

1 apply to administrative law judges or hearing officers of state agencies.¹ NCA's reliance
2 on Attorney General Opinion No. 1995-19 is misplaced as that opinion interpreted a now
3 repealed version of the Nevada Code of Judicial Conduct. The currently operative
4 Revised Nevada Code of Judicial Conduct, adopted in 2009 and effective January 19,
5 2010, explicitly excludes hearing officers and administrative law judges from its
6 application. Attorney General Opinion 1995-19 (AGO 1995-19) states that a
7 commissioner of the Public Service Commission acts as a hearing officer to decide a
8 contracted case.² As the current RNCJC excludes hearing officers from its scope, if the
9 reasoning of AGO 1995-19 is followed, the RNCJC would not apply to Public Service
10 Commissioners hearing a contested case as it considered them to be acting as hearing
11 officers. NCA's efforts to expand NRS 1 and the Revised Nevada Code of Judicial
12 Conduct to apply to individuals other than judges is without support and contrary to the
13 plain language of Nevada Law and the RNCJC.

14 **B. NCA has understood SPCSA Members are not Judges and has**
15 **Lobbied Individual Members in a Manner that would be an Ethical**
16 **Violation were those Members Judges.**

17 Throughout its interaction with SPCSA Members, NCA has demonstrated a
18 consistent understanding that SPCSA members are public officials and not judges.
19 Attorneys are prohibited from communicating ex parte with a judge by Rule of
20 Professional Conduct ("RPC") 3.5(b). Counsel for NCA has engaged in discussions with
21 Member Guinasso without opposing counsel present.³ Additionally, an attorney for
22 Connections Inc., NCA's Education Management Organization, was also engaged in
23 communication with Member Guinasso that would have been prohibited by RPC 3.5(b)
24 were Member Guinasso considered to be a judge.⁴ These communications would be
25 ethical violations if SPCSA members were treated as judges. However, if SPCSA

26 ¹ Revised Nevada Code of Judicial Conduct Section I(B), "Administrative law
27 judges and hearing officers of state agencies are not judges within the meaning of this
28 Code."

² Attorney General Opinion No. 1995-19 at 1.

³ See Exhibit A, Member Guinasso's Affidavit at § 29.

⁴ *Id.* §13 and §14.

1 members are not judges and are public officials, the communications would likely not be
2 subject to RPC 3.5. As neither NCA's counsel nor counsel for Connections, Inc. would
3 willingly violate RPC 3.5 by engaging in communications with a judge, NCA and its
4 counsel, Connections Inc., and its counsel must all understand and agree that SPCSA
5 members are not judges and are public officials.

6 **C. Authority Members are Public Officers and are Subject to the**
7 **Recusal Standards Contained in NRS 281A. NCA has not alleged**
8 **any Violation of NRS 281A.**

9 As demonstrated above, Authority members are not judges, and thus, decisions
10 regarding recusal are not governed by NRS 1 or the RNCJC. Instead, SPCSA members
11 appointed pursuant to NRS 388A.153 are public officers as defined by NRS 281A.160.
12 Thus, SPCSA members are not without ethical obligations, but they are different from
13 those imposed on judges. NRS 281A.420 prohibits public officers from approving,
14 disapproving, voting, abstaining from voting or otherwise acting upon items where they
15 have a pecuniary interest, have accepted a loan or gift or would be affected by the public
16 officer's commitments in a private capacity. NCA has not alleged any violation of NRS
17 281A nor put forth any facts supporting a conclusion that Member Guinasso has any
18 obligation under NRS 281A.420 to recuse himself from this item.⁵

19 Moreover, the distinction between judges and public officers is supported by strong
20 public policy. Unlike judges, public officers appointed to boards, commissions and
21 councils develop or come to their position with specific subject matter expertise enabling
22 them to make informed and educated decisions regarding matters that come before their
23 public body. Public policy encourages public officers to respond to constituents⁶ and
24 engage in discussions with attorneys and parties with matters before the body so that the
25 members of the body may be fully apprised of all perspectives before engaging in the
26 public discourse and deliberation at open meetings as required by NRS 241. If judicial

27 ⁵ Any facts alleged would have to overcome the presumption of honesty and
28 integrity which cloaks those who serve as adjudicators. *Gilman v. State Bd. Of Vet. Med. Examiners* 120 Nev. 263, 269 (2004) citing *Withrow v. Larkin* 421 U.S. 35 (1975).

⁶ See Exhibit A, §30.

standards were applied to public officers, the public would be denied access to its officers, the decision making process would be starved of useful and pertinent information, decision making would be less informed.⁷ Thus, public policy supports the existing legal framework of applying the recusal standards of NRS 281A.420 to SPCSA members, not the RNCJC or NRS 1.

D. Even if the RNCJC is applied to the SPCSA, an Allegation of Bias Against Counsel is Insufficient.

“Generally, an allegation of bias in favor of or against counsel for a litigant states an insufficient ground for disqualification because it is not indicative of extrajudicial bias against the party.”⁸ Extrajudicial bias, or bias arising from something other than things learned from participation in the case is generally required for recusal of judges.⁹ However, bias against counsel, as alleged by NCA’s Motion for Recusal¹⁰ is insufficient to show extrajudicial bias. “In *Ainsworth*, former Justice Gunderson openly ridiculed Combined's attorney in court, referred to him in a motion as a “loser” or “losing lawyer” approximately 130 times, and admitted to entering the case with a preconceived negative impression of Combined's counsel. . . In spite of these facts, [the Court] denied the motion to disqualify and the petition for rehearing.”¹¹ The NCA’s allegation that Member Guinasso is biased against its counsel is wholly insufficient to establish bias. The justification for this limitation remains true:

In a small state such as Nevada, with a concomitantly limited bar membership, it is inevitable that frequent interactions will occur between the members of the bar and the judiciary. Thus, allegations of bias based upon a judge's associations with

⁷ The application of the RNCJC to Administrative boards, councils and commissions could result in time intensive and costly trainings that would place further significant demands on board and commission members (many of whom have no legal training and serve without compensation).

⁸ *Ainsworth v. Combined Ins. Co.*, 105 Nev. 237, 259, 774 P.2d 1003, 1019 (1989); *see also, In re Petition to Recall Dunleavy*, 104 Nev. 784, 769 P.2d 1271 (1988).

⁹ *See Commonwealth v. Eddington*, 71 Mass. App. Ct. 138, 144 (2008).

¹⁰ Motion for Recusal at 5:24.

¹¹ *See Las Vegas Downtown Redev. Agency v. Hech* 113 Nev. 632, 636 (1997) footnote 1.

1 counsel for a litigant pose a particularly onerous potential for
2 impeding the dispensation of justice.¹²

3 Additionally, “if a litigant could successfully challenge a judge based upon
4 allegations of bias against counsel for the litigant, “it ‘would bid fair to decimate the
5 bench’ and lawyers, once in a controversy with a judge, ‘would have a license under which
6 the judge would serve at their will.’”¹³ These justifications related to a small pool of
7 attorneys and a limited bar are even more impactful for specialized boards and
8 commissions like the SPCSA where the attorneys able to capably represent clients in
9 specialized areas of law are severely limited. Though it is well-demonstrated above that
10 SPCSA members are not subject to the RNCJC or the recusal processes of judges, even if
11 the SCPSA members were to apply these standards, bias against counsel is not enough.
12 Additionally, the bias must be from an extrajudicial source. Nothing in the NCA’s motion
13 even alleges any source of extra-judicial bias sufficient to cause Member Guinasso to
14 recuse himself.

15 **E. Declarations Based on Hearsay Should Be Stricken as Improper,**
16 **Unreliable and Irrelevant.**

17 The Declaration of Heather Engelhardt more closely resembles a law school exam
18 question testing an applicant’s ability to identify all the various means of inadmissibility
19 than it does evidence. It is based entirely on a hearsay conversation of someone named
20 Jeff Anthony and an unnamed person alleging to be employed by the Nevada Department
21 of Education. The declaration relies on the recollection of someone other than the
22 declarant of a conversation that he claims to have had over 40 days prior to his
23 conversation with Ms. Englehardt. Additionally, it is entirely unclear why Mr. Anthony’s
24 conversation with the Department of Education has anything to do with the SPCSA and
25 is therefore irrelevant under NRS 48.105. Further, it is hearsay as defined by
26 NRS 51.035.

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28 ¹² *Id.* at 635, quoting *Dunleavy* at 790-1.

¹³ *Id.*

1 The Declaration of Sherrie Miles-Syverson is also based entirely on hearsay
2 conversations between a Jeff Anthony (presumably the same person Ms. Engelhardt
3 relies on for her testimony) and Executive Director Patrick Gavin. It is irrelevant to the
4 motion for recusal as hearsay and should be excluded under NRS 48.105 and NRS 51.035.
5 Further, the Declaration of Brian Rosta is irrelevant to the motion for recusal and should
6 be excluded under NRS 48.105.

7 Finally, even if, contrary to its own applicability statement, the RNCJC is
8 interpreted to apply to SPCSA members, and if NCA's failure to allege extrajudicial bias
9 is ignored, the Declaration of Joseph Thomas is still insufficient to establish bias when
10 the Affidavit of Members Giunasso and Declaration of Member Mackedon are
11 considered.¹⁴ The reliability of Mr. Thomas' declaration is diminished by the time
12 between the conversation on March 29, 2017 and his declaration of May 5, 2017 as well as
13 the fact that Mr. Thomas was not close enough to hear the entirety of the conversation of
14 the comments of Member Mackedon. Even when afforded maximum deference, Mr.
15 Thomas' declaration shows no extrajudicial bias and is fully rebutted by the Declaration
16 of Member Mackedon and the Affidavit of Member Guinasso. Thus, even when viewed in
17 the most favorable circumstances, the Motion for Recusal should be denied.

18 III. CONCLUSION

19 The Motion for Recusal sets forth no adequate ground for recusal and should be
20 denied. Member Guinasso and all members should base all recusal decisions based on the
21 standards set forth in NRS 281A.420.

22 DATED: May 17, 2017.

23 ADAM PAUL LAXALT
24 Attorney General

25 By: s/ Gregory D. Ott
26 GREGORY D. OTT
27 Senior Deputy Attorney General

28 ¹⁴ See Exhibit A and Exhibit B, Declaration of Member Mackedon.

1 **CERTIFICATE OF SERVICE**

2 It is hereby certified that I am an employee of the Office of the Attorney General,
3 State of Nevada, and that on May 17, 2017 a true and correct copy of the foregoing
4 STATE PUBLIC CHARTER SCHOOL AUTHORITY'S OPPOSITION TO MOTION FOR
5 RECUSAL AND/OR DISQUALIFICATION was sent by email to the following:

6 Robert Whitney
7 Deputy Attorney General
8 Office of the Attorney General
9 555 E. Washington Ave.
10 Las Vegas, Nevada 89101
11 RWhitney@ag.nv.gov

12 Laura K. Granier
13 Davis Graham & Stubbs, LLP
14 50 W. Liberty St., Ste. 950
15 Reno, Nevada 89501
16 Laura.granier@dgsllaw.com

17 s/ Marissa Kuckhoff
18 _____
19 Marissa Kuckhoff, Legal Secretary II
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