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Kathryn Garner

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tion panel did not abuse its power and it had the proper authorization to make the decisions regarding the Paulsons' permit.

Next, the court determined a former employee of a state agency is not automatically barred from serving as an arbitrator in a case where the same agency is a party. As long as the individual was a resident of the judicial district in which the arbitration occurred and the judge chose the individual from the lists of potential arbiters submitted by FWP, FCD, and the permit applicant, then the person could be an arbitrator. The former FWP employee that served as an arbitrator in this case met both of these conditions. Additionally, the court had previously held prior employment was insufficient to establish partiality per se. The Paulsons' argument of partiality was therefore speculative and conclusory at best.

Thus, the arbitration panel had the statutory authority to make permit determinations, was impartial in making its decision, and provided adequate remedies for permit application review. For these reasons, the court upheld the ruling of the district court not to vacate the arbitration panel's decision.

John Lintzenich

NEBRASKA

***In re* Applications T-851 and T-852, 686 N.W.2d 360 (Neb. 2004)** (holding the Department of Natural Resources properly reduced the allocation of incidental groundwater storage rights in proportion to a decrease in state power district's direct irrigation service).

The Nebraska Public Power District ("NPPD") filed applications with the Department of Natural Resources ("DNR") concerning two of NPPD's water appropriations. The NPPD filed the applications after one of its water users, Terry Crawford, ceased use of NPPD's surface water and began irrigating his land with well water. NPPD's applications requested a transfer of the location of diversion and use of two of NPPD's water appropriation rights. NPPD believed the transfer was necessary in order to avoid losing the water rights associated with Crawford's land. The DNR approved the transfer for one application. However, with respect to the second appropriation, the DNR cancelled 0.65 cubic feet per second ("cfs") of the NPPD's incidental groundwater storage allocation. The NPPD appealed this decision to the Supreme Court of Nebraska.

The DNR based its decision on language from a May 1988 order ("order") that originally granted water appropriation rights to the NPPD, but also stipulated that a proportionate reduction in incidental underground storage would accompany any reduction in direct irrigation service. Based on the terms of the order, the DNR concluded Crawford's decision not to use the direct irrigation service consequently reduced the NPPD's direct irrigation service. Thus, pursuant

to the stipulations of the order, the DNR proportionally reduced NPPD's allocation of incidental underground water.

NPPD appealed the DNR's decision, arguing the cancellation of 0.65 cfs violated Nebraska's constitution and state law. However, the court concluded, because NPPD failed to appeal the order, the order became binding. Thus, NPPD's argument was a collateral attack on a final agency decision and the court accordingly had no authority to review whether the order violated the state constitution or state law.

NPPD also argued the DNR improperly applied the order's proportional reduction condition by interpreting the term "service" contrary to the court's interpretation in *In re Application U-2*. Specifically, NPPD claimed water from the canals that provided water for NPPD's direct irrigation service naturally seeped into, and mixed with, groundwater, thereby recharging Crawford's wells. NPPD thus argued that because the water that filled Crawford's wells originated from the same source that provided NPPD's direct irrigation water, Crawford's land remained part of NPPD's service.

The court, however, determined it did not need to interpret the term "service," but needed to interpret the order's use of the entire phrase "direct irrigation service." Because the DNR relied on a Nebraska statute when calculating the original grant of water rights, the court concluded the statute's definition of "direct irrigation service" was dispositive. The statute defined "direct irrigation service" as irrigation from the natural flow of streams, which referred only to surface water irrigation, not underground water storage. Thus, pursuant to the Nebraska statute, when Crawford ceased using direct irrigation service and began using well water, such nonuse reduced NPPD's service. Based on the language of the order and the statutory definition of "direct irrigation service," the court upheld the DNR's decision to cancel 0.65 cfs of the NPPD's groundwater rights as a result of the reduction in NPPD's direct irrigation service.

Kathryn Garner

NEW MEXICO

Hanson v. Turney, 94 P.3d 1 (N.M. Ct. App. 2004) (holding the New Mexico statute distinguished between a vested water right and a permit to appropriate waters, a vested water right arose only after the application of waters to a beneficial use and only vested water rights could be transferred).

Mabel Hanson ("Hanson"), the holder of two permits for the appropriation of groundwater, appealed the New Mexico State Engineer's ("State Engineer") decision denying Hanson's application that requested a transfer of the type of the use designated in the permit from irrigation to subdivision use. Pursuant to state law, the holder of the water right can file an application with the State Engineer request-