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SUPREME COURT
STATE OF OKLAHOMA
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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. PR-124,489

STATE OF OKLAHOMA, ex rel. GENTNER DRUMMOND, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, and BOB SULLIVAN,
Petitioners,

v.

THE HONORABLE JOHN D. MILLER, Independent Hearing Examiner; GLEN MULREADY, Insurance Commissioner of the State of Oklahoma; and the OKLAHOMA INSURANCE DEPARTMENT,
Respondents.

NATURE OF THE ACTION: PROHIBITION AND MANDAMUS

Original jurisdiction proceeding. Writ sought to the Honorable John D. Miller, Independent Hearing Examiner; Glen Mulready, Insurance Commissioner; and the Oklahoma Insurance Department, Oklahoma County, Oklahoma.
Oklahoma Insurance Department Case No. 26-0820-TRN.

AMENDED BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRITS OF PROHIBITION AND MANDAMUS

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SUBJECT INDEX

SUMMARY OF THE RECORD 3

PROPOSITION I. This is a contested individual proceeding. 4
- 36 O.S. §§ 313, 319, 984 4
- 75 O.S. §§ 250.3, 316 ..... 4, 5

PROPOSITION II. The Commissioner should stand aside, as Commissioner Grimes did in *Roussel*. 5
- *Johnson v. Bd. of Governors of Registered Dentists*, 1996 OK 41 ..... 7, 8
- *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) 6
- *Roussel v. State ex rel. Grimes*, 1980 OK 101 ..... 5, 7, 8
- *State ex rel. Bennett v. Childers*, 1940 OK 389 6
- *State ex rel. Mayo v. Pitchford*, 1914 OK 269 6
- *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977) 6
- *Wilson v. Okla. Horse Racing Comm'n*, 1996 OK 3 ..... 5, 6, 8
- *Withrow v. Larkin*, 421 U.S. 35 (1975) 6
- *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 968 F.3d 1156 (10th Cir. 2020) 6
- Okla. Const. art. II, § 7; U.S. Const. amend. XIV 6
- 36 O.S. §§ 307, 319 6
- 75 O.S. § 316 ..... 7, 8

PROPOSITION III. The order denying the Affidavit was a clear abuse of discretion. 8
- *Arbuckle Simpson Aquifer Prot. Fed'n v. Okla. Water Res. Bd.*, 2013 OK 29 10
- *Bowen v. State ex rel. Okla. Real Estate Appraiser Bd.*, 2011 OK 86 ..... 10, 11
- *Denney v. Scott*, 1992 OK 134 11
- *Johnson v. Bd. of Governors of Registered Dentists*, 1996 OK 41 ..... 10, 11
- *Merritt v. Hunter*, 1978 OK 18 ..... 10, 11
- *State ex rel. Bennett v. Childers*, 1940 OK 389 ..... 10, 11
- 12 O.S. § 1451 10
- 36 O.S. §§ 307, 313, 319 9
- 75 O.S. § 316 ..... 8, 10

PROPOSITION IV. Prohibition lies, and the Application is not premature. 12
- *Arbuckle Simpson Aquifer Prot. Fed'n v. Okla. Water Res. Bd.*, 2013 OK 29 13
- *Baby F. v. Okla. Cnty. Dist. Ct.*, 2015 OK 24 12
- *Draper v. State*, 1980 OK 117 12
- *Hunsucker v. Fallin*, 2017 OK 100 12
- *State ex rel. Freeling v. Lyon*, 1917 OK 229 12
- *Tobacco Settlement Endowment Tr. Fund v. Stitt*, 2026 OK 1 12
- 36 O.S. § 319 12
- 75 O.S. § 318 12

PROPOSITION V. *Southwestern Bell* does not control. 13
- *Sw. Bell Tel. Co. v. Okla. Corp. Comm'n*, 1994 OK 38 13
- 75 O.S. § 316 13

CONCLUSION 14

SUMMARY OF THE RECORD

On July 14, 2026 the Insurance Commissioner noticed a hearing under 36 O.S. §§ 307 and 984 to determine whether the Oklahoma homeowners insurance market is noncompetitive. App. at 71.

At the September 4, 2026 conference the Hearing Examiner appeared by video from within the Department's offices, in the company of the Department's legal assistant. App. at 35, 37, 40–42 (Tr. 2, 4, 7:10–11, 8:11–19, 9:6–9). Mr. Robinson, for the Oklahoma P&C Advocacy Association, moved orally for a continuance; the Department stated that it had no objection; both Petitioners objected. App. at 47–50 (Tr. 14:9–17:8). He announced a five-minute recess, which ran thirteen minutes, from 9:21 to 9:34 a.m., inside the Department's offices and beyond the observation of every remote participant, then returned and granted the continuance. App. at 52 (Tr. 19:7–10, 19:25). Counsel for the Department then stated that "we are anticipating that [the Commissioner] may be a witness." App. at 57–58 (Tr. 24:18–25:5).

Petitioners filed their joint affidavit under 75 O.S. § 316 on September 10, 2026. App. at 1–17.

On September 15 the Hearing Examiner referred the Affidavit to the Commissioner, stayed the proceeding, and struck every setting, including October 26. App. at 192–93 (Tr. 18:5–8, 18:20–19:1).

On September 22, 2026 the Department filed a Response in the name of "the State of Oklahoma, *ex rel.* Glen Mulready, Insurance Commissioner," asking that the Affidavit "be denied in its entirety." App. at 196, 207. On October 2, 2026 Mr. Mathis, designated by the Commissioner without notice to the parties, denied it, denied as moot the request that the

Commissioner withdraw, and directed that the proceeding resume "without further delay." App. at 18–29.

ARGUMENT

PROPOSITION I. This is a contested individual proceeding.

Petitioners have maintained throughout that this is a contested individual proceeding governed by Article II of the Administrative Procedures Act. 36 O.S. §§ 313(A), (B), 319, 984(A). Their observation below that the motion to dismiss failed even if the proceeding were legislative was made in the alternative, not as a concession. App. at 135, 142, 157, 164.

An "individual proceeding" is "the formal process employed by an agency having jurisdiction by law to resolve issues of law or fact between parties and which results in the exercise of discretion of a judicial nature." 75 O.S. § 250.3 (defining "individual proceeding"). This proceeding fits that definition. The presumption that the market is competitive stands "unless the Commissioner, after a hearing, issues an order" finding otherwise. 36 O.S. § 984(A). The statute places "[t]he burden of proof in any hearing" on "the party or parties advocating the position that competition does not exist," and it requires that "[a]ll determinations by the Commissioner shall be made on the basis of findings of fact and conclusions of law." 36 O.S. § 984(A), (B)(2). Findings of fact and conclusions of law are the mark of a final agency order in an individual proceeding. 75 O.S. § 250.3. The Notice of Hearing invited participation by "all interested parties with a direct, immediate, and substantial interest," App. at 71, and the examiner sits as "a quasi-judicial officer," 36 O.S. § 319. The Department has treated the proceeding the same way. It moved to dismiss two parties for lack of standing, App. at 127, and it answered the Affidavit under § 316, which applies only to an individual proceeding, App. at 203. The order under review was entered by an officer

"designated by the Insurance Commissioner . . . pursuant to 75 O.S. § 316," App. at 18, and it applied the standard that governs an examiner "operating in a judicial capacity" without deciding whether the proceeding is rulemaking. App. at 24.

PROPOSITION II. The Commissioner should stand aside, as Commissioner Grimes did in *Roussel*.

Agency adjudicators are presumed capable of judging a controversy fairly, and an agency may combine investigative, enforcement, and adjudicative functions without offending due process. *Wilson v. Oklahoma Horse Racing Commission*, 1996 OK 3, ¶ 13, 910 P.2d 1020, 1023. Petitioners do not ask this Court to disturb either rule, and they do not contend that § 316 is infirm. The presumption yields to specific facts, and this record supplies them. The Commissioner's hand appears at every stage.

Before noticing the hearing, the Commissioner decided its question by written order, without a hearing, and then announced in the release convening the hearing that he stood by that answer. App. at 69–70, 85–86. Through counsel filing in the name of "the State of Oklahoma, ex rel. Glen Mulready, Insurance Commissioner," the Department moved, the evening before the September 4 conference, to dismiss Mr. Sullivan and Craig MacIntyre, both candidates for Insurance Commissioner. App. at 127, 132. The next morning the Department did not oppose Mr. Robinson's motion for a continuance. App. at 47–48. The Department then announced that the Commissioner may be its witness. App. at 57–58. When the Affidavit was filed, a Response in his name asked that it be denied, App. at 196, 207, and the Commissioner chose the officer who decided it, without notice to the parties. App. at 18, 23. He also urged voters to defeat Mr. Sullivan and co-hosted a fundraiser for Mr. Sullivan's opponent with Brett Robinson. App. at 87–89.

In the Department release announcing this hearing the Commissioner stated: "I also stand by my position that we have a competitive market for homeowners insurance coverage." Affidavit of Whitten and Hunter, App. at 7 (Aff. ¶¶ 32–33). The statement was made outside any authorized proceeding, and courts weigh where a statement was made together with what it says. *Zen Magnets, LLC v. Consumer Product Safety Commission*, 968 F.3d 1156, 1171 (10th Cir. 2020) (asking "whether administrators made the prior statements in the course of an authorized proceeding"); *see also Wilson v. Oklahoma Horse Racing Commission*, 1996 OK 3, ¶ 16, 910 P.2d 1020, 1024 (quoting *Staton v. Mayes*, 552 F.2d 908, 914 (10th Cir. 1977)). Petitioners do not contend that an official is disqualified because he or she has spoken publicly about an industry or a policy. The Commissioner's statements are of a different order. They answer the precise question set for hearing, he had already reduced that answer to a written order, App. at 69–70, and his Department anticipates calling him as a witness to defend it, App. at 57–58.

Withrow v. Larkin supplies the test: a court may determine "from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." 421 U.S. 35, 58 (1975). Due process "entitles a person to an impartial and disinterested tribunal," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); Okla. Const. art. II, § 7; U.S. Const. amend. XIV, and every litigant is entitled to "the cold neutrality of an impartial judge," *State ex rel. Bennett v. Childers*, 1940 OK 389, ¶ 6, 188 Okla. 14, 105 P.2d 762, 763 (restating *State ex rel. Mayo v. Pitchford*, 1914 OK 269, 43 Okla. 105, 141 P. 433).

Petitioners do not contend that an agency may not engage hearing examiners, or that an examiner paid by the agency is for that reason partial. The Legislature authorized the Commissioner to appoint independent hearing examiners. 36 O.S. §§ 307, 319. That

arrangement earns public confidence because the official who signs the examiner's contract stands apart from the controversy the examiner decides. Here he does not. The officer who appointed this examiner, and whose Department pays him, App. at 5 (Aff. ¶ 26), has announced the answer to the question the examiner must decide, litigates against a party through motions filed in his own name, and is expected to take the stand to defend his answer before an examiner who serves at his Department's pleasure. To rule for Petitioners, the examiner must find that the official who engaged him was wrong. The appearance of partiality comes from the combination, not the contract. The order under review weighed the contract and the Commissioner's conduct separately and never together, App. at 27–28.

The order set the Commissioner aside as moot because he "does not preside, and cannot review, the Hearing Examiner's final order." App. at 28. Petitioners agree that he does not preside. App. at 9 (Aff. ¶ 44). But the request reached every "adjudicative, decisional, or supervisory role," App. at 28, and the Commissioner has kept the supervisory one. He chose the officer who decided his own disqualification, App. at 18, 23, and his counsel continue to file in his name, App. at 127, 207. Unless he withdraws, the Department he heads would also assign any successor examiner. 75 O.S. § 316. The request that he withdraw is not moot.

This Department has been here before. Insurance Commissioner Gerald Grimes, believing "that any hearing conducted by either himself or any member of his staff might give the appearance that the hearing examiner was not impartial," disqualified "himself and his staff" under § 316, and the matter was heard by an officer appointed in his stead. *Roussel v. State ex rel. Grimes*, 1980 OK 101, ¶¶ 4, 6, 614 P.2d 53, 55. This Court has also affirmed an order disqualifying an agency's entire adjudicative body. In *Johnson* the district court "disqualified the present members of the Board, including the member investigating the

charges, from participating in any disciplinary proceedings against Dr. Johnson," and this Court held that it "was acting within its discretion." 1996 OK 41, ¶¶ 11, 39, 913 P.2d at 1344, 1349. Commissioner Grimes stepped aside on the strength of an appearance alone; the record here shows far more. Section 316 supplies the means. When the disqualification of an agency member leaves no quorum, "the Governor immediately shall appoint a member pro tem to sit in place of the disqualified member in that proceeding." 75 O.S. § 316. The Insurance Commissioner is the agency's only member, and in *Roussel* the officer appointed in his stead "became an Insurance Commissioner pro tem." 1980 OK 101, ¶ 20, 614 P.2d at 57. The member pro tempore, and not a Department whose head has taken sides, would then assign the examiner. At a minimum, this Court may do what it did in *Wilson*, remanding "for a hearing before an impartial panel of the Board of Stewards." 1996 OK 3, ¶ 17, 910 P.2d at 1024.

PROPOSITION III. The order denying the Affidavit was a clear abuse of discretion.

The Commissioner has already answered the question that matters. The order under review recites that "[b]ecause the Affidavit names the Commissioner and the Department anticipates calling him as a witness, the Commissioner has designated the undersigned . . . to determine the Affidavit in his stead." App. at 23. An officer who steps back from a decision because he is named in it and may be called to testify about it has recognized that he cannot accord "a fair and impartial hearing or consideration." 75 O.S. § 316. The statute attaches a consequence to that recognition. He "shall withdraw," and when his withdrawal leaves no quorum, a member pro tempore sits in his place. *Id.* The Commissioner took the first half of that step and skipped the second. He stood down from the decision and kept the power to choose who would make it.

Petitioners' position has been consistent. Section 316 commits the issue to "the administrative head of the agency," and the Department agrees that the Commissioner "is required to rule on this issue." App. at 203 (Resp. ¶ 8). The same section commands that an officer who cannot accord a fair hearing "shall withdraw." Those provisions describe one decision, not two. The ruling § 316 leaves to the Commissioner personally is whether he will withdraw. As counsel told the Hearing Examiner, "[t]he Commissioner needs to either disqualify or not disqualify under 316." App. at 187 (Tr. 13:18–19). If he withdraws, the statute decides what follows: the agency is left without a quorum, and a member pro tempore sits in his place in this proceeding. If he refuses, the refusal is his, and it is reviewable here. What § 316 does not allow is a third course, in which the Commissioner keeps the office and hands the question of his own fitness to an officer of his choosing. The Department's claimed source of that power, 36 O.S. §§ 307 and 319, App. at 203–04, lets the Commissioner have matters heard by examiners he appoints. Neither provision addresses who determines an affidavit under § 316, and nothing in the Insurance Code displaces that section, so 36 O.S. § 313(B) has no conflict to resolve. As to the Commissioner's own disqualification, § 316 assigns the issue to "the remaining members" of the agency, of which there are none, and the Department claimed authority to designate only "to determine if there are grounds to disqualify the current Hearing Examiner." App. at 203–04. Petitioners objected to exactly that on the record: "If he's disqualified, he shouldn't be able to pick the judge." App. at 191 (Tr. 17:9–11). The Affidavit asked that the Commissioner "take no part in the determination of this Affidavit." App. at 9 (Aff. ¶ 44). Taking no part includes not choosing who decides. When the Department instead filed a response on the merits in his name, the Joint Objection asked for a prompt ruling under

the statute, treating him as "[t]he officer to whom § 316 commits the determination" and asking that he "comply with 75 O.S. § 316" by written order. App. at 217–18 (Joint Obj. ¶¶ 1–2).

Section 316 is mandatory: the officer "shall withdraw," and the "issue shall be determined promptly." 75 O.S. § 316. Mandamus issues "to compel the performance of any act which the law specially enjoins as a duty," and may "require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions." 12 O.S. § 1451.

The Commissioner may rule on the Affidavit in the first instance, and Petitioners do not contend otherwise. "[T]he ruling of a judge in a civil cause on his own disqualification will not be reversed, except for a clear abuse of discretion." *Merritt v. Hunter*, 1978 OK 18, ¶ 2, 575 P.2d 623, 624. But the standard is not self-appraisal: "even though a judge personally believes himself to be unprejudiced, unbiased and impartial, he should nevertheless certify his disqualification where there are circumstances of such a nature to cause doubt as to his partiality, bias or prejudice." *Id.* ¶ 5, at 624. Where that standard is not met, this Court issues mandamus directing the officer to certify his disqualification. *Id.* ¶ 6, at 624; *Bennett*, 1940 OK 389, syl. ¶ 2, 105 P.2d at 762.

The same standard governs administrative adjudicators. *Johnson v. Board of Governors of Registered Dentists*, 1996 OK 41, ¶ 33, 913 P.2d 1339, 1348 (the standard "applies equally to administrative boards acting in an adjudicatory capacity as it does to judges"); *Bowen v. State ex rel. Oklahoma Real Estate Appraiser Board*, 2011 OK 86, ¶ 22, 270 P.3d 133, 139.

Nor is the duty discretionary: providing a fair and impartial hearing is a "plain legal duty" and "not something subject to discretion," and an officer unable to provide one is "required to withdraw." *Arbuckle Simpson Aquifer Protection Federation of Oklahoma, Inc.*

v. Oklahoma Water Resources Board, 2013 OK 29, ¶ 15, 343 P.3d 1266, 1272. *The October 2 order was a clear abuse of discretion under Merritt*, for two reasons.

First, the officer who decided the Affidavit was chosen by one of the subjects of the Affidavit, Commissioner Mulready, without notice to the parties and over their objection. App. at 18, 23, 191 (Tr. 17:7–16). Counsel for the Department had told the Hearing Examiner that the Commissioner "could appoint another hearing examiner to decide the matter of disqualification." App. at 185 (Tr. 11:3–11).

Second, the order did not weigh the circumstances together. The appearance of partiality is judged on "the totality of the circumstances." *Bowen*, 2011 OK 86, ¶ 23, 270 P.3d at 139. The order recited that standard, App. at 22, and then concluded that "[a]n aggregation of individually lawful and unremarkable circumstances does not become an appearance of partiality merely by being listed together." App. at 28. That asks whether each circumstance is lawful, not whether together they would cause a reasonable person to doubt the tribunal. The order also describes Ms. Standerfer, whom the Affidavit identified as the Department's legal assistant, as its "administrative court clerk," App. at 24–25, the title she gives herself in the Department's affidavit, App. at 212, while stating that the Department's affidavits "do not serve as the basis of this order," App. at 25 n.1. Where the question is close, "an error, if made, should be in favor of the disqualification rather than against it." *Bennett*, 1940 OK 389, syl. ¶ 1, 105 P.2d at 762.

Denney v. Scott, 1992 OK 134, ¶ 22, 848 P.2d 1142, 1145, which affirmed a State Auditor's refusal to disqualify himself, predates Johnson's application of that standard to administrative adjudicators and does not cite § 316.

PROPOSITION IV. Prohibition lies, and the Application is not premature.

Prohibition issues upon a showing that "1) a court, officer, or person has or is about to exercise judicial or quasi-judicial power; 2) the exercise of said power is unauthorized by law; and 3) the exercise of that power will result in injury for which there is no other adequate remedy." *Baby F. v. Oklahoma County District Court*, 2015 OK 24, ¶ 8, 348 P.3d 1080, 1084. The Hearing Examiner sits as "a quasi-judicial officer." 36 O.S. § 319. The order under review directs that the proceeding resume before him "without further delay." App. at 29. A tribunal constituted in disregard of § 316 is not authorized by law.

Petitioners do not contend that review of a final order under 75 O.S. § 318 is inadequate whenever an agency adjudicator's impartiality is questioned. Ordinarily it is adequate. A party who objects only to the structure the Legislature prescribed, and who identifies no fact particular to his or her own proceeding, must raise that objection on review of the final order. This Application differs twice over. Petitioners do not challenge § 316. They ask that it be enforced, because the determination was made by an officer the statute does not name. And the proceeding below is not a private licensing dispute. It will decide whether the homeowners insurance market of the entire State is noncompetitive, a matter in which "the public, the community at large, has some pecuniary interest." *State ex rel. Freeling v. Lyon*, 1917 OK 229, ¶ 1, 63 Okla. 285, 165 P. 419, 420; see *Hunsucker v. Fallin*, 2017 OK 100, ¶ 6, 408 P.3d 599, 602–03; *Tobacco Settlement Endowment Trust Fund v. Stitt*, 2026 OK 1, ¶¶ 10–12, 583 P.3d 280, 286–87.

Nor is the Application premature. Prohibition "is a preventive, rather than a corrective, remedy. It issues to prevent the threatened commission of a future act, not to undo a completed act nor to review or nullify an act which has already been performed." *Draper v. State*, 1980

OK 117, ¶ 14, 621 P.2d 1142, 1147. In the closest case this Court said that "[t]he time to address allegations of bias, or the appearance of bias, on the part of the hearing officer is now." *Arbuckle Simpson*, 2013 OK 29, ¶ 17, 343 P.3d at 1272.

PROPOSITION V. *Southwestern Bell* does not control.

Respondents will invoke *Southwestern Bell Telephone Co. v. Oklahoma Corp. Commission*, 1994 OK 38, 873 P.2d 1001, which declined to disqualify a Corporation Commissioner. That decision turned on the Court's conclusion that the rate proceeding was legislative, and "proceedings which are legislative in nature do not implicate judicial processes and do not require application of the judicial standards urged by SWB." Id. ¶ 9, 873 P.2d at 1005. This proceeding is not legislative. See Proposition I. NAMIC and APCIA contend otherwise. App. at 223. The Court described § 316 as "statutory provision of directives for voluntary disqualification of agency members who sit by appointment and hearing officers who are agency employees together with a mechanism for their replacement." Id. ¶ 20, 873 P.2d at 1007. The request before it was to disqualify an elected officer "in the absence of any constitutional or statutory provision allowing his disqualification or providing for a replacement," *id.*, and the rule of necessity rested on that absence, *id.* ¶ 29, at 1009.

Southwestern Bell also arose before a Commission exempt from Article II of the Administrative Procedures Act, *id.* ¶ 18, 873 P.2d at 1007, where an appeal remained available, *id.* ¶ 23, at 1008. Here § 316 applies by its terms and supplies the replacements that were absent there: for an examiner, "the agency shall assign another in his stead," and for a member whose disqualification leaves no quorum, "the Governor immediately shall appoint a member pro tem." 75 O.S. § 316.

CONCLUSION

Petitioners respectfully request that this Court assume original jurisdiction and grant the relief sought in the Application and Petition.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2026, a true and correct copy of the above and foregoing *Amended Brief in Support of Application to Assume Original Jurisdiction and Petition for Writs of Prohibition and Mandamus* was served, in the manner provided in 12 O.S. § 2005(B) and the Rules for Electronic Filing in the Oklahoma Courts, upon the following respondents, parties, and real parties in interest entitled to notice under Rule 1.191(e):

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