department or applicant coming forward with some proof that what the Petitioner is saying is not true. None of the agents for DEP that handled the 2003/2004 authorization possibly even work for DEP seven or eight years later. The applicant need to show they are entitled to the exemption.

50. Quoting from *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983).

The court must review this motion from the petitioner's perspective questioning "judges impartiality" rather than [from] the judge's [perspective] of his ability to act fairly and impartially. Also: *Smith v. Santa Rosa Island Authority*, 1DCA 729 So.2d 944 (1998). In *Coleman v. State*, App. 4, Dist., 866 So.2d 209 (2004).

Recusal of trial judge was warranted to satisfy appearance of justice, not with standing absence of actual bias, In evaluating this motion to reconsideration to disqualify/recuse, sufficiency of the substance is essentially an extension of sufficiency of the form. This legal sufficiency is a pure question of law.

MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1335 (Fla. 1990).

Further, if the form of the motion is sufficient--i.e., the motion is procedurally sufficient--it does not matter whether the substance of the allegations are true.

The Potter Motion is legally sufficient, but not in the eyes of the successor ALJ.

Madura v. Turosienski, 901 So. 2d 396, 398 (Fla. 2d DCA 2005). (noting that, in in evaluating a motion to disqualify, the court must accept the facts alleged as true).

Indeed, under Florida Rule of Judicial Administration 2.330(f), a judge is required to immediately grant the disqualification if the motion is legally sufficient.

THE NATURE OF THE RELIEF SOUGHT

51. Potter sincerely believes that he has demonstrated a preliminary basis for relief and a departure from the essential requirements of law which has caused and will cause him material injury for which there is no adequate remedy by appeal from the final order (yet un entered) in the case below. Therefore, Potter wishes to have this Court issue an order to show cause directing the successor ALJ, through the respondents, to show cause within the time allowed by the Court why relief should not be granted pursuant to Florida Rule of appellate Procedure 9.100 (f). Following the filing of a reply by Potter to the Respondent's response to the order to show cause pursuant to Florida Rule of Appellate Procedure 9.100 (i), Potter would requests that this Court:

- (1) Reverse the Administrative Law Judge's Order Denying Motion to Disqualify Counsel. (Appendix 11).
- (2) Grant Potter's Motion to Disqualify Successor ALJ in the case below. (Appendix 4).....and
- (3) Enter an order disqualifying directing Chief Judge of the Division To assign a hearing officer that is not biased and/or prejudiced.

**ARGUMENT IN SUPPORT OF THE PETITION
AND APPROPRIATE CITATIONS OF AUTHORITY**

52. The Administrative Law Judge's Order Denying Motion to Disqualify or Recuse himself on review by this court should conclude that Potter's Motion to Disqualify/Recuse the successor ALJ, giving the facts was not unreasonable, untimely, or disingenuous, but did show and make it possible to conclude that there was bias and prejudiced evident in the facts presented in this Writ.

53. Florida Rules of Judicial Administration (Appendix)

Rule 2.330 as quoted by the successor ALJ is in itself not
To be used by Administrative cases.

54. Since the successor ALJ chose to use Rule 2.330 the successor ALJ is
Therefore bound to the Florida Statute 38.10.

55. The successor ALJ did not follow the proper procedure for a replacement
Judge, that is one that previous was disqualified/recused.

56. The Florida Statute is clear that the replacement/successor to a previous
Disqualified/recused Judge must enter such ruling on the minutes of the
Court.

57. The official Comment by the successor in his Order was that

"The undersigned cannot rule that he is in fact not fair or
impartial in this case. Accordingly, the motion is denied."

FS 38.10 states that **If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause.**

The successor ALJ has yet to state that he does stand fair and Impartial as between the parties and their respective interests.

By saying he cannot rule that he is in fact not fair or impartial in this case, he has not complied.

58. The Florida Rule of Judicial Administration Rule 2.330

2.330. Florida Rules of Judicial Administration

(a) Application. **This rule applies only to county and circuit judges** in all matters in all divisions of court. (b) Parties. Any party, including the state, may move to disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct

(emphasis supplied)

59. The successor ALJ in his order used Rule 2.330 (g) it is shown below:

(g) Determination — Successive Motions. If a judge has been previously disqualified on motion for alleged prejudice or partiality under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion.

This rule used by the successor ALJ omits the phrase that is in the FS 38.10,

which is: (only last sentences shown):

If such judge holds, rules, and adjudges that he or she does stand fair and impartial as between the parties and their respective interests, he or she shall cause such ruling to be entered on the minutes of the court and shall proceed to preside as judge in the pending cause. The ruling of such judge may be assigned as error and may be reviewed as are other rulings of the trial court.

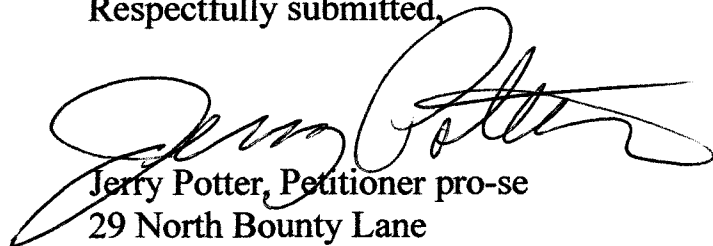
The successor ALJ chose to not respond to the truth of the facts alleged in support of the motion. The truth of the facts alleged in support of the motion are contained in this document Writ of Certiorari.

CONCLUSION

WHEREFORE, Petitioner Pro Se Jerry Potter respectfully requests this Court to issue an order to show cause to Respondents to defend the actions of the successor ALJ, and to reverse the decision of the successor Administrative Law Judge in the Division of Administrative Hearings and to disqualify successor ALJ from presiding in any further proceedings in the case below. Direct, to the Chief Judge, that the Petitioner have a hearing officer that is not biased and prejudiced.

Respectfully submitted,

Enclosures see appendix:
14 entries total 61 pages


Jerry Potter, Petitioner pro-se
29 North Bounty Lane
Key Largo, Florida 33037
(305) 852-5959

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by United States Mail on this 25th day of May, 2011, to:

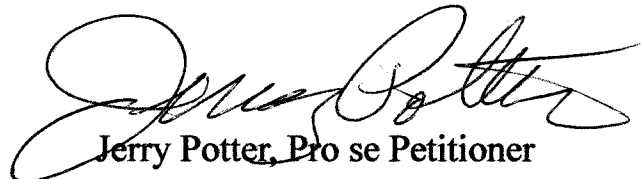
Bryнна J. Ross
Assistant General Counsel for DEP
3900 Commonwealth Boulevard MS—35
Tallahassee, Florida 32399-3000
Counsel for Respondent: DEP

Ira and Judith Ellenthal
21 Shorehame Club Road
Old Greenwich, CT.
06870
Counsel for Respondent: Newitt


Jerry Potter, Petitioner Pro Se

Font Certification

I hereby certify that the foregoing is in the Times New Roman 14 Point Font.


Jerry Potter, Pro se Petitioner

APPENDIX
COVER PAGE FOR
FOURTEEN (14) DOCUMENTS

	Pg. #
1. ORDER...dated 11/02/09 DOAH Case 09-5120	1-2
2. Notice of Withdrawl of Application May 4, 2010 Case 09-0845	3-4
3. 3 rd Amend. Supplement Case 09-0845	5-10
4. Petitioner's Response to show Cause Case 10-9417	11-17
5. ORDER...Denying Recusal 12/10/10 Case 10-9417	18-19
6. ORDER...Denying Discovery 12/10/10 Case 10-9417	20-21
7. Motion to Reconsider by Petitioner 12/20/10 “	22-34
8. Order Granting Motion 1/03/11 “	35-36
9. Order Transfer of Case 1/03/11 “	37-38
10. Order continue no discovery 2/18/11 “	39-40
11. Notice of Filing transcript 3/09/11 “	41
12. Joint Status Report 4/08/11 “	42-43
13. Motion for recusal Successor 4/18/11 “	44-59
14. Order denying recusal motion 4/25/11 “	60-61
15. Petitioner's Response to show cause (affidavit) #4 above	62-63

Cover page for the appendix 14 documents 61 pages

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,)
)
 Petitioner,)
)
 vs.) Case Nos. 09-5120
) 09-5122
 WILLIAM SPRITZNAGEL AND)
 DEPARTMENT OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondents.)
 _____)

ORDER

On October 6, 2009, Respondent Spritznagel filed motions to dismiss the petitions in both Case No. 09-5120 and 09-5122. On October 19, 2004, Petitioner requested extensions of time through November 3, 2009, to file responses. On October 23, 2009, Respondent Spritznagel filed objections to the requests for extension of time.

After consideration of the filings and other information in the files, the following is ordered:

1. The motions to dismiss are granted without prejudice to file amended petitions by the close of business on Monday, November 23, 2009.

2. The file reflects difficulties encountered by Petitioner in accessing the complete files of the Department of Environmental Protection (DEP) alleged by Petitioner to have led to the speculative and conjectural nature of the allegations in the petition. The parties are urged to co-operate in scheduling Petitioner's review of non-confidential matters in the DEP files in a timely manner if Petitioner decides to file amended petitions.

1

DONE AND ORDERED this 2nd day of November, 2009, in Tallahassee, Leon County, Florida.



DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of November, 2009.

COPIES FURNISHED:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,

Petitioner,

DOAH CASE NO.: 09-0845

OGC CASE NO.: 08-2799

v.

FRANK NEWITT &
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

NOTICE OF NEWITT'S WITHDRAWAL OF APPLICATION

Respondent FRANK NEWITT, by and through his undersigned counsel, hereby gives notice of the withdrawal of his application for a boatlift that is the subject of this proceeding.

Respectfully submitted,

THE SILVER LAW GROUP, P.A.
Attorneys for Frank Newitt
Post Office 710
Islamorada, Florida 33036
Telephone: 305-664-3363
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By: Patricia M. Silver
Patricia M. Silver, Esq.
Fla. Bar. No. 525863

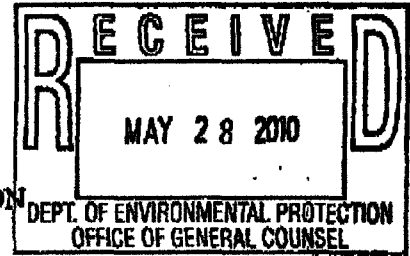
CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2010, a true and correct copy of the foregoing was served via U.S. Mail to the following:

Brynna J. Ross
Assistant General Counsel
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, FL 32399-3000
*Counsel for State of Florida Department
of Environmental Protection*

Jerry P. Potter
29 North Bounty Lane
Key Largo, FL 33037
Pro-Se Petitioner

By: Patricia M. Silver
Patricia M. Silver, Esq.



STATE OF FLORIDA
 DEPARTMENT OF ENVIRONMENTAL PROTECTION

JERRY POTTER,
 Petitioner, Pro se

-vs-

FRANK NEWITT, and
 STATE OF FLORIDA DEPARTMENT
 OF ENVIRONMENTAL PROTECTION,
 Respondent's.

O.G.C.: 08-2799

LT DOAH CASE NO. 09-0845

PETITIONER'S 3rd AMENDED SUPPLEMENT TO MOTION FOR COST AND FEES

1) Petitioner files this 3rd amended Supplement to Motion for Cost and Fees as a Supplement to the 2nd Supplement to Motion for Cost and Fees which was filed on May 26, 2010. Pryor to that the petitioner had filed in DOAH case 09-0845 Motions because of the expedited manor in which the case was closed out. As a result, the Petitioner was then forced to file with the State of Florida Department of Environmental Protection duplicate filings to keep from being denied due process.

2) This was brought about when on May 4, 2010, the respondent Frank Newitt withdrew the application for an already installed boat lift (Since November 2008). The Department had approved the Boat Lift when the dock's owner in question was already under previous notice (April 2005) to bring the dock into compliance. The department was the one that requested the compliance issues after previous complaints by the Petitioner.

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3) On May 5, 2010, the Administrative Law Judge (the Judge/ALJ) Issued an order Closing the file. The case was closed before the Petitioner ever received written notice from the ALJ. In subsequent motions filed: the Petitioner has filed with DEP duplicate motions. Then Fearful the case was going to be closed out filed the Cost and fee with DEP. In the motion the Petitioner asked for time to file the documentation on the bills and amounts spent on costs as a supplement.

4) On May 19, 2010, the Petitioner filed with the DEP Clerks office the amended Supplement to Motion for Cost and Fees, which outlined (documentation) of the actual costs.

5) On May 26, 2010, the Petitioner filed a 2nd Verified Supplement to the Motion For Cost and Fees. This filing outlined the basic reasons why the permit should not have been issued by DEP. It also listed why the respondent should have known that permit even after it was issued and installed when the Petitioner tried to talked to all parties that this is not right, DEP and Respondent Newitt continued and did not wish to discuss any of the options that were brought up many times by the petitioner.

6) Also in the 2nd Amended Supplement to the Motion for cost and fees the petitioner mentioned to file additional reports from survey an biologist. These Professional opinions Are what is being filed today, see Exhibit 1, letter from Island Surveying, it is dated today May 28, 2010. It specifically addresses that the Newitt (respondent/applicant/owner) dock and boat lifts (both have problems). The listings are 1-4 and they are:

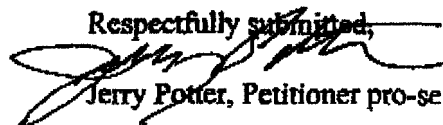
- (1) The Newitt dock contains 547 square feet.
- (2) The Newitt north riparian line to the property goes across the North boat lift.

- (3) The Newitt south riparian line to the property goes across the Petitioner's North side of the approved addition at the terminal end.
- (4) The North riparian line of the neighbor to the North of Newitt/Kennedy is Malcom Leonard (33 N. Bounty Lane), is drawn by Massey and in addition to the riparian lines on each side of the respondent's property, his surveyor has according to the Potter survey has now created a situation where the neighbor may be in violation. His now as shown in the Massey survey has his north riparian line going across his own boat lift.

7) The Petitioner has brought this up using documents that were submitted that were obtained by the Petitioner from the governing agencies own files. How can they not have known about this. In addition many of these were brought to the agencies attention and the petitioner argument was either dismissed or ignored. (See exhibit 2; Sept. 2005, meeting with DEP staff).

8) The Petitioner has received, by telephone today May 28, 2010, from biologist, Bart Baca, of CSA South Inc, that violations in and around the Newitt dock do exist. These violations are of the type that are consistent with the prop dredging, and that the violations are documented with photos. These photos are to be assembled and ready near the end of next week. Mr. Baca has been extremely busy due to the recent Gulf Of Mexico Oil Leak (GOMOL). Additionally, Mr. Baca advised that violations along the respondent's shore line also exist. The petitioner understands that some of the violations along the shore line are under the Enforcement statute, Florida Administrative Code Rules governing enforcement, but only mentioned because of the petitioners previous attempts to call attention to these alleged violation were not followed up on by the Department. The petitioner believes the DEP has "dirty hands."

Respectfully submitted,



Jerry Potter, Petitioner pro-se


Exhibit 1 - Island Surveying, Inc.

summary of site visit 04/30/10 (1 pg)

2 - DEP Conversation/Meeting Sept. 2005 (1pg)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by United States Mail on this ~~21st~~ 21st day of May, 2010 to Brynna J Ross; Senior Assistant General Counsel for Department of Environmental Protection, 3900 Commonwealth Boulevard MS—35; Tallahassee, Florida 32399-3000; and Patricia M. Silver from the THE SILVER LAW GROUP, P.A ; Post Office Box 710; Islamorada, Florida 33036.


Jerry Potter, pro se Petitioner
305.852.5959

COS date:
5/28/10
JP



08-2799

ISLAND SURVEYING, INC.

EXHIBIT 1

F.H. Hildebrandt, President

May 28, 2010

Mr. Jerry Potter
29 North Bounty Lane
Key Largo, FL 33037

Re: Potter Dock (Key Largo)

Dear Mr. Potter:

Per your request, I have reviewed the following information.

1. The Newitt dock contains 547 square feet.
2. The riparian line drawn by David Massey (Survey #7979A, dated 5/26/05) goes across the North boat lift (Newitt @31 Bounty Lane).
3. The South riparian line of Newitt as drawn by Massey goes across the Potter approved addition at the terminal end.
4. The North riparian line at Malcom-Leonard (33 North Bounty Lane) as drawn by Massey goes across the North boat lift as existing.
5. The fee for Island surveying for relocations of docks, shorelines and drawings will be \$2,100.00.

If you have any questions, or need further information, please do not hesitate to contact us.

Sincerely,

F. H. Hildebrandt, PLSM, P.E.

Offices at Northside, 3152 Northside Dr., Suite 201, Key West, FL 33040
(305) 293-0466, fax: (305) 293-0237, e-mail: fhildeb1@bellsouth.net

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08-2799

EXHIBIT 2

CONVERSATION RECORD

PERMIT NO.

OR FILE NO. 44-0147198-003 COUNTY: Monroe DATE: Sept 16, 2005 TIME: 10:00

Mr. Jerry Potter

OF neighbor to 31 N. Bounty Lane Buccaneer Point, Key Largo

ADDRESS 29 N. Bounty Ln, Key Largo

TELEPHONED CAME IN WAS CALLED PHONE _____

RE: 31 N. Bounty Lane, Key Largo

CONVERSATION:

Mr. Potter came to our office to meet with me and George about the reference property. Mr. Potter objects to the above referenced authorization for installing a boat lift on a dock located at 31 N. Bounty Lane. The applicant for the boat lift and property owner is Mr. Monte Kennedy. Mr. Potter strongly objects to this project for reasons stated in a letter from his attorney dated March 15, 2005. The letter states that Mr. Kennedy's dock is not located within Mr. Kennedy's riparian lines and that a portion of the dock including the area where the proposed boat lift will be installed encroaches on Mr. Potter's property. Mr. Potter said a survey from Fred Hildebrandt, dated June 22, 1999, shows 2 sets of riparian lines including riparian lines extending out the property lines waterward (East to West). Mr. Potter maintains these are the correct riparian lines and not the second set of lines which are the lines provided in the survey submitted by the applicant. Mr. Potter complained that the Department based the authorization on the incorrect information provided in the applicant's survey while ignoring the Hildebrandt survey which he said he provided to our staff before they issued the boat lift authorization. Mr. Kennedy also complained that he had never received notice of the above referenced authorization even though he asked Tania, the last permit processor, to keep him informed of Department actions regarding this property. We explained to Mr. Potter that, pursuant to Chapter 120, FS, he could still petition a hearing if he has never received notification of this action. I also explained that the procedure to file a petition to OGC is included in the authorization which we faxed to Mr. Potter at his request on September 14. We also provided Mr. Potter with a copy of Section 120.569 F.S. containing the procedure to file a petition for an administrative hearing

Mr. Potter said he will file the petition as soon as possible. He also raised issues related to fill and mangrove cutting violations on Monte Kennedy's shoreline. I asked Mr. Potter if he wished to file a complaint at this time regarding these violations and he said no. George explained that the fill issues are under investigation. We told Mr. Potter we would review the file and follow up to make sure any outstanding violations are addressed in compliance with Department regulations.

NO FURTHER ACTION REQUIRED FOLLOW UP SUSPENSE DATE _____

SIGNATURE Gus Rios

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**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

JERRY POTTER,

Petitioner,

vs.

**DOAH CASE NO. 10-9417
OGC CASE NO. 10-2341**

**IRA ELLENTHAL, JUDITH ELLENTHAL,
and STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,**

Respondents.

_____ /

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE

Petitioner Jerry Potter, pro-se (Potter/Petitioner) files this response to Order issued in this cause on October 18, 2010. In the Administrative Law Judge's Order on 10/18/10, this Response is due no later than October 29, 2010. This response is timely. In support of the Petitioner's response to show cause the Petitioner would state the following:

- 1. The petitioner has filed with this response an affidavit, it is attached at the end of this response to show cause.**
- 2. The petition filed on September 27, 2010, in this case is timely.**
 - a. Extension of Time to file petition requested 05/11/10; EOT granted 05/18/10, until September 27, 2010. Petition timely filed September 27, 2010.**
- 3. The petitioner had not received any notice from the Department when the Petitioner observed dock removal and heavy equipment operating along the shore (construction work) of the respondents Ellenthal's upland residence. This was on or about July 10-14, 2010.**
- 4. The petitioner made arraignments with the DEP clerk "Jean" at the Marathon office on or about July 28, 2010, to review the Ellenthal file. Petitioner requested and obtained a copy**

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of the entire (complete) file on that date. (25 -30 pages)

5. Petitioner was acting only on what was observed on or about July 10-14, 2010.

That was his only notice, what petitioner saw from his own property.

6. The Department requested, (from file) Ellenthal Respondent/ Applicant to obtain Affidavits for 25 ft. set back waiver forms from adjoining neighbors to the north and south.

7. There was no published or written notification of anyone of this agency action other than the immediate neighbors signing the setback waivers, this was confirmed by review of the file.

8. The petitioner's residence is located approximately some 150-170 feet to the south measured along the shoreline.

9. The agency action issued in this case is an exemption, the letter was signed by DEP agent Matt Culver on December 3, 2003 (R). (Marathon Office)

10. Over five (5) years after the exemption letter was issued, and no activity around the respondent's dock and shore line the Petitioner requested to review the file of the Respondent at the DEP Marathon office. The date was January 25, 2009.

11. The next day January 26, 2009, the Petitioner filed with DEP a Petition for an administrative hearing against Potter's neighbor to the north, Frank and Joanna Newitt, there address in 31 N. Bounty Lane, Key Largo. The issues: was a dock, boat lifts, and water quality in the area around the Newitt dock and boat lifts. (dock was over 500 sq. ft., Newitt's boatlifts were outside the Newitt north and south riparian lines). (DOAH case 09-0845)

12. The requested exemption by Newitt, and issued by DEP (Marathon) was for a boat lift. The subject boat lift was already installed when Petitioner inquired to DEP, that was in November 2008.

13. After petitioner was authorized to have Potter's surveyor enter lands through Compel Order, on April 30, 2010 a survey was conducted. All issues raised by Potter in his Petition were proven with the survey results. (oversize dock, north and south riparian not compliance)

14. On May 5, 2010, Applicant Newitt withdrew application. (DEP has not taken any action to have the illegal and non conforming structures come into compliance or removed.)

15. In the above paragraph.s, 12, 13, and 14 notice the dates align with the three dates stated in the Department's Motion to Bifurcate. (Jan. 25, 2009; April 30, 2009; April 12, 2010)

16. Also at the same time January to May 2010, another case involving the same issues: See DOAH 09-5120, case started with petition in September 2009, and settlement reached May 2010. The Parties were Potter, petitioner vs. DEP and William Spitznagel, respondent's. Spitznagel residence was located at 3 South Bounty Lane, Key Largo, Florida. The issues: A dock, boat lifts, riparian line set backs and water quality issues in the area around the Spitznagel dock and boat lifts. The dock was over the 500 sq. ft. limit, it was reduced in size on or about January 2010. The riparian line was resolved after DEP requested as built survey.

17. The dates concerning DEP counsel, as mentioned in the motion are all dates in which the petitioner was looking only for riparian line issues, (see below) that conflicted with the Newitt permit application. The petitioner's survey conducted on the dock an boatlifts on the Newitt property in April 30, 2010, re-confirmend that.

18. DEP counsel in this case was assigned to the Newitt and Spitznagel cases also.

19. It is also documented of the Petitioner's difficulty in obtaining information from the Marathon DEP office file review. Some examples:

- a. ALJ David Maloney, November 2, 2009, Order: (DOAH case 095120)

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" 2. The file reflects difficulties encountered by Petitioner in accessing the complete files of the Department of Environmental Protection (DEP) alleged by Petitioner to have led to the speculative and conjectural nature of the allegations in the petition. The parties are urged to co-operate in scheduling Petitioner's review of non-confidential matters in the DEP Files in a timely manner if Petitioner decides to file amended petitions. "

b. In the Spitznagel case (DOAH case 095120) DEP representatives and Bruce Frank and Celia Hitchens made on January 20, 2010, a site visit to meet with Spitznagel agents. The site visit determined the 8 inches ((4 inches each side) would make the dock compliant. The following week when the petitioner examined the files this report was missing. On April 9, 2010, when the petitioner again visited the file it was present. This can be verified by MCBBD permit #10300381, demo permit to remove 4 inches off of each side of the decking walk-way.

c. In March 2005, Petitioner's then counsel Nick Mulick wrote a letter concerning the now Newitt dock location and boatlift application. The letter requested Mr. Mulick, to be notified of any action by DEP in regards to the said now Newitt boatlift and dock location issue. A few (3) months later the permit was issued with out any notification to Mr. Mulick's office. When questioned later DEP lead agent George Kenny said he misplaced the file and forgot about it. Mr. Kenny resigned from the Department in early 2006. The petitioner has other incidents of similar papers being misplaced, moved, not available only to show up at a later date. (sometimes). It is not necessary to cite any other examples, there are more. Needless to say the petitioner does not rely on checking a file once from past experience. Present DEP counsel and the Petitioner have discussed this many times with no satisfactory results to the petitioner.

20. In summary, the only notice the petitioner received from DEP on the Ellenthal Exemption: DEP ERP # 44-0223322-001, was when he received the complete file on or about July 28, 2010. An example of the type riparian lines the petitioner was looking for is submitted as

Exhibit 1, (exhibit 1 Newitt site drawing.) It shows the lots numbered in Block 6, left to right as 17, 16, 15, & 14; (lot 14 is the Newitt property) the date on the DEP stamp is June 28, 2005.

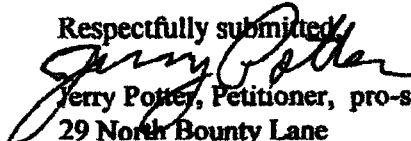
(Lot 16 is the respondent Ellenthal lot). When looking at the Ellenthal lot on drawing exhibit 1 (Newitt site drawing). The south RIPARIAN line is at approximate 22 degree angle from the south PROPERTY line. (lot 14).

21. **Exhibit 2** is a copy of the site plan of the Ellenthal project. The Ellenthal drawing is showing the DEP stamp date of November 19, 2003. It is easy to see the Ellenthal property lines are extended an continue as riparian location out over the water on exhibit 2-Ellenthal site drawing. On the respective drawings this error (on the Newitt survey) would reflect a distance of 12-15 feet different location at the terminal end of the any dock with 22 degree angle, at 100 feet from shore. The farther you go out the 12-15 feet distances increase. The issue is the acceptance of these different riparian line location for the same property line by DEP is crucial to the Potter case against Newitt.

22. The petitioner by filing this "response to show cause" does not give up rights on any of the other enforcement issues that may negate the exemption, and any alleged violations during construction that would cause the permti to be revoked. Or if the permit exemption is in error.

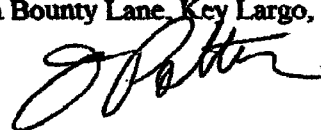
Exhibits:

- 1-Newitt drawing 1 pg
- 2-Ellenthal drawing 1 pg

Respectfully submitted,

 Jerry Potter, Petitioner, pro-se
 29 North Bounty Lane
 Key Largo, Florida 33037
 (305) 852-5959

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States Mail on this 29th day of October 2010, to: Brynna J. Ross, Assistant General Counsel for DEP, 3900 Commonwealth Boulevard M.S. -35, Tallahassee, Fl. 32399-3000; and Ira & Judith Ellenthal, 35 North Bounty Lane, Key Largo, Florida 33037.



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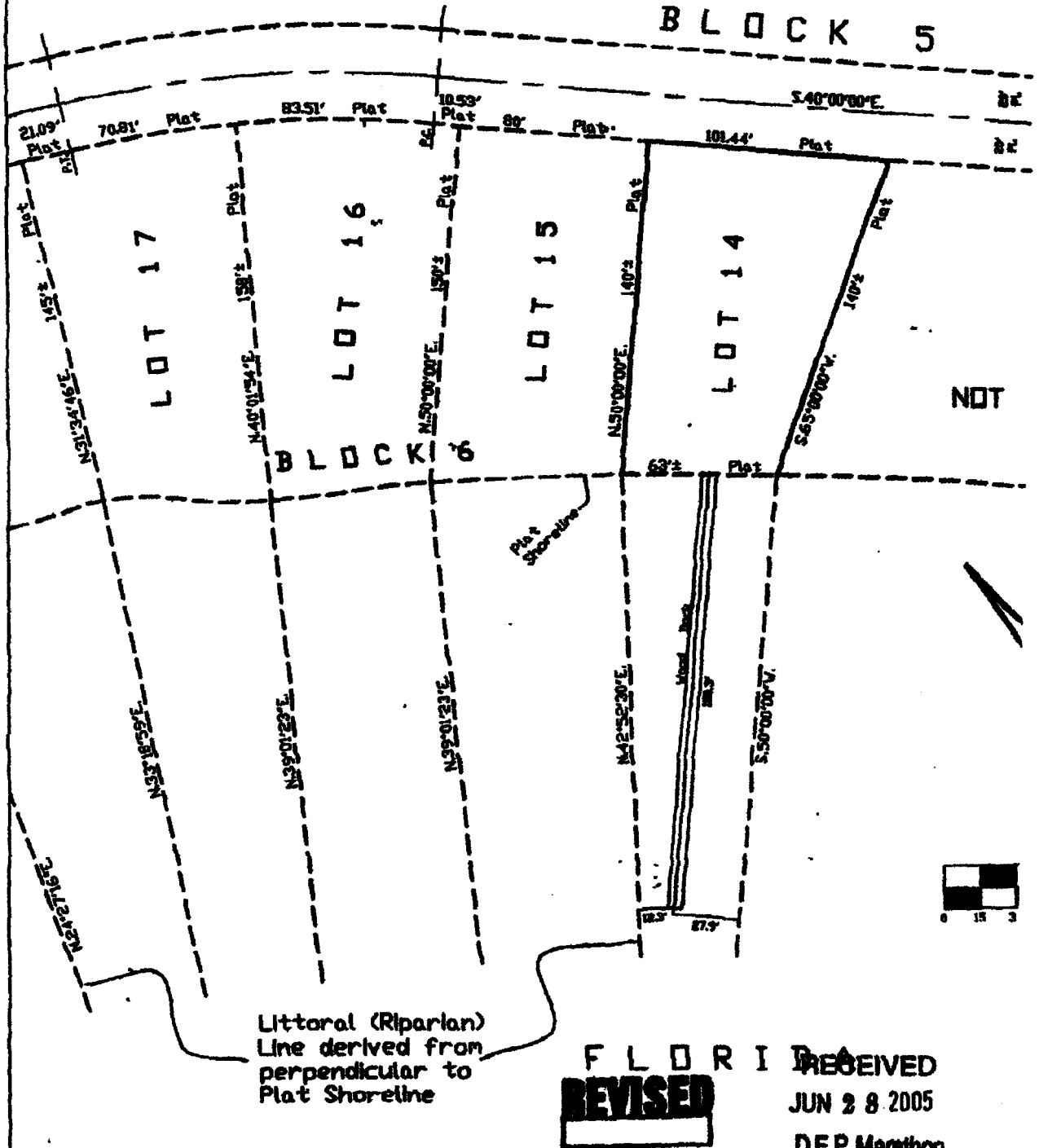
EXHIBIT 1 1pg.

DOAK 10-9417

NOTES:

- 1) This sketch was made for the "SPECIFIC PURPOSE" of depicting the Littoral (Riparian) Lines adjacent to the Lots shown hereon in Block 6, BUCCANEER POINT, according to the Plat thereof, as Recorded in Plat Book 7, at Page 6 of the Public Records of Monroe County, Florida, and were derived by running at a perpendicular to the Plat shoreline.
- 2) The location of the dock hereon was derived from a field survey performed by this firm on 12-08-03 and is shown for informational purposes only.
- 3) The bearing base for this sketch was derived from the Recorded Plat as described hereon.

SPECIFIC
PURPOSE
SKETCH



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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,)
)
 Petitioner,)
)
 vs.) Case No. 10-9417
)
 IRA ELLENTHAL, JUDITH)
 ELLENTHAL, AND DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

ORDER

A telephonic hearing was held on December 9, 2010, to take evidence on the issue of whether Jerry Potter's petition for hearing was timely filed with the Department of Environmental Protection (DEP). At the commencement of the hearing, Mr. Potter made an oral motion for recusal of the Administrative Law Judge (ALJ), based on the employment of the ALJ as an Assistant General Counsel at the Department of Environmental Regulation (DER) from 1981 to 1984. Mr. Potter contends that the ALJ's representation of the DEP's predecessor agency creates a conflict of interest and prevents the ALJ from providing Mr. Potter a fair hearing on the issues raised in his petition.

The ALJ's representation of DER ended more than 25 years ago. The public records of DOAH cases, which are available on DOAH's website, show that the ALJ frequently presides over hearings in which DEP is a party, and that he has issued a number of Recommended Orders and Final Orders against DEP. The ground for recusal stated by Mr. Potter is inadequate to show a conflict of interest or an appearance of impropriety. Accordingly, it is

ORDERED that the motion for recusal is DENIED.

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DONE AND ORDERED this 10th day of December, 2010, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of December, 2010.

COPIES FURNISHED:

Brynna J. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

Jerry P. Potter
29 North Bounty Lane
Key Largo, Florida 33037

Judith Ellenthal
21 Shorehame Club Road
Old Greenwich, Connecticut 06870

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,)
)
 Petitioner,)
)
 vs.) Case No. 10-9417
)
 IRA ELLENTHAL, JUDITH)
 ELLENTHAL, AND DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

ORDER

A telephonic hearing final hearing was held on December 9, 2010, to take evidence on the single issue of whether Jerry Potter's petition for hearing was timely filed with the Department of Environmental Protection. The following procedures shall govern the rest of this proceeding:

1. A party may file a proposed recommended order no later than 10 days after the transcript of the telephonic hearing is filed with the Division of Administrative Hearings ("DOAH") or, in the event that the transcript is not ordered by a party and filed with DOAH, no later than January 7, 2010.
2. The only issue that may be addressed in a proposed recommended order is whether the petition was timely.
3. All proposed findings of fact shall be based on the record created at the December 9, 2010, telephone hearing.
4. If the Administrative Law Judge (ALJ) determines that the petition was untimely, a Recommended Order will be issued, recommending that the Department enter a final order that dismisses the petition as untimely.

5. If the ALJ determines that the petition was timely, an Order will be issued requiring the parties to confer and advise the ALJ of several dates when they are available for a continuation of the final hearing on the issues raised in the petition for hearing.

6. No further discovery shall be conducted unless an Order is issued determining that the petition was timely.

DONE AND ORDERED this 10th day of December, 2010, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
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Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

Jerry P. Potter
29 North Bounty Lane
Key Largo, Florida 33037

Judith Ellenthal
21 Shoreham Club Road
Old Greenwich, Connecticut 06870

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,

Petitioner,

vs.

DOAH CASE NO. 10-9417

OGC CASE NO. 10-2341

IRA ELLENTHAL, JUDITH ELLENTHAL,
and STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

PETITIONER'S MOTION FOR RECONSIDERATION OF ORDER DENYING RECUSAL

Jerry Potter, (Potter/Petitioner), pro se, files this Motion for Reconsideration of Order Denying Recusal issued on December 10, 2010, (received by U. S. Mail on or about 12/14/10). The Order (subject of this Motion) was issued in this case (Division of Administrative Hearings [DOAH] case number 10-9417) in response to the Petitioner's oral motion for "recusal and/or disqualification" made at the beginning (under oath) of the Evidentiary Hearing (telephonic) held on December 9, 2010. In support of such motion the Petitioner states the following:

- 1) A telephonic hearing was held on December 9, 2010, to take evidence on the issue of whether petitioner's petition for hearing was timely filed with the Department of Environmental Protection (DEP). At the commencement of the hearing, and all parties were sworn in the Petitioner made a request to discuss some procedural matters. It was at this time the Petitioner made a brief reference to a timely response the Petitioner had made to Motion from Respondent DEP to Bifurcate the proceeding on October 6, 2010. The Petitioner stated that before the time to respond had expired (Petitioner had until October 18, 2010, to file a response)

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the Administrative Law Judge (ALJ) in this case issued an Order to Show Cause. The DOAH Docket (Record [R] in this case) does show that the Petitioner's filed on October 18, 2010, a timely request for enlargement of time to respond to DEP's Motion to Bifurcate. The DOAH Docket shows that before the Petitioner's timely request for he enlargement of time the ALJ did issue the following Order on 10/18/10:

ORDER TO SHOW CAUSE

"This cause came before the Administrative Law Judge on the Motion to Bifurcate Proceeding. No response was filed by Petitioner. Because the motion alleges facts which could require a dismissal of this case, it is ORDERED that Petitioner shall show cause in writing no later than October 29, 2010, whether his petition was filed more than 21 days* after his receipt of notice of the Department's intent to issue the permit and, if so, why his petition should not be dismissed as untimely".

DONE AND ORDERED this 18th day of October, 2010, in Tallahassee, Leon County, Florida. (emphasis added)

* The time limit was 14 days, not 21, due to project being on state owned lands.
The Petition was filed within 14 days after receiving an extension of time from DEP.

2) The Petitioner's Oral Motion (12/09/10) was timely because the Petitioner found out on or about December 4-8, 2010, that the Administrative Law Judge assigned to this case, Judge Bram D. E. Canter, was a former employee of the State of Florida Department of Environmental Regulation (DER) during the time period of 1981-1984. According to an article published in the Florida Bar's Administrative Law Section Newsletter, titled, "Meet the DOAH Administrative Law Judges" dated September 2006, (volume XXVIII, No. 1). The article was compiled by DOAH's Director and Chief Judge Robert S. Cohen and Administrative Law Judge Linda M. Rigot. (see exhibit 1, page 7 - 8; paragraph 1)
Quote from exhibit 1 article: MIDDLE DISTRICT, Name: Bram D. E. Canter

"Prior Professional Experience:

Assistant General Counsel, Department of Environmental Regulation (1981-1984)

The exchange between parties and the ALJ (exact language) at the hearing on December 9, 2010, is not available from the transcript at the time of this Motion. Petitioner reserves the right to amend and or supplement when the transcript becomes available, if necessary.

3) The petitioner asked in his Oral Motion to ALJ if any thing should have been "disclosed" before the case started. Petitioner mentioned the article to ALJ and the Petitioner felt that this should have been disclosed. The ALJ stated that it is not a conflict of interest. The petitioner stated that if that and that was the ALJ ruling that the Petitioner has the right to appeal that, "conflict of interest" issue. The petitioner stated that if the Petitioner were to prevail on the appeal, any continuation of the evidentiary hearing would be moot. The Petitioner requested the ALJ to issue a written order. The evidentiary hearing was continued to its conclusion, despite the Petitioner's objection then that the Petitioner feels prejudiced as to the fact that the ALJ worked for the same agency (O.G.C. assignment) as one of the parties to this case: (DEP). During the hearing the Petitioner again mentioned that he had the feeling of prejudice because of the direction of questioning was taking.

4) The next day, December 10, 2010, the following Order was issued by the ALJ:

ORDER

A telephonic hearing was held on December 9, 2010, to take evidence on the issue of whether Jerry Potter's petition for hearing was timely filed with the Department of Environmental Protection (DEP). At the commencement of the hearing, Mr. Potter made an oral motion for recusal of the Administrative Law Judge (ALJ), based on the employment of the ALJ as an Assistant General Counsel at the Department of Environmental Regulation (DER) from 1981 to 1984. Mr. Potter contends that the ALJ's representation of the DEP's predecessor agency creates a conflict of interest and prevents the ALJ from providing Mr. Potter a fair hearing on this issue raised in his petition.

The ALJ's representation of DER ended more than 25 years ago. The public records of DOAH cases, which are available on DOAH's website, show that the ALJ frequently presides over hearings in which DEP is a party, and that he has issued a number of Recommended Orders and Final Orders against DEP. The ground for recusal stated by Mr. Potter is inadequate to show a conflict of interest or an appearance of impropriety. Accordingly, it is ORDERED that the motion for recusal is DENIED.

DONE AND ORDERED this 10th day of December, 2010, in Tallahassee, Leon County, Florida.

5) Before commenting further on the ALJ response to the Petitioner's Oral Motion, it is first necessary to review the Petitioner rights under the Administrative Procedure Act. See Florida Jurisprudence 2nd Administrative Law section 277.

6) This case is a proceeding under Florida Statutes 120.569 and 120.57 before an Administrative Law Judge (ALJ) against the State of Florida Department of Environmental Protection (DEP) and Ira and Judith Ellenthal (Ellenthal's) on a Petition for Formal Administrative Hearing by Potter. Potter has alleged disputed issues of material fact. See Potter Petition for Formal Administrative Hearing in Record (R).

7) Potter's Petition was referred by DEP to the State of Florida Division of Administrative Hearings (DOAH) which assigned Administrative Law Judge Bram B. D. Canter (Judge Canter) to this case. See Initial Order of Judge Canter.

8) Florida Statute 120.569 provides the following:

"(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under, FS 120.573 or 120.574. Unless waived by all parties, FS 120.57(1) applies whenever the proceeding involves a disputed issue of material fact....."

"(2) (a).....Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity."

9) Florida Statute 120.57 (1) provides that:

The parties are not proceeding under Florida Statutes 120.573 or 120.574, and the parties have not waived proceeding under Florida Statute 120.57(1). Therefore Florida Statute 120.569 applies in this case. The purpose of the provision in this statute for the disqualification of an Administrative Law Judge is to give the parties to administrative hearings faith in the system of administrative law and the belief that, regardless of the outcome, they were afforded due process of law by a fair and impartial decision-maker.

11) Florida Statute 120.665, which may or may not be applicable in this case, since the Administrative Law Judge is sitting in place for the agency head for the proceeding, provides:

(1) Notwithstanding the provisions of FS 112.3143, any individual serving alone or with others as agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by suggestion filed within a reasonable period of time prior to the agency proceeding.

12) Potter has a just cause for a well-founded belief or fear that Judge Canter has not been and will not be fair and impartial and is biased and prejudiced toward Potter in this proceeding. Potter has attached his affidavit as Exhibit 2 to this Motion stating the basis for his belief or fear that Judge Canter is not and will not be fair and impartial and is biased and prejudiced against Potter. The references in Potter's Affidavit are to the pleadings previously filed with DOAH in this case, see (R) and again stated during the December 9, 2010, telephonic hearing in which all parties were sworn in before testimony. That transcript is not ready yet and therefore can not be used to present written transcript testimony (written form) for this Motion.

13) The Petitioner's allegations in support of this Motion may not be disputed or refuted but rather must be assumed to be true by Judge Canter for purposes of consideration of this Motion. See: Bay Bank & Trust Company vs. Lewis, 634 So. 2d 672, (1DCA 1994). The actions or decisions by Judge Canter summarized above and specified at the Hearing and attested to in the accompanying affidavit objectively demonstrate bias and prejudice against Potter and require disqualification or recusal. See: World Transportation, Inc. vs. Central Florida Regional Transportation, 641 So. 2d 913, (5DCA 1994).

14) Now continuing with comment on the ALJ Order, (see paragraph # 4 above) from ALJ Order Denying Recusal: (paragraph 2)

CDEB ended more than
more than 25 years ago

"The ALJ's representation of DER ended more than 25 years ago. The public records of DOAH cases, which are available on DOAH's website, show that the ALJ frequently presides over hearings in which DEP is a party, and that he has issued a number of Recommended Orders and Final Orders against DEP. The ground for recusal stated by Mr. Potter is inadequate to show a conflict of interest or an appearance of impropriety. Accordingly, it is ORDERED that the motion for recusal is DENIED".

This was the ALJ explanation contained in the second paragraph from the 12/10/10 written Order Denying Recusal.

15) The Petitioner would submit the following statements from the State of Florida District Court of Appeal, First District, case number CASE NO. 1D05-2497. The Parties are:

LEE MEMORIAL HEALTH SYSTEM Petitioners,
v.
STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION;
and SELECT SPECIALTY HOSPITALLEE, INC., Respondents.

The First District stated in that case: CASE NO. 1D05-2497 (see below)

"Courts have repeatedly held that a judge who is presented with a motion for disqualification "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification."

Bundy v. Rudd,
366 So. 2d 440, 442 (Fla. 1978);

Dep't of Agric. and Consumer Servs. v. Broward County,
810 So. 2d 1056, 1059 (Fla. 1stDCA 2002);

J & J Indus., Inc. v. Carpet Showcase of Tampa Bay, Inc.,
723 So. 2d 281 (Fla. 2d DCA 1998).

"When a judge has looked beyond the mere legal sufficiency of a motion to disqualify on the basis of prejudice and bias and attempted to refute such charges, he has exceeded the proper scope of his inquiry. (Bundy, 366 So. 2d at 442.)"

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“This basis alone establishes grounds for disqualification. Id. In the order denying the motion to disqualify, the ALJ did not merely find the motion to disqualify legally insufficient. The ALJ specifically stated that the motion “lacks merit.” The ALJ also specifically refuted petitioner’s contention that there was bias on the ALJ’s part in connection with Tenet and the federal lawsuit. The ALJ looked beyond the mere legal sufficiency of the motion and refuted the charges of partiality. Thus, this basis alone establishes grounds for disqualification. Accordingly, we grant the petition for writ of prohibition and the petition for writ Of certiorari. We vacate the order denying the motions to disqualify and to vacate the recommended order.”
 (no emphasis needed)..... End of CASE NO. 1D05-2497

16) Quotes from Bundy v. Rudd, 366 So 2d 440, (Fl Sup. Ct.1978)(paragraph 2-3):

Regardless of whether respondent ruled correctly in denying the motion for disqualification as legally insufficient, our rules clearly provide, and we have repeatedly held, that a judge who is presented with a motion for his disqualification “shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.”Fla. R. Crim.P. 3.230(d);

see e.g., Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932);

Suarez v. State, 95 Fla 42, 115 So. 519 (1928); Theo. Hirsch Co. v. McDonald Furniture Co., 94 Fla.185, 114 So. 517 (1927).

When a Judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established his disqualification.

Bundy v. Rudd.....(paragraph 4)

Once a basis for disqualification has been established, prohibition is both an appropriate and necessary remedy. Brown v. Rowe, 96 Fla. 289, 118 So. 9 (1928). Accordingly, the writ of prohibition must issue directing respondent to disqualify himself in all proceedings presently pending against the petitioner. We assume, however, that the formal issuance of the writ will be unnecessary

17) At the telephonic Evidentiary Hearing (12/09/10) Respondent Ellenthal (Judith) was present and had also prepared questions to ask of the Petitioner. The Petitioner had no advance notice that the Ms. Ellenthal would be present, and therefore had not prepared -7-

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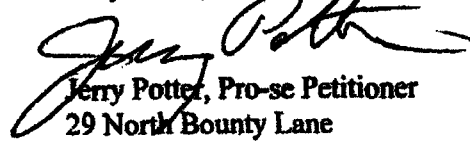
questions to ask of Respondent Ellenthal. Petitioner stated that all of the Petitioner's Certificate of Service mail had been refused by Respondent Ellenthal and returned to the Petitioner. This has been since the case has begun. Ms. Ellenthal did make the statement that DEP Counsel had been sending her copies. Yet the Respondent Ellenthal refuses to enter the case and take part in discovery. (The yet not ready transcript will confirm these statements)

18) The ALJ 12/10/10 Order attempted to adjudicate the issue of "conflict of interest" and refute the conflict of interest raised by Petitioner. "This basis alone establishes grounds for disqualification. See Bundy v. Rudd; 366 So 2d 440, (Fl SC1978).

- WHEREFORE Petitioner requests:
- 1) ALJ recuse/disqualify himself immediately
 - 2) ALJ take no other action in this case.
 - 3) DOAH appoint a new ALJ in this cause.
 - 4) Petitioner reserves right to amend/supplement with transcript when ready, if necessary.

Exhibit 1....Meet DOAH ALJ's (4 pgs)
 2.... Affidavit (1 pg)

Respectfully submitted,


 Jerry Potter, Pro-se Petitioner
 29 North Bounty Lane
 Key Largo, Fl. 33037
 (305) 852-5959

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed by United States Mail on December 20, 2010, to:

BRYNNA J. ROSS
 Senior Assistant General Counsel
 3900 Commonwealth Boulevard, MS 35
 Tallahassee, FL 32399-3000

IRA AND JUDIT ELLENTHAL
 35 North Bounty Lane
 Key Largo, Florida 33037

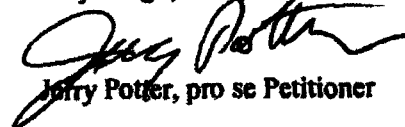

 Jerry Potter, pro se Petitioner

EXHIBIT 2

DOAH 10-9417

STATE OF FLORIDA

COUNTY OF MONROE

Affidavit of Jerry Potter in Support of Petitioner's Suggestions or Motion for Disqualification/Recusal of Administrative Law Judge

I Jerry Potter am the Petitioner in the Division of Administrative Hearings (DOAH) case number DOAH 10-9417. The parties are the State of Florida Department of Environmental Protection (DEP) and Ira and Judith Ellenthal, 35 North Bounty Lane, Key Largo, Florida 33037. (Petitioner reside 29 N. Bounty Lane, Key Largo, Florida, 33037).

The Administrative Law Judge (ALJ) assigned to the case is Bram D.E. Canter. Judge Canter is a former employee of the Department of Environmental Regulation (DER). This was not disclosed at any time to the petitioner.

In 1993, DER and Department of Natural Resources became the DEP, DEP is a party to this case. Judge Canter when with DER worked as Assistant General Counsel for that agency. As the Petitioner I feel that, "that is a conflict of interest" and feel that Judge Canter is not and will not be fair impartial but prejudiced and biased against the Petitioner. The Petitioner further believes that I will not be allowed to exercise and protect my procedural rights.

As a non-lawyer pro se litigant, I am aware that I am obligated to abide by the applicable statutes and rules, including the procedural rules governing administrative proceedings and I have endeavored to do so. I also feel at certain times during all proceedings that I must feel comfortable to be able to look to the Administrative Law Judge to protect my procedural rights and property right and all substantial interests as well as all other parties. I do not have that feeling with the ALJ assigned to this case.

Jerry Potter
Jerry Potter

STATE OF FLORIDA

COUNTY OF MONROE

Before me, the undersigned authority, personally appeared Jerry Potter, who is known to me or produced the following identification FLD 2300435890240 and swore or affirmed that the statements contained herein are true and correct to the best of his knowledge and belief.

Dated this 20 day of December 2010.
Lisa Guy
notary public

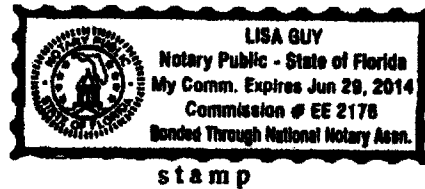


EXHIBIT I

DOAH 10-947

Administrative Law Section Newsletter

Volume XXVIII, No. 1 • September 2006

Meet the DOAH Administrative Law Judges

Compiled by Director and Chief Judge Robert S. Cohen and Administrative Law Judge Linda M. Rigot (Part I of II)

One of the benefits of membership in the Administrative Law Section is the opportunity to get to know the Administrative Law Judges before whom we practice in a variety of contexts—at Section events, in seminars, and here, in print, in the Newsletter. Please take this opportunity to share your Newsletter with non-members and encourage them to join the Section!

Most of the DOAH ALJs are primarily assigned cases by geographic area for easier scheduling and travel. Some are assigned cases on a state-wide basis in a specialized subject matter. The first part of this article gives brief biographical sketches of the Chief Judge, the Deputy Chief Judge, and the ALJs who hear cases in the northern and middle districts of Florida. Part II, which will appear in the next newsletter issue, will feature the ALJs who hear cases in the southern district and those who specialize in hearing environmental and health care cases.

The Northern District starts at Escambia County on the west, encompassing the entire panhandle across to Nassau County and goes as far south as Hernando, Sumter, Lake, and Volusia Counties. The Middle District starts at Pasco, Polk, Orange, and Seminole Counties, includes Brevard County, and runs down the middle and western portions of the state, ending with Collier County.

Chief Judge/Director of DOAH

Name: ROBERT S. COHEN

Colleges, Degrees, and Years:

B.A. *cum laude*, Brandeis University (1979); J.D., Florida State University (1981)

Year Admitted to The Bar: 1982

Year Employed at DOAH: 2003

Prior Professional Experience:

Shareholder, Robert S. Cohen, P.A. (1997-2003); Managing Shareholder, Pennington, et al. (1993-1997); Shareholder, Associate, Haben, et al. (1983-1993); Associate, McFarlain, et al. (1980-1983)

Relevant Professional Activities:

Member, Administrative Law, Health Law, Workers' Compensation, and Government Lawyers Sections, The Florida Bar; President's Pro Bono Service Award, Second Judicial Circuit (2004); Florida Government Bar Association; William H. Stafford Inn of Court (Master, 2004-Present); Tallahassee Bar Association (President, 1997-1998; Board of Directors 1995-2002); Legal Aid Foundation (President, 2001-2002; Treasurer, 2000-2001; Board of Directors, 1999-Present); Tallahassee Women Lawyers Association; Member, Administrative Law Section, National Conference of Administrative Law Judges, American Bar Association; National Association of Administrative Law Judges; Second Judicial Circuit Bench/Bar Committee (2003-Present); Federal Alliance for Safe Homes Steering Committee (2000-2003); Residential Community Mitigation Program Advisory Committee, Department of Community Affairs (2000-2001); Property Tax Administration Task Force, Florida Department of Revenue (2002-2003)

Deputy Chief Judge

Name: HARRY L. HOOPER

Colleges, Degrees, and Years:

B.S., Auburn University (1965); Master in Public Administration, Florida State University (1994); J.D. *cum laude*, Mercer University (1973)

Year Admitted to The Bar:

Alabama (1973); Georgia (1974); Florida (1986)

Year Employed at DOAH: 2001

Prior Professional Experience:

General Counsel, Florida Department of Banking and Finance (1995-2000); Assistant Director and Counsel, Division of Insurance Fraud (1991-1995); Director, Division of Alcohol and Tobacco (1990-1991); Assistant General Counsel, Department of Business Regulation (1988-1990); Assistant State Attorney, 20th Judicial Circuit (1986-1987); Judge Advocate and Military Judge, U.S. Marine

Corps (1970-1986); Artillery Officer, U.S. Marine Corps (1965-1970).

Relevant Professional Activities:

Member, Tallahassee Bar Association; Member, Jefferson County Bar Association; Vice-President, Florida Government Bar Association; Member, Administrative Law Section, The Florida Bar; *pro bono* attorney, North Florida Legal Services; Florida International Volunteer Corps (advisor to the governments of Guyana and the Dominican Republic).

Northern District

Name: CHARLES C. ADAMS

Colleges, Degrees, and Years:

B.A., Florida State University (1964); J.D., University of Florida (1969)

Year Admitted to The Bar: 1970

Year Employed at DOAH: 1975

Prior Professional Experience:

Partner, Powers, Folsom, Adams and Smith, P.A., in Jacksonville (1974-75); Assistant Public Defender, Duval County (1973); Assistant County Solicitor, Palm Beach County (1970-72); Associate, Parish and Parish, in West Palm Beach (1970)

Relevant Professional Activities:

Member, Health Law Section, The Florida Bar; Lecturer, The Florida Bar CLE Courses

Name: DIANE CLEAVINGER

Colleges, Degrees, and Years:

B.S. *cum laude*, Indiana State University (1978); J.D. with high honors, Florida State University (1981)

Year Admitted to The Bar: 1981

Year Employed at DOAH: 1988

Prior Professional Experience:

Partner, Fitzpatrick and Barron, in Panama City (1985-88); Partner, Hilton and Cleavinger, in Panama City (1981-85)

Name: DON W. DAVIS

Colleges, Degrees, and Years:

B.S., University of Florida (1965); J.D., Florida State University (1969)

Year Admitted to The Bar: 1970

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EXHIBIT I DOAH 10-9417

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Administrative Law Section Newsletter

Year Employed at DOAH: 1987**Prior Professional Experience:**

General Counsel, Florida Game and Fresh Water Fish Commission (1987); General Counsel, Florida Department of Commerce (1978-87); Assistant State Attorney, Seminole County (1977-78); County Judge and Acting Circuit Judge, Madison County (1971-77); Assistant General Counsel, Office of State Comptroller (1970-71)

Relevant Professional Activities:

Member, Administrative Law Section, The Florida Bar; Member, Tallahassee Bar Association; Honorary member, American Trial Lawyers Association

Name: ELLA JANE P. DAVIS**Colleges, Degrees, and Years:**

B.A.Ed., University of Maryland (1967); J.D., Florida State University (1970)

Year Admitted to The Bar: 1970

Year Employed at DOAH: 1984

Prior Professional Experience:

Attorney, Florida Department of Transportation (1978-84); Author, West's Florida Practice series: *Davis, Florida Workers' Compensation* (Vols. 6-8) c.1982; Sole practitioner, in Tallahassee (1975-78); Attorney-Editor, Florida Industrial Relations Commission (1972-74); Partner, Dansby, Davis and Davis, in Tallahassee (1970-72)

Relevant Professional Activities:

Member, Administrative Law and Workers' Compensation Sections, The Florida Bar; Tallahassee Bar Association; Certified County and Circuit Court Mediator; Past member, Second Circuit Grievance Committee; Past Executive Council member and CLE Chair, Workers' Compensation Section, The Florida Bar; Past member, The Florida Bar Professionalism and CLE Committees and the Journal/News Board; Former Visiting Instructor, Florida State University College of Law; Author and instructor for various CLE courses; Florida's first female legislative staff intern.

Name: SUZANNE F. HOOD**Colleges, Degrees, And Years:**

B.A., Stetson University (1966); J.D. with honors, Florida State University (1987)

Year Admitted to The Bar: 1987

Year Employed at DOAH: 1994**Prior Professional Experience:**

Associate, Law Offices of Hilliard R. Reddick, in Quincy (1992-94); Judicial Clerk, Supreme Court of Florida (1990-92); Senior Attorney, Florida Department of Insurance (1988-90); Judicial Clerk, First District Court of Appeal of Florida (1987-88); Teacher, public and private school systems in Florida and Georgia (twelve years' experience between 1966 and 1983)

Relevant Professional Activities:

Member, Administrative Law Section, The Florida Bar; Member, Tallahassee Bar Association

Name: LISA ("LI") SHEARER NELSON**Colleges, Degrees, And Years:**

B.A., Carson-Newman College (1980); J.D., Florida State University (1983)

Year Admitted To The Bar: 1983

Year Employed at DOAH: 2006

Prior Professional Experience:

Director, Holtzman Equels, P.A. (2001-2006); Associate, Holtzman, Krinzman, Equels and Furla (1999-2001); Deputy General Counsel, Department of Business and Professional Regulation (1993-1999); Appellate counsel, Department of Professional Regulation (1986-1993); Law Clerk to Chief Justices James E. Alderman and Joseph A. Boyd, Jr., Florida Supreme Court (1983-86).

Relevant Professional Activities:

Past Chair and current Executive Council member, Administrative Law Section, The Florida Bar; Member, Health Law and Appellate Practice Sections, The Florida Bar; Member, Florida Government Bar Association; Lecturer, The Florida Bar CLE courses; Author, Administrative Law Section *Newsletter* articles

Name: P. MICHAEL RUFF**Colleges, Degrees, and Years:**

B.A., Florida State University (1969); J.D., Florida State University (1971)

Year Admitted to The Bar: 1971

Year Employed at DOAH: 1980

Prior Professional Experience:

Senior Hearing Examiner, Florida Public Service Commission (1976-80); Associate, Woods and Johnston, in Tallahassee (1973-75); Legislative

Aide, Florida Senate (1969-70)

Relevant Professional Activities:

Former Executive Council member, Administrative Law Section, The Florida Bar; Member, Environmental and Land Use Law Section, The Florida Bar; Past Director, past officer, and current member, Tallahassee Bar Association; Lecturer, The Florida Bar CLE courses; Attended Harvard Law School course in Mediation/Negotiation (1988); Member, Second Judicial Circuit Professionalism Committee; Volunteer judge, Florida State University College of Law Moot Court

Name: BARBARA J. STAROS**Colleges, Degrees, and Years:**

B.A., Eckerd College (1974); J.D., University of Florida (1977)

Year Admitted to The Bar: 1978

Year Employed at DOAH: 2000

Prior Professional Experience:

Of Counsel, Pennington, Moore, Wilkinson, Bell and Dunbar, P.A., and Cobb, Cole and Bell (1996-2000); General Counsel, Florida Department of Education (1993-1996); Deputy General Counsel, Florida Department of Education (1986-1993); Assistant Attorney General, Department of Legal Affairs (1979-1986); Staff Attorney, Joint Legislative Management Committee (1978-1979).

Relevant Professional Activities:

Member, Administrative Law and Government Lawyers Sections, The Florida Bar; Member, Tallahassee Women Lawyers; Author, *Stetson Law Review*; Contributing author: *Florida Association of School Administrators' Florida Education Handbook*; Lecturer, Lorman Education Services CLE courses; Lecturer, Florida Law-Related Education Association Summer Law Institute on School Law; Lecturer, Institute for Small and Rural School Districts Legal Issues Workshop.

Middle District**Name: BRAM D. E. CANTER****Colleges, Degrees, and Years:**

B.A. with high honors, University of South Florida (1974); J.D., University of Florida (1977); LL.M. with

continued..

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highest honors, George Washington University (1981)

Year Admitted to The Bar: 1978

Year Employed at DOAH: 2005

Prior Professional Experience:

Solo Practice (1997-2005); Shareholder, Pennington Law Firm, in Tallahassee (1993-1996); Shareholder, Haben and Culpepper, in Tallahassee (1986-1993); Associate, Gunster, Yoakley, Criser & Stewart, in W. Palm Beach (1984-1986); Assistant General Counsel, Department of Environmental Regulation (1981-84); Director, Water Law Center, University of Florida College of Law (1977-79)

Relevant Professional Activities:

Member, Environmental Law and Administrative Law Sections; Co-Author, Florida Water Law 1980, *Florida Water Atlas*; CLE lecturer in water law and environmental law.

Name: JEFF B. CLARK

Colleges, Degrees, and Years:

B.A., Florida State University (1962); J.D., University of Tennessee (1968)

Year Admitted to The Bar: 1969

Year Employed at DOAH: 2000

Prior Professional Experience:

Attorney, Gurney, Gurney and Handley, in Orlando (1969-77); Solo practice, in Orlando (1978-2000); Municipal Judge, City of Orlando (1972-1975); City Commissioner, City of Orlando (1980-1992); Colonel, United States Marine Corps (retired)

Relevant Professional Activities:

Member, Orange County and American Bar Associations

Name: SUSAN B. HARRELL

Colleges, Degrees, and Years: B.A. *summa cum laude*, Florida State University (1974); J.D. *cum laude*, Florida State University (1978)

Year Admitted to The Bar: 1979

Year Employed at DOAH: 1993

Prior Professional Experience:

General Counsel, Florida Department of Management Services (formerly, Department of General Services) (1985-93); Attorney, Department of General Services (1982-85); Assistant General Counsel, Department of Health and Rehabilitative Services (1980-82); Associ-

ate, Field, Granger, Santry and Mitchell, in Tallahassee (1979-80)

Relevant Professional Activities:

Member, Administrative Law and Government Lawyer Sections, The Florida Bar; Member, Tallahassee Bar Association; Past Chair, Association of General Counsels

Name: CAROLYN S. HOLIFIELD

Colleges, Degrees, and Years:

B.A., University of South Florida (1971); M.A., University of South Florida (1976); J.D., Florida State University (1984)

Year Admitted to The Bar: 1985

Year Employed at DOAH: 1995

Prior Professional Experience:

Assistant General Counsel, Department of Education (1987-91, 1993-95); Chief, Administrative Law Section, Department of Transportation (1991-93); Adjunct Professor, Florida A. & M. University (1991-95); Adjunct Professor, Nova University (1987-91); Staff Attorney, Leon County School District (1985-87); Counselor/Advisor, University of South Florida (1979-81); Teacher, Guidance Counselor, Hillsborough County School District (1971-79)

Relevant Professional Activities:

Member, Administrative Law Section, The Florida Bar

Name: DANIEL M. KILBRIDE

Colleges, Degrees, and Years:

B.A., Stetson University (1965); J.D., Stetson University (1974)

Year Admitted to The Bar: 1974

Year Employed at DOAH: 1989

Prior Professional Experience:

County Judge and Acting Circuit Judge, Indian River County (1985-89); City Attorney, City of Sebastian (1977-84); City Attorney, City of Fellsmere (1979-84); Private practice, in Vero Beach (1977-84); Assistant City Attorney and City Prosecutor, City of Vero Beach (1974-77); Special Agent (Captain), Office of Special Investigations, United States Air Force (1967-71)

Relevant Professional Activities:

Member, Administrative Law and Government Lawyers Sections, The Florida Bar; Member, National Association of Administrative Law Judges; Distinguished Leadership

Award, Conference of County Judges of Florida (1987, 1988)

Name: DANIEL MANRY

Colleges, Degrees, and Years:

B.S., University of Florida (1968); J.D., University of Florida (1971); M.L.T., Georgetown University (1983)

Year Admitted to The Bar:

Florida (1971); Colorado (1977); District of Columbia (1985)

Year Employed at DOAH: 1989

Prior Professional Experience:

Assistant Attorney General, Florida Department of Legal Affairs (1988-89); Bureau Chief, Florida Department of Revenue, Bureau of Technical Assistance (1986-88); Legal Editor, *Tax Management Portfolios*, Bureau of National Affairs (1986); Associate, Holland and Knight, in Tampa (1984-85); Associate, Aronow, Anderson, Beaty and Lee, in Denver (1984); Associate, Silverstein and Mullens, in Washington, D.C. (1983); President, Manry Realty (1976-82); Daniel Manry, P.A., in Denver and Breckenridge (1973-82); Assistant Public Defender, Lee County, Florida (1972-73); Reginald Heber Smith Community Lawyer Fellowship, Howard University, Assigned to Camden Regional Legal Services, Camden, N.J. (1971-72)

Relevant Professional Activities:

Author, *Florida Administrative Practice Manual*, Department of Revenue; *The Scarecrow in McDonald's Farm: A Fairy Tale About Administrative Law*, *The Florida Bar Journal* (March 1999).

Name: R. BRUCE MCKIBBEN, JR.

Colleges, Degrees, and Years:

A.A., Brevard Community College (1978); B.A., Florida State University (1980); J.D., Florida State University (1984)

Year Admitted to The Bar: 1984

Year Employed at DOAH: 2006

PRIOR PROFESSIONAL EXPERIENCE:

Ronald A. Mowrey, P.A. (1984); Department of Health and Rehabilitative Services (1985-86); Dempsey and Goldsmith, P.A. (1987-90); Haben and Culpepper, P.A. (1990-94); Holland and Knight, LLP (1994-98); R. Bruce McKibben, P.A. (1998-2006)

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Relevant Professional Activities:

Affiliation with Florida Health Care Association and American Health Lawyers Association; Special Counsel to Academy of Florida Elder Law Attorneys; Speaker, The Florida Bar CLE courses; Member, Tallahassee Bar Association; Member, Administrative Law and Health Law Sections, The Florida Bar; Recipient of Ann Bowden Award— Child Advocate of the Year

Name: WILLIAM F. QUATTLE-BAUM
Colleges, Degrees, and Years:

B.S. with high honors, University of Florida (1975); J.D., University of Florida (1978)

Year Admitted to The Bar: 1979

Year Employed at DOAH: 1987

Prior Professional Experience:

Assistant Director, Florida Small Business Health Access Project (1987); Deputy Campaign Manager and Communications Director, Bob Graham for U.S. Senate (1986); Senior Executive Assistant, Florida Department of Banking and Finance (1984-86); Attorney, Florida House of Representatives (1980-84); Press Secretary, U.S. Senator Richard Stone Campaign (1980); Attorney, Florida Department of Insurance (1979-80)

Name: LAWRENCE P. STEVENSON

Colleges, Degrees, And Years:

B.A., Florida State University (1983); J.D. with honors, University of Florida (1987)

Year Admitted to The Bar: 1987

Year Employed at DOAH: 1997

Prior Professional Experience:

Partner, Holland and Knight, in Tallahassee (1995-97); Associate, Holland and Knight, in Tallahassee (1987-94).

Relevant Professional Activities:

Member, Administrative Law Section, The Florida Bar; Member, Tallahassee Bar Association.



The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300

PRSR-STD
U.S. POSTAGE
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TALLAHASSEE, FL
Permit No. 43

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS


JERRY POTTER,)
)
Petitioner,)
)
vs.) Case No. 10-9417
)
)
IRA ELLENTHAL, JUDITH)
ELLENTHAL, AND DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Respondents.)
_____)

ORDER

This cause came before the Administrative Law Judge on Petitioner's Motion for Reconsideration of Order Denying Recusal. No response was filed by Respondents. The Department of Environmental Protection did not request an extension of time as it did for the proposed recommended order. Having considered the motion and being otherwise advised, it is

ORDERED that the motion is granted and, upon reconsideration, the motion for recusal is GRANTED. This case will be transferred to another Administrative Law Judge for all further proceedings.

DONE AND ORDERED this 3rd day of January, 2011, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of January, 2011.

COPIES FURNISHED:

Brynna J. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

Jerry P. Potter
29 North Bounty Lane
Key Largo, Florida 33037

Judith Ellenthal
21 Shoreham Club Road
Old Greenwich, Connecticut 06870

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,)
)
 Petitioner,)
)
 vs.) Case No. 10-9417
)
 IRA ELLENTHAL, JUDITH)
 ELLENTHAL, AND DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

NOTICE OF TRANSFER

The parties are hereby notified that this case has been transferred to the undersigned for all further proceedings.

January 3, 2011



DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
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www.doah.state.fl.us

COPIES FURNISHED:

Brynna J. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

Jerry P. Potter
29 North Bounty Lane
Key Largo, Florida 33037

37

Judith Ellenthal
21 Shoreham Club Road
Old Greenwich, Connecticut 06870

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,)
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 IRA ELLENTHAL, JUDITH)
 ELLENTHAL, AND DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

ORDER

After consideration of Petitioner's Motion (Petition) for Reconsideration of Previous Orders filed February 2, 2011; DEP's response in opposition filed February 14, 2011, in which DEP states it has no objection to the bifurcation of the final hearing being lifted but otherwise opposes the motion; and the motions to quash subpoenas duces tecum issued to the Ellenthals filed February 9, 2011, and February 17, 2011, the following is ordered:

1. The final hearing in this case remains bifurcated;
2. The telephonic hearing set for March 25, 2011, remains set for consideration of the single issue of whether Petitioner Potter's petition was timely filed;
3. The Order issued by Judge Canter on December 10, 2010, that governs post-hearing procedure remains in effect, including paragraph 6; that no further discovery shall be conducted until it is determined that the petition was timely filed; and,
4. The motions to quash subpoenas duces tecum filed by the Ellenthals are granted.

DONE AND ORDERED this 18th day of February, 2011, in Tallahassee, Leon County, Florida.



DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of February, 2011.

COPIES FURNISHED:

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3900 Commonwealth Boulevard, Mail Station 35
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Ira Ellenthal
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,

Petitioner,

vs.

DOAH CASE NO. 10-9417
OGC CASE NO. 10-2341

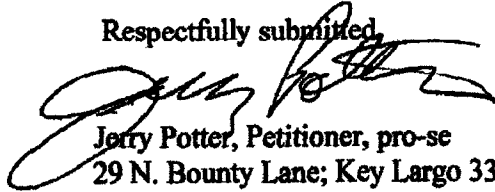
IRA ELLENTHAL, JUDITH ELLENTHAL,
and STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

PETITIONER'S NOTICE OF FILING TRANSCRIPT

Petitioner Jerry Potter files this Notice of Filing of Transcript. The transcript is from the Evidentiary Hearing (telephonic) held December 9, 2010. The Hearing was held Before Administrative Law Judge B.D. Canter. Petitioner's cross of Jean Murphy, DEP.

Respectfully submitted,



Jerry Potter, Petitioner, pro-se
29 N. Bounty Lane; Key Largo 33037
Florida; (305) 852-5959

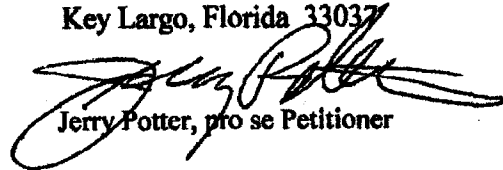
Transcript: 14 pages

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed by United States Mail on March 9, 2011, to:

BRYNNA J. ROSS
Senior Assistant General Counsel
3900 Commonwealth Boulevard, MS 35
Tallahassee, FL 32399-3000

IRA AND JUDIT ELLENTHAL
35 North Bounty Lane
Key Largo, Florida 33037



Jerry Potter, pro se Petitioner

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARING**

**DOAH CASE NO.10-9417
OGC CASE NO. 10-2341**

JERRY POTTER,

Petitioner,

vs.

**IRA ELLENTHAL, JUDITH ELLENTHAL,
and STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,**

Respondents.

JOINT STATUS REPORT

Petitioner Jerry Potter files this Status Report on behalf of the Applicant and Petitioner on the on-going Settlement and or Agreement discussions. The Petitioner and Applicant's have made progress to the point the Applicant's now agreed to have ready for submittal a new, revised or amended drawing prepared by their surveyor and/or engineer. Applicant advised Petitioner in last call, after several others today, that no date is now available of when to expect the "new" drawing will be completed. He is in the field and will not be able to return the applicants phone


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approved boat lift location, (not constructed), by the Department and Army Corps.

This last week was delayed some by mis-information concerning this agreement being assisted by another party (adjoining property owner) that had signed a previous letter of concurrence this was not properly understood and or explained to the Petitioner.

The busy schedule of applicant's has caused them to request this status report to be filed by the Petitioner. The Applicant stated that she will not be available rest of the day today. It is the applicant's desire to have careful and guarded discussions on the progress so the submitted document will meet the requirements and acceptance of all three (3) governmental agencies.

In the last call the Petitioner and Applicant had it was cut short by interference, lost cell ??? Any objection to what is in the filing is allowed to be changed by the Applicant with no objection by the Petitioner. The Petitioner did leave a phone message with DEP counsel prior to filing this report today.

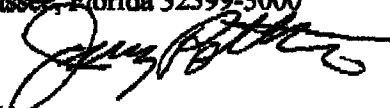

Jerry P. Potter
29 North Bounty Lane
Key Largo, Florida 33037

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion was sent by U.S. Regular Mail on April 8, 2011 to all parties of record:

Ira and Judith Ellenthal
21 Shorehame Club Rd.
Old Greenwich, CT 06870

Brynna L. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000


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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOAH CASE NO. 10-9417
OGC CASE NO. 10-2341

JERRY POTTER,

Petitioner,

vs.

IRA ELLENTHAL, JUDITH ELLENTHAL,
and STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

PETITIONER'S MOTION FOR RECUSAL OR DISQUALIFICATION
OF SUCCESSOR ADMINISTRATIVE LAW JUDGE

Petitioner Jerry Potter (Potter/Petitioner) files this Motion for Recusal/
Disqualification of Successor Administrative Law Judge (ALJ). In support of this
Motion the Petitioner states the following:

1. The Petitioner has rights under the Administrative Procedure Act. See Florida Jurisprudence 2nd Administrative Law section 277.
2. This case involves an exemption authorization letter issued in 2003 and 2004 by the State of Florida Department of Environmental Protection (DEP) to the Applicant's Judith and Ira Ellenthal (applicants) to remove/replace an already existing dock in the same footprint at the applicants Key Largo vacation residence. (record)
3. The applicant's reside in the State of Connecticut.

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4. Additionally under this exemption the applicant's requested to install two (2) boat lifts (one of which) was a boat lift elevator, the other one is a four (4) pile lift. (the 4 pile lift is shown on the submitted drawings as twelve (12) feet wide at the center line of the supporting ten (10) inch diameter piles (record).

5. The applicant's did not have any boat lifts attached to the existing Dock at the time of the application.

6. The Petitioner filed with DEP a Petition for Administrative Hearings (09/27/10) which DEP filed with the Division of Administrative Hearings (DOAH) on October 1, 2010. (record)

7. The Department on December 6, 2010, filed a Motion to Bifurcate the Proceeding (in fact a Motion to Dismiss the Petition) on the issue of timeliness of Petitioner's filing the Petition.

8. As a result of that Motion the Petitioner filed a letter to the initial ALJ and DEP counsel assigned to the case. The content of the letter had to do with the method in which the Petitioner's was to be contacted by telephone in any dealings with this case. The Petitioner is pro se and does not have an office or staff of personnel to assist in research, filing, clerical and other administrative issues. It also raised certain health issues concerning the petitioner's wife who resides in the same residence.

9. At the writing and preparing this Motion it is not clear if the successor ALJ has been made aware of that letter.

10. The successor ALJ was also assigned to a previous case also assigned to DOAH, (DOAH Case No. 09-5120).

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11. That case was settled prior to hearing. That case located also in the same neighborhood in which the above case is located. The issues in that case were similar to this case, dock size, exemption issued by DEP incorrectly, (a developing pattern by the DEP Marathon Office in issuing letter's of authorization wor exemption in the Petitioner's neighborhood that affect the petitioner's substantial interests) and riparian lines (DEP, and ALJ's do not have authority to determine riparian lines; (see Florida Constitution)

12. Affected parties can agree and file with clerks office a survey with approval of affected parties the notarized agreement. If that is not accepted by the parties only a Circuit Court Judge can determine the riparian lines. (FC)

13. A surveyor can only "suggest" where the riparian lines are.

14. If two (2) or more surveys, by different surveyors are submitted to DEP they, DEP, do not have the authority to select which one is correct. That is if the two or more surveys show any "conflicting" results.

15. This is only mention now in this motion at this point because it will be relevant later below.

16. In the DOAH Case No. 09-5120 mentioned above in which the successor ALJ presided in after certain filings in which are a central point in this above numbered case. That was the issue of "complete files being made available to the Petitioner for review of agency action". The petitioner has on numerous times had to go to Bonnie Hazleton of the Public Records Division out of the Florida Governors office to force DEP to make available to the Petitioner in more than one instance.

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17. In paragraph #7 above, the DEP Motion to Bifurcate, was filed because of the appearance on timeliness of the Petition filed by Potter.

18. In the Department's Motion to Bifurcate, in paragraph #7: (filed with DOAH 10-6/10) counsel stated:

7. However, the Department's records indicate that the Petitioner requested and was provided the Department's South District's Branch Office's File No. 44-0223322-001 on January 25, 2009, April 30, 2009, April 9, 2010, and July 28, 2010.

Counsel also was also of the problems of obtaining information from the Marathon branch office, the office that issued the applicant's authorization in that DOAH # 09-5120 case.

19. The current successor ALJ in this above numbered case, did issue an Order in the DOAH case 09-5120 on November 2, 2009 which stated in paragraph Number 2:

"2. The file reflects difficulties encountered by Petitioner in accessing the complete files of the Department of Environmental Protection (DEP) alleged by Petitioner to have led to the speculative and conjectural nature of the allegations in the petition. The parties are urged to co-operate in Scheduling. Petitioner's review of non-confidential matters in the DEP files in a timely manner if Petitioner decides to file amended petitions."

20. This documents that the successor ALJ that is now in the above case that the successor ALJ knew of the problems encountered by the Petitioner in obtaining questionable files from DEP, it was even mentioned in case 09-5120 where the petitioner was not told of a on site visit to approve the reduction of the size of an already constructed dock.

21. Even after the inspection by Marathon DEP agents filed reports of the on site visit they (reports) were not present when inspected by Petitioner at a later date.

22. The petitioner's response to the reasons for the Petition was timely was filed in his answer (response) to the Motion to Bifurcate on October 29, 2010.

23. Before the Petitioner's timely response was filed on October 29, 2010, the initial ALJ filed an Order to show cause on October 18, 2010.

24. In the Petitioner's response it laid out all of the problems encountered with obtaining information at DEP Marathon Office. It was totally unreliable.

25. On November 1, 2010 a case status telephonic hearing was held.

26. On November 2, 2010 the Initial ALJ issued an Order to have a Hearing on the timeliness (dismiss) issue.

27. The Petitioner contended (record) that if the Petitioner's response to the Order to show cause was read there would be no need for a hearing on the timeliness issue.

28. On December 9, 2010, a telephonic hearing was held in the DEP Marathon Office. Due to previous information received from DEP employees the Petitioner was told that Gus Rios (DEP Marathon Mgr.) would be present that day, and no one told the Petitioner that the applicant's were going to be present at the telephonic hearing. Petitioner was unprepared for both, Rios not present from DEP. And Judith Ellenthal being present when up to this point neither of the applicant's had made an appearance despite filing other wise by DEP.

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29. Petitioner filed oral Motion to disqualify/recuse initial ALJ on grounds of conflict of interest as being a former employee of the agency that morphed into the present DEP. The initial ALJ job title with the previous morphed agency was with the "office of general counsel" the same title as one of the parties in the above numbered case. The ALJ denied the motion and the hearing was held.

30. The initial ALJ filed two Orders the next day, December 10, 2010, the First was the denial of the petitioner's motion to recuse/disqualify in writing. Second was to not allow any discovery by the Petitioner to support the Petitioner's Case until after the Hearing determines the timeliness (dismiss).

31. On December 20, 2010, Petitioner filed a Motion for Reconsideration of Disqualify/Recuse of initial ALJ. The Petitioner now had additional reasons due The ALJ written order. A clear violation of the "Bundy" rule was cited.(record)

32. On January 3, 2011 the initial ALJ granted the Petitioner's Motion for Reconsideration, and on the same date the following was filed by the successor ALJ.

33. On January 3, 2011 the following Order was filed in this case by the ALJ in case 09-5120: (ALJ in case 09-5120 which is over, is now entering this case)

NOTICE OF TRANSFER

"The parties are hereby notified that this case has been transferred to the undersigned for all further proceedings."
January 3, 2011

34. On February 4, 2011 a Case Status Motion Hearing (telephonic) was held by the Successor ALJ (now in this case). All parties were to be in attendance but no one was present for the applicant's interests. During the conference between the

Successor ALJ, Counsel for DEP and the Petitioner to discuss the next best date for another hearing on the timeliness of the Petition to be rescheduled. March 25, 2011, 10:00 a.m. Also when Petitioner raised the issue that all parties are required by the Order to be present, where is the applicant? The successor ALJ responded, "that some information was received "they" may not make it, and Ms. Ross can speak for them". (the Petitioner was not notified by any party or the Division of Administrative Hearings that one or both the applicant's were not going to be present.

35. The Petitioner then stated to the ALJ that Ms. Ross represents the Department's interest's and cannot represent the applicant. The ALJ then said, "well I mean they have the same interests or are closely aligned".

36. In that same telephonic hearing the petitioner had the feeling that the ALJ was arguing the case for the applicant, example:

ALJ: "There is case law that says once you received notice, that does constitute "constructive notice".

Petitioner: "States the file was not complete, in the first instance there were Only one or two pages, referencing is the project on State owned Lands. It was a request to DEP bureau of Land Mapping".....

Continued:..... "At the December 9, 2010 hearing conducted by The initial ALJ, the DEP employee that handles The files admitted under oath that she did not know what was in or what was supposed to be in the files".

(Since the February 4, 2011 Case Status Hearing, the Petitioner has filed with the DOAH clerks office the transcript of that cross Examination of the DEP witness.)

That one page of the transcript is shown, more questions Were asked, but not include at this time to make this point.

SEE TRANSCRIPT NEXT PAGE: (quoted)

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THE COURT: Mr. Potter.

MR. POTTER: Yes.

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5 CROSS EXAMINATION

6 BY MR. POTTER:

7 Q: Miss Murphy, if someone requests the file, and since
8 they're mentioning the Ellenthal file, right now, if you were
9 to go get it, how many pages would be in that file?

10 A: I don't know.

11 Q: So how can you tell if you don't know how many pages
12 are there? There is no way of telling if it's complete or
13 not, or is there any way you can tell when you have a file in
14 your hand and you're walking out, say that the person is
15 coming in an hour, or two hours, and you bring it out ahead of
16 time, so it's like you usually do, which is appreciated. And
17 you bring a file out and you have no way of knowing if that
18 file has five pages, or twenty-five pages, or if it you
19 have no way of knowing what's in the file, you just bring the
20 file out?

21 A: That's correct

[The Petitioner reserves the right to supplement the case law on "constructive Notice" unavailable at this time, must go to law library.]

37. Since the February 4, 2011 Case Status Hearing the petitioner has filed (record) that the Department has not produced Matt Culver the permit agent in charge of issuing the authorization letter from DEP nor has DEP provided a chain of custody of that file to prove that what the Petitioner is claiming is not true. This has most likely led the parties to enter into settlement/agreement discussions. Which have been going well.

38. With both applicant's and petitioner agreeing on points and the petitioner

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was finalizing to get it typed up (no staff) the ALJ places the case in abeyance which is not what the applicant's or petitioner wanted.

39. The Petitioner has had a problem with the Department's first settlement that was faxed to the petitioner to sign, after reading it the Petitioner advised counsel For DEP that it was unacceptable as written.

a. DEP counsel responded in a way that was not professional and it cannot be handled or be resolved by DOAH or any ALJ. The Petitioner does also understand that DEP counsel is most likely responding to counsel's supervisors requests. These un-professional remarks were mentioning specifically the Petitioner and bringing up Mrs. Potter, petitioner's wife, health issues.

b. The most recent non professional behavior was during these ongoing discussions about settlement issues revolved around a letter of Concurrence Florida Administrative Code (FAC) 18-21.004(3)(d).

I understand that the subject project will be located entirely within the applicant's riparian rights area, and I do not object to the proposed structure or activity being located within the area required as a setback distance from the common riparian rights line, as required by Chapter 18-21.004(3)(d), F.A.C.

40. On February 18, 2011 the successor ALJ issued the following in Paragraph's 3 and 4 that order Order:

3. The Order issued by Judge Canter on December 10, 2010, that governs post-hearing procedure remains in effect, including paragraph 6; that no further discovery shall be conducted until it is determined that the petition was timely filed; and,

4. The motions to quash subpoenas duces tecum filed by the Ellenthals are granted.

Which completely denied due process to the Petitioner to use the Applicant's deposition to prove the Petitioner's case. After Petitioner filed Motion for

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Clarification the successor ALJ issued the following Order on 02/22/11:

ORDER

Petitioner's Motion for Clarification of February 7, 2011, Order was filed on February 18, 2011.

The following is found and ordered:

1. The Order that prohibits discovery until an order is entered finding the petition in this case to be timely was entered by Administrative Law Judge Canter on December 10, 2010. That Order preceded by more than three weeks the Order that granted the motion for the administrative law judge's recusal. (The Order of Recusal was entered on January 3, 2010.)
2. The December 10, 2010, Order has been in effect since it was rendered and remains in effect. Petitioner violated the Order when, in late December 2010, he noticed the Ellenthals' depositions and when he served the subpoenas duces tecum on the Ellenthals. The subpoenas, therefore, were quashed.
3. The Order entered on February 18, 2011, stated that the issue to be heard on March 25, 2011, in the first part of a bifurcated final hearing is the single issue of whether the petition was filed timely. See paragraph 2, of the Order.
4. Following the first part of the bifurcated final hearing on March 25, 2011, the parties will be given the opportunity to file proposed orders on the single issue of the timeliness of the petition.
5. If the petition is determined to have been filed late, then a recommended order will be issued recommending that the Department enter a final order dismissing the petition for being filed late.
6. If the petition is determined to have been filed timely, then appropriate dates will be selected for the conclusion of the final hearing on the issue of the merits of the petition and discovery will be allowed in the interim pursuant to a discovery schedule.

DONE AND ORDERED this 22nd day of February, 2011, in Tallahassee, Leon County, Florida.

S

DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building

-10-

53

1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of February, 2011.

41. The petitioner has stated that the initial ALJ's Order should not be allowed because the Motion to Recuse/Disqualify was filed Oral before the Hearing on December 9, 2010. Then after the initial ALJ had the benefit to hear the testimony of the DEP employee Jean Murphy state that she did not know what was in the files nor did she know what should be in them. So any testimony from Ms. Murphy that Ms. Murphy handed a file to the Petitioner proves nothing. The Petitioner has filed an affidavit to verify what he got in the files it is in the record. Not one DEP employee can state what was in the file or should have been when handed to the Petitioner along with 6-7 other files visited those respective dates by the petitioner.

42. During the settlement/agreement discussions the Petitioner filed several "Status Reports" the last one was on April 8, 2011. Due to the late filing time and Having to type the report myself, as a courtesy I called the successor ALJ Judicial Assistant around 12:30 - 1:00 p.m. to advise that it would be filed in a couple of Hours, due to it being a Friday. When I got no answer a recording came on and A voice stated that "this is the Judicial Assistant to ALJ David Maloney and Bram D. Canter, please your case Number and message and your call will be returned as soon as possible." The Petitioner did not leave a message, but called 30 min. Later and verbally advised JA what was going on between the applicant and the

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Petitioner, and that the said status report would be filed shortly, it was filed on or about 3:00 p.m.

43. The initial ALJ was Bram D. Canter, the replacement ALJ is David Maloney and they share the same office in DOAH main office building in Tallahassee. This is troubling to the Petitioner.

44. The present set up in DOAH is as the Petitioner understands it is Four (4) ALJ are assigned all Environmental cases in the State of Florida. The cases are assigned by Senior ALJ J. Lawrence Johnston. The other three (3) ALJ's are David Maloney (assigned this above numbered case), Donald Alexander and Bram D. Canter.

45. Under the present set up when the initial ALJ was recused, the office mate took over the case. This in it self is improper or at least gives the appearance of improprieties at best and this is troubling to the Petitioner.

46. In circuit court reassignments that is done by the Chief Judge to avoid any appearance of improprieties which was not done in this case. Just on the fact that the two ALJ's, Maloney and Canter, shared an office together should be enough to see that ALJ Maloney did not get the case assigned to ALJ Maloney.

47. From my inquiries it has been determined that the assignment is decided on there own, the four ALJ's that handle the Environmental cases.

48. The Division of Administrative Hearings presently, April 18, 2011, has This above numbered case as being assigned to the following location.

Location: Kingsley, FL District: Northern

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49. Florida Statute 120.57 (I) provides that:

The parties are not proceeding under Florida Statutes 120.573 or 120.574, and the parties have not waived proceeding under Florida Statute 120.57(I). Therefore Florida Statute 120.569 applies in this case. The purpose of the provision in this statute for the disqualification of an Administrative Law Judge is to give the parties to administrative hearings faith in the system of administrative law and the belief that, regardless of the outcome, they were afforded due process of law by a fair and impartial decision-maker.

II) Florida Statute 120.665, which may or may not be applicable in this case, since the Administrative Law Judge is sitting in place for the agency head for the proceeding, provides:

(III) Notwithstanding the provisions of FS 112.3143, any individual serving alone or with others as agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by suggestion filed within a reasonable period of time prior to the agency proceeding.

50. Potter has a just cause for a well-founded belief or fear that Judge Maloney has not been and will not be fair and impartial and is biased and prejudiced toward Potter in this proceeding. Potter has attached his affidavit to this Motion stating the basis for his belief or fear that judge Maloney is not and will not be fair and impartial and is biased and prejudiced against Potter. The references in Potter's Affidavit are to the pleadings previously filed with DOAH in this case, see

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(record) and again stated during the December 9, 2010, telephonic hearing in which all parties were sworn in before testimony. Judge Maloney insists on not allowing the Petitioner to conduct any discovery to prove that his Petition is in fact timely.

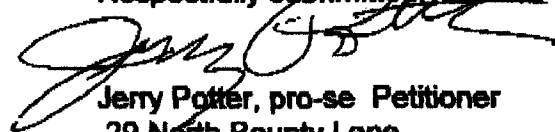
51. The Petitioner's allegations in support of his Motion may not be disputed or refuted but rather must be assumed to be true by Judge Maloney for purposes of consideration of this Motion. See; *Bay Bank & Trust Company vs. Lewis*, 634 So. 2d 672, (IDCA 1994). These actions or decisions by Judge Maloney summarized above and specified at the Hearing and attested to in the accompanying affidavit objectively demonstrate bias and prejudice against Potter and require disqualification or recusal. See: *World Transportation, Inc. vs. Central Florida Regional Transportation*, 641 So. 2d 913, (5DCA 1994).

51. Now continuing with comment on the ALJ Order, (dated 2/22/11 above) From Petitioner's Motion for Clarification filed with DOAH on February 18, 2011.

WHEREFORE Petitioner requests:

1. The Successor ALJ recuse/disqualify himself immediately.
2. The ALJ take no other action in this case.
3. DOAH appoint a new Third ALJ in this cause.
4. Petitioner reserves right to amend/supplement with case law when ready. if necessary.

Respectfully submitted,



Jerry Potter, pro-se Petitioner
29 North Bounty Lane
Key Largo, Florida 33037
(305) 852-5959

2 Affidavit (2 pgs)

-14-


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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was mailed by United States Mail on April 18, 2011 to:

BRYNNA J. ROSS
Senior Assistant General Counsel
3900 Commonwealth Boulevard, MS 35
Tallahassee, FL 32399-3000

IRA AND JUDITH ELLENTHAL
21 Shorehame Club Road
Old Greenwich, Connecticut
06870


Jerry Potter, pro-se Petitioner
29 North Bounty Lane
Key Largo, Florida 33037
(305) 852-5959

STATE OF FLORIDA

COUNTY OF MONROE

Affidavit of Jerry Potter in Support of Petitioner's Suggestions or Motion for Disqualification-Recusal of Administrative Law Judge

I Jerry Potter am the Petitioner in the Division of Administrative Hearings (DOAH) case number DOAH 10-9417. The parties are the State of Florida Department of Environmental Protection (DEP) and Ira and Judith Ellenthal, 35 North Bounty Lane, Key Largo, Florida 33037. (petitioner reside 29 N. Bounty Lane, Key Largo, Florida, 33037).

The Successor Administrative Law Judge (AL2) assigned to the case is David Maloney. ALJ Maloney was assigned to this case, not in an blind assignment, or by DOAH but decided by the four other ALJ that handle the Environmental Cases assigned to the Division. This was not disclosed at any time to the petitioner or as known any of the other parties.

Judge Maloney is now and was assigned to the same office as the initial ALJ assigned to this case. The Petitioner has no way of knowing on any of the conference calls with the initial or successor ALJ assigned to this case that any of the conversations were compromised. (Maloney & Canter shared one office)

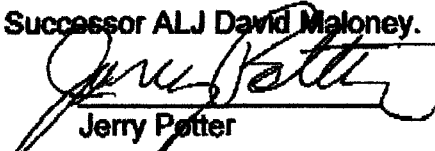
As the Petitioner I feel that, "that that successor ALJ did not disclose to the parties" that he shared an office with the disqualified/recused initial ALJ.

The Petitioner has by Order of the Successor ALJ implemented Orders by The Initial ALJ that were issued after the Motion to Disqualify was Orally Tendered on December 9, 2010. This is a violation of due process of Allowing the petitioner to prove his case that the petition was timely.

The Petitioner now feels that Judge Maloney will not be fair impartial but prejudiced and biased against the Petitioner. The Petitioner further believes that I will not be allowed to exercise and protect my procedural rights.

As a non-lawyer pro se litigant, I am aware that I am obligated to abide by the applicable statutes and rules, including the procedural rules governing administrative proceedings and I have endeavored to do so. I also feel at certain times during all proceedings that I must feel comfortable to be able to look to the Administrative Law Judge to protect my procedural rights and property rights and all substantial interests as well as all other parties.

I do not have that feeling with the present assigned Successor ALJ David Maloney.


Jerry Potter

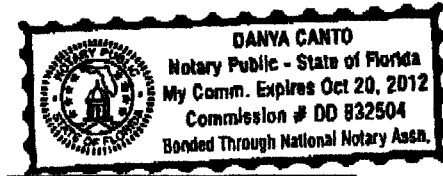
STATE OF FLORIDA COUNTY OF MONROE

Before me, the undersigned authority, personally appeared Jerry Potter, who is: ✓ known to me or _____ produced the following identification _____, and swore or affirmed that the statements contained herein are true and correct to the best of his knowledge and belief.

Dated this 18th Day of April 2011.



Notary Public



Stamp

JG

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,)
)
 Petitioner,)
)
 vs.) Case No. 10-9417
)
)
 IRA ELLENTHAL, JUDITH)
 ELLENTHAL, AND DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Respondents.)
 _____)

ORDER

On April 18, 2011, Petitioner Potter filed "Petitioner's Motion for Recusal or Disqualification of Successor Administrative Law Judge." The Department filed a response on April 20, 2011. The Ellenthals filed a response in opposition on April 22, 2011.

This is the second motion in this case for recusal or disqualification of an administrative law judge filed by Petitioner.

Florida Judicial Administration Rule 2.330(g) governs Successive Motions for Disqualification of Trial Judges. While the rule does not directly control a motion to disqualify an administrative law judge from an administrative proceeding, it is instructive. The rule provides:

Determination -- Successive Motions. If a judge has been previously disqualified on motion for alleged prejudice or partially under subdivision (d)(1), a successor judge shall not be disqualified based on a successive motion by the same party unless the successor judge rules that he or she is in fact not fair or impartial in the case. Such a successor judge may rule on the truth of the facts alleged in support of the motion. (Emphasis added).

The undersigned cannot rule that he is in fact not fair or impartial in this case. Accordingly, the motion is denied.

DONE AND ORDERED this 25th day of April, 2011, in Tallahassee, Leon County, Florida.



DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2011.

COPIES FURNISHED:

Brynna J. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

Jerry P. Potter
29 North Bounty Lane
Key Largo, Florida 33037

Judith Ellenthal
Ira Ellenthal
21 Shorehame Club Road
Old Greenwich, Connecticut 06870

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY POTTER,

Petitioner,

vs.

DOAH CASE NO. 10-9417
OGC CASE NO. 10-2341

IRA ELLENTHAL, JUDITH ELLENTHAL,
and STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE
AFFIDAVIT OF JERRY POTTER

STATE OF FLORIDA
COUNTY OF MONROE

On this date: October 29, 2010

BEFORE ME, the undersigned authority personally appeared JERRY POTTER, who is known to me ✓ or who produced _____ as identification, who after being sworn, affirmed that the following statements are true and correct to the best of his knowledge and belief:

1. Your Affiant is the Petitioner in the above styled cause.
2. I am a resident of the United States, reside in the State of Florida on Key Largo, Monroe County at 29 North Bounty Lane, 33037.
3. Petitioner, affiant, Jerry Potter has filed his response to Administrative Law Judge's "Order to Show Cause" in the above DOAH case 10-9417. (attached)
4. Affiant, Jerry Potter, has listed in his "response to show cause" twenty-two (22) paragraphs attached, Affiant states all 22 paragraphs are true.
5. Affiant, Jerry Potter, has attached two (2) exhibits:

Exhibit 1 is from Marathon DEP file of Frank Newitt

Exhibit 2 is from Marathon DEP file of Ellenthal, Respondent in this case.

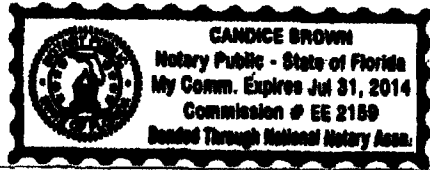
(CONTINUED NEXT PAGE)

-1-

62

- 6. Affiant, Jerry Potter, received his file of first notification of State of Florida Department of Environmental Protection agency action in this cause from The Department of Environmental Protection's Marathon Office on or about July 28, 2010. This was the ERP Exemption #44-0223322-001 issued to respondent Ira and Judith Ellenthal.

FURTHER YOUR AFFIANT SAYTH NOT



notary stamp

Candice Brown
 NOTARY PUBLIC
 My Commission Expires

Respectfully submitted,

Jerry Potter
 Jerry Potter, Petitioner, pro-se
 29 North Bounty Lane
 Key Largo, Florida 33037
 (305) 852-5959

CERTIFICATE OF SERVICE

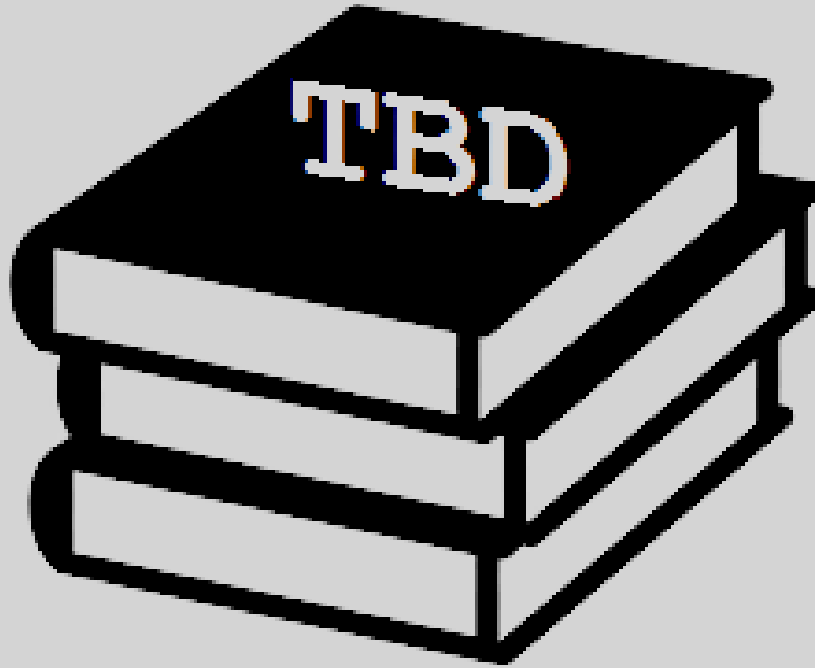
I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States Mail on this 29th day of October 2010, to: Brynna J. Ross, Assistant General Counsel for DEP, 3900 Commonwealth Boulevard M.S. -35, Tallahassee, Fl. 32399-3000; and Ira & Judith Ellenthal, 35 North Bounty Lane, Key Largo, Florida 33037.

Jerry Potter

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