

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, LLC
Renewal 1 to Permit NACC-1302
Application

Case No. RC-19-189

Coyote Creek Mining Company, LLC
Revision 9 to Permit NACC-1302
Application

Case No. RC-19-190

ORDER DENYING MOTION TO DISQUALIFY

On May 20 and 22, 2019, Coyote Creek Mining Company, LLC (CCMC) filed with the Public Service Commission (Commission) applications for Revision No. 9 and Renewal No. 1 to Surface Coal Mining Permit NACC-1302 for its Coyote Creek Mine south of Zap in Mercer County.

Casey and Julie Voigt (Voigts) requested an informal conference on the revision and renewal applications. The informal conference was held on October 8, 2019. On October 21, 2019, the Commission conditionally approved Revision No. 9, subject to the right of any person that is or may be adversely affected to request a formal hearing, and approved Renewal No. 1.

On November 20, 2019, the Voigts filed a request for a Formal Hearing with the Commission. On November 21, 2019, the Commission issued a Notice of Formal Hearing scheduling the hearing to commence at 9:00 a.m. on December 16, 2019 in the Commission's Hearing Room in the State Capitol Building.

On December 6, 2019, the Voigts filed a Motion to Disqualify Wade Mann and Crowley Fleck, PLLP from Representing Coyote Creek Mining Company, LLC in This Matter Due to

Conflict of Interest under Rule 1.12 of the North Dakota Rules of Professional Conduct. The Voigts' motion requests that the Commission disqualify Wade Mann and the law firm Crowley Fleck, PLLP from representing CCMC in this proceeding and do not object to a continuance to allow CCMC to retain substitute counsel. The Voigts' motion and supporting papers state they are uncomfortable with Attorney Mann representing CCMC in this proceeding because from January 2014 to December 2015, Attorney Mann was an Administrative Law Judge (ALJ). During that time, Attorney Mann presided as a procedural ALJ for the hearing on CCMC's permit application in December 2014, and as the ALJ for a hearing on a revision to the permit in May 2015. For the May 2015 hearing, Attorney Mann issued recommended findings of fact, conclusions of law and a recommended order to the Commission. The Voigts cite to North Dakota Rule of Professional Conduct 1.12, N.D.A.C. § 69-02-01-06(4), case law, and ethics opinions in support of their request.

CCMC filed a Response to Motion to Disqualify Crowley Fleck PLLP from Representing Coyote Creek Mining Company, L.L.C. on December 9, 2019. CCMC disputes that there are grounds to disqualify Attorney Mann and Crowley Fleck PLLP. Specifically, CCMC argues that Attorney Mann never "substantially" participated in the 2014 and 2015 hearings. CCMC also argues that N.D.R.Prof. Conduct 1.12 only applies when the matters are the "same," and CCMC believes the matter currently pending before the Commission is sufficiently different from the 2014 and 2015 proceedings.

The Commission has taken no position on this motion and has requested the ALJ to decide the motion.

North Dakota Rule of Professional Conduct 1.12(a) states:

Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a

judge or other adjudicative officer or law clerk to such a person, or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding consent in writing after consultation.

The Commission has adopted a rule that states:

Rules of conduct. All persons appearing before the commission must conform to the standards of ethical conduct required of practitioners before the courts of the state of North Dakota. The commission or a hearing officer may bar a person from appearing before the commission for improper conduct.

N.D.A.C. § 69-02-01-06(4). The Commission's rule does not define "improper conduct." The Rules of Professional Conduct define "misconduct" in part as violating or attempting to violate the Rules, knowingly assisting or inducing another to do so, or doing so through the acts of another. N.D.R.Prof. Cond. 8.4(a). It's unclear if the Commission believes its rule confers authority upon the Commission to decide whether an attorney has violated the Rules of Professional Conduct; or if the rule is merely meant to allow the Commission authority to prevent a lawyer from participating in Commission proceedings when improper conduct has been found by another tribunal such as the district court or Disciplinary Board. To disqualify Attorney Mann and Crowley Fleck, PLLP in this case, the Commission would need to exercise the former authority and make a finding that Attorney Mann's representation of CCMC violates the Rules of Professional Conduct.

The Commission cites the following authority for its rule:

The commission in all cases may conduct its proceedings, when not otherwise particularly prescribed by law, in a manner most conducive to the proper dispatch of business and to the ends of justice. A majority of the commission shall constitute a quorum for the transaction of business, but a commissioner shall not participate in any hearing or proceeding in which that commissioner has any direct personal pecuniary interest. The commission from time to time may make or amend such general rules or orders as may be requisite for the orderly regulation of proceedings before it, including forms of notice and the service thereof, which shall conform as nearly as possible to those in use in the courts of this state. Any party may appear before the commission and may be heard in person or by attorney. Every vote and official action of the commission shall be entered of record and its proceedings shall

be public upon the request of any person interested. The commission shall have an official seal, which shall be judicially noticed, and every commissioner shall have the right to administer oaths and affirmations in any proceeding pending before the commission.

N.D.C.C. § 49-01-07. While the legislature has conferred the Commission with authority to create rules to govern its proceedings, it's unlikely that authority extends to attorney conduct under the Rules of Professional Conduct. Jurisdiction over lawyer professional conduct lies with the North Dakota Supreme Court and judicial branch. *See* N.D. Const. art. VI, § 3(3); N.D. R. Lwyr. Disc. Rule 1.1.

After considering the Motion to Disqualify and supporting documents and CCMC's opposition, the undersigned ALJ finds no authority for the Commission, or its designated ALJ, to making a finding that an attorney's conduct has violated the North Dakota Rules of Professional Conduct. The Voigts' Motion to Disqualify is **DENIED**.

Dated at Bismarck, North Dakota, this 11 day of December 2019.

State of North Dakota
Public Service Commission

By: Hope Hogan
Hope L Hogan
Administrative Law Judge
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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the **ORDER DENYING MOTION TO DISQUALIFY** was mailed, inside mail, at the State Capitol, on the 11 day of December 2019, to:

John Hamre
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505-0480

and that true and correct copies of the above document were sent by electronic mail and mailed, regular mail, on the 11 day of December 2019, to:

Wade Mann
Crowley Fleck, PLLP
PO Box 2798
Bismarck, ND 58502-2798

Derrick Braaten / JJ England / Carey Goetz
Braaten Law Firm
109 North 4th Street – Suite 100
Bismarck, ND 58501

and that a true correct copy of the above document was mailed, inside mail, at the State Capitol on the 11 day of December 2019, to:

John Schuh
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505-0480

OFFICE OF ADMINISTRATIVE HEARINGS
Hope L Hogan, Administrative Law Judge


Louise Wetzel