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For Publication

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

HENRY S. HOFSCHEIDER,)
)
 Plaintiff,)
)
 v.)
)
 ANA DEMAPAN-CASTRO, and)
 MARIANAS PUBLIC LANDS)
 AUTHORITY BOARD OF DIRECTORS,)
)
 Defendants.)
)
 _____)

CIVIL ACTION NO. 04-0523

**ORDER CONCERNING DEFENDANT
MPLA’s MOTION FOR THE RECUSAL
OF JUDGE KENNETH L. GOVENDO**

THIS MATTER was last before this Court on May 31, 2005, on Defendant the Board of Directors of the Marianas Public Lands Authority’s motion for the recusal of Judge Kenneth L. Govendo. Arguing the motion on behalf of the movant was Matthew T. Gregory and opposing the motion on behalf of the Plaintiff was Sean E. Frink. Also present was G. Anthony Long, on behalf of Defendant Ana Demapan-Castro, who took no position on the motion. Having considered the pleadings and arguments of counsel, the Court is prepared to rule.

FACTUAL BACKGROUND

This case ultimately arises from the allegedly illegal termination of the Plaintiff, Henry S. Hofschneider, as Commissioner of the Marianas Public Land Authority (MPLA) by the Board of Directors (“Board”) of MPLA. Ms. Demapan-Castro is the Chairperson of the Board. Mr. Hofschneider filed the instant suit on November 8, 2004, and it was assigned to Associate Judge Kenneth L. Govendo. The case proceeded normally until March 31, 2005, when the instant motion was filed. The motion was filed approximately a week before the Plaintiff’s motion for partial summary judgment and each Defendant’s individual motions to dismiss were to be heard. Those matters have since been taken off-calendar pending resolution of this motion.

1 The Board's motion is brought pursuant to 1 CMC § 3309(b), which allows a party that
2 believes that there are grounds to disqualify the judge before whom the matter is pending to bring
3 a motion seeking that judge's disqualification. In so doing, the party must cite the specific grounds
4 on which it seeks recusal. *Id.* In this case, the Board argues that the impartiality of the judge in this
5 matter, Judge Kenneth L. Governdo, might reasonably be questioned because of certain letters to
6 the editor that he wrote. The appearance of partiality is grounds for recusal under 1 CMC § 3308(a).
7 The matter was then assigned to this Court to hear.¹

8 The letters themselves were all published in the *Marianas Variety* newspaper in 2002, well
9 prior to Judge Govendo assuming the bench. One of the letters, published September 6, 2002,
10 concerns MPLA, and what Judge Govendo considered its failure to use public lands for public
11 purposes. He condemns MPLA for turning over so much public land to private developers for golf
12 courses and hotels instead of using it for homesteads or for public facilities. A second letter,
13 published October 11, 2002, questions the manner in which then Northern Marianas College (NMC)
14 President Kenneth Wright handled the termination without cause of 11 NMC employees. The last
15 two, published May 3, 2002 and May 14, 2002, condemn the behavior of the Governor's Council
16 on Developmental Disabilities in trying to remove its then Executive Director.

17 In addition, the Board notes that Judge Govendo represented a party (his son) in a lawsuit
18 against MPLA's predecessor agency, the Marianas Public Land Commission, in 1990. It argues that
19 the first letter and the lawsuit show bias against MPLA, while the other three letters show bias
20 against government boards and in favor of those fired. By contrast, the plaintiff argues that the
21 letters do not in any way concern the issues presented in this case and so do support a finding of
22 perceived bias. In addition, Plaintiff argues that the present motion is untimely and procedurally
23 defective.

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26 ¹ The matter was probably referred to another judge by Judge Govendo because Com. C. Judic. Cond. Canon
27 3(D)(c) prevents a judge from hearing a motion for his or her own recusal when that motion is based on an allegation
28 of bias or prejudice. However, as is detailed below, this Court has concluded that the procedural requirements of Canon
3(D)(c) are not triggered when the motion for recusal merely alleges the appearance of bias. Therefore, the Court
concludes that a judge faced with a recusal motion based merely on the appearance of bias, 1 CMC § 3308(a), probably
may hear and decide the motion himself or herself. No referral to another judge is necessary.

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2 **LEGAL CONSIDERATIONS**

3 **I. Proper Procedure for Recusal**

4 The Court in this case is asked by the Board to order Judge Govendo to recuse himself. The
5 Court finds this troubling, not because of the substance of the motion, but because of the nature of
6 the act. The judges of the Commonwealth Superior Court are all equal. No one judge takes
7 precedent over the others, except for the administrative powers of the Presiding Judge. More
8 important, the rulings of one Superior Court judge on matters of law are not binding on the other
9 judges. Given this, and the lack of any clearly delineated procedure for recusal in statutory law,
10 common law, or the rules of procedure, the Court believes that it lacks the power to *order* another
11 judge, in their capacity as a judge, to do anything. At best, this Court believes that its power extends
12 only to hearing the evidence, weighing the evidence, and making a recommendation.² However,
13 before the Court can do that in this motion, it must first consider two procedural questions raised by
14 Plaintiff.

15 **II. Procedural Issues**

16 Plaintiff raises two procedural challenges to the instant motion. First, he argues that the
17 motion is defective because it was supported by an affidavit signed by the Board's attorney, instead
18 of by a party. Second, he argues that it is untimely.

19 **A. Problems with the Supporting Affidavit**

20 By law, any party seeking to disqualify a judge must state the specific grounds for that
21 motion. 1 CMC § 3309(b). This statement ordinarily takes the form of an affidavit, and in some
22 cases an affidavit is *required*. See Com. C. Judic. Cond. Canon 3(D)(c). By this Court's reading
23 of the Canon, an affidavit needs to be specific, and the appropriate attorney must certify that the
24 affidavit is made in good faith. *Id.* However, the Court does not believe that the rules necessarily
25 prevent an attorney from being both affiant and certifier, especially where, as in this case, it was an
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27 ²The Court has concluded that it lacks the power to order another Superior Court judge to recuse, however, the
28 Court takes no position on whether or not it should have that power. The Court hopes that either the Legislature or our
Supreme Court will clarify the matter in the near future.

1 attorney and not a party who discovered the alleged evidence of bias.³ Therefore, if it is this Court’s
2 decision to make, the Court will not deny the motion on this ground.

3 However, Plaintiff argues that the Court does not have the option of accepting an affidavit
4 signed by an attorney. To support this argument, Plaintiff cites two cases from our Supreme Court.
5 In the first, *Bank of Saipan v. Superior Court (Disqualification of Lamorena)*, 2002 MP 17 ¶¶ 14-16,
6 the Supreme Court denied a motion to recuse Alberto C. Lamorena, III, from sitting as justice pro
7 tem in an appeal in the case.⁴ In denying the motion, the Court specifically cited the fact that the
8 affidavit in support of the motion had been signed by an attorney instead of by the party seeking
9 recusal. Similarly, in *Saipan Lau Lau Dev., Inc. v. Superior Court (San Nicolas)*, 2000 MP 12 ¶¶
10 4-7, Justice Pro Tem Timothy H. Bellas denied a motion seeking recusal of a pro tem justice
11 (coincidentally Justice Pro Tem Alberto C. Lamorena, III, again), because the supporting affidavit
12 had been signed by an attorney rather than a party. Plaintiff argues that this principle should apply
13 to the instant recusal motion.

14 Unfortunately for Plaintiff, the cases are not directly on point. Both of the cases were
15 brought under 1 CMC § 3308(b)(1), which requires a judge to be recused, “[w]here he or she has
16 a personal bias or prejudice concerning a party” However, the Board now argues that its
17 motion is brought primarily under 1 CMC 3308(a), which requires to a judge to be recused
18 whenever, “his or her impartiality might reasonably be questioned.” This distinction seems minor,
19 but the case law suggests that it changes the affidavit requirement. In *Bank of Saipan*, Justice Pro
20 Tem Tydingco-Gatewood specifically concluded that it was only a motion brought pursuant to
21 Section 3308(b)(1) that triggered the strict, party-only affidavit requirement of Com. C. Judic. Cond.
22 Canon 3(D)(c). 2002 MP 17 ¶¶ 14-15. In *Saipan Lau Lau Dev., Inc.*, Justice Pro Tem Bellas went
23 further, finding that the affidavit requirement of Canon 3(D)(c) did not apply to the motions brought
24 pursuant to Section 3308(a) and, indeed, that “there are no strict procedural requirements” for
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26 ³ Indeed, it is strange to ponder what such an affidavit might look like. “I, client, do hereby state under penalty
27 of perjury, that my attorney told me that he went to the offices of the *Marianas Variety* newspaper and....”

28 ⁴ Note that this case was decided by a single Justice Pro Tem, Frances Tydingco-Gatewood, who was asked
to decide only the recusal motion. This is apparently the normal recusal procedure in our Supreme Court.

1 bringing such a motion. 2000 MP 12 ¶ 5. Therefore, this Court must conclude that, insofar as the
2 instant motion is brought pursuant to 1 CMC § 3308(a), the fact that the Board’s attorney signed the
3 affidavit stating the grounds for dismissal, is no reason to deny the motion.

4 **B. Timeliness**

5 Plaintiff’s other procedural argument against the instant motion is that it is untimely. Under
6 Commonwealth Code of Judicial Conduct Canon 3(D)(c), a motion to recuse and affidavit must be
7 “filed in sufficient time not to delay any proceedings unless the moving party can show he or she
8 had no reason to previously question the [] judge’s bias” or the judge was only recently
9 assigned. In this case, there is no question that the recusal motion delayed the proceedings - the
10 instant motion was filed on March 31, 2005, a week before Plaintiff’s motion for partial summary
11 judgment and Defendants’ motions to dismiss were to be heard. All of these motions are now on
12 hold. The Board justifies its failure to bring the motion earlier by arguing that its current counsel,
13 Matthew T. Gregory, was approved by the Court as substitute counsel on the same day the motion
14 was filed. Clearly, Mr. Gregory could not have filed his motion any sooner than he did. However,
15 the Board has not shown any reason why Mr. Gregory’s predecessor could not have discovered the
16 same information in November 2004 that Mr. Gregory found in March 2005. If the timeliness
17 requirement of Canon 3(D)(c) applied in the instant matter, the Court would likely recommend
18 denying the motion on that basis.

19 Unfortunately for Plaintiff, again, it appears that the requirements of Canon 3(D)(c) do not
20 apply. Both the *Bank of Saipan* and *Saipan Lau Lau Dev., Inc.* Courts made clear that the
21 procedural requirements of Canon 3(D)(c) do not apply to a motion to recuse brought pursuant to
22 1 CMC § 3308(a). See *Bank of Saipan*, 2002 MP 17 ¶ 14 and *Saipan Lau Lau Dev., Inc.*, 2000 MP
23 12 ¶ 5. Indeed, the *Saipan Lau Lau Dev., Inc.* Court stated that “there are no strict procedural
24 requirements” for bringing a recusal motion under Section 3308(a). *Id.* If the affidavit requirement
25 of Canon 3(D)(c) does not apply to a motion brought pursuant to Section 3308(a), and the Court has
26 before it two published Supreme Court opinions that say it does not, then the Court must conclude
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1 that the requirement that a motion not delay proceedings also does not apply.⁵ Therefore, the mere
2 fact that the Board’s motion has delayed proceedings without adequate justification under Canon
3 3(D)(c) is no grounds to deny it insofar as it is brought pursuant to Section 3308(a).

4 Of course, like all motions in civil cases, the instant motion is governed by Commonwealth
5 Rule of Civil Procedure 11(b)(1), which disallow motions brought for an improper purpose,
6 including unnecessary delay. However, in this case, the Court concludes that the motion itself is
7 well-taken, that it was brought in good faith, and that it was brought in as timely a manner as Mr.
8 Gregory could possibly have managed. The Court concludes that the motion to recuse may not be
9 denied on that basis.

10 **III. Arguments For and Against Judge Govendo’s Recusal**

11 Pursuant to the requirements of 1 CMC § 3308(a), a judge must recuse himself or herself “in
12 any proceeding in which his or her impartiality might reasonably be questioned.” The decision as
13 to whether or not a judge’s impartiality may reasonably be questioned is to be “made from the
14 perspective of a reasonable observer who is informed of all the surrounding facts and
15 circumstances.” *Microsoft Corp. v. U.S.*, 530 U.S. 1301, 1302, 121 S. Ct. 25, 26, 147 L. Ed. 2d
16 1048, 1049 (2000) (Statement of Chief Justice Rehnquist respecting recusal). The Court believes
17 that being informed “of all the surrounding facts and circumstances” requires not only that the
18 fictional reasonable observer consider the facts, but also the legal standards that apply.⁶

19 In a case like this, where either bias or the appearance of bias is alleged,⁷ the Ninth Circuit
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21 ⁵ Frankly, the Court finds this result bizarre, because it largely eviscerates the procedural protections provided
22 in Canon 3(D)(c). It allows an attorney to avoid the burdensome affidavit and timeliness requirements simply by alleging
23 the appearance of bias instead of actual bias. The Court can see no difference in the type of evidence that should be
24 required to support actual bias versus the appearance of bias. In fact, the mere appearance of bias is much easier to
25 prove. Indeed, the only reason an attorney might choose to go the actual bias route is because, as the Court stated in
26 Footnote 1 above, it appears that a judge whose recusal is sought based on appearance of bias can decide the matter
27 personally, but must allow another judge to make the decision when actual bias is alleged. The Court believes that the
28 procedural requirements of Canon 3(D)(c) ought to apply to all bias-based motions for recusal, whether apparent or
actual.

⁶ This is similar to what a jury does as judge of the facts. They jury must apply the law they are given, via jury
instructions, to the facts they have heard.

⁷ It appears that the Ninth Circuit treats motions for recusal based on bias or appearance of bias as largely the
same. Perhaps it would be wise if this jurisdiction did the same.

1 has found that alleged bias is grounds for disqualification only where the evidence “belies an
2 aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside
3 It is an animus more active and deep-rooted than an attitude of disapproval toward certain persons
4 because of their known conduct” *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980)
5 (holding that a judge who had previously denied membership in a private club to the defendant, told
6 a university not to accept a contribution from the defendant because he ran a house of prostitution,
7 and stated that the defendant was “not good for Reno” properly refused to recuse himself).
8 Similarly, “generalized policy views [do not] necessitate recusal.” *United States v. Payne*, 944 F.
9 2d 1458, 1476 (9th Cir. 1991) (upholding trial court judge’s decision not to recuse where accusation
10 of bias was based on judge’s participation in a commission that determined that there was an
11 inseparable link between child pornography and child abuse - defendant had been convicted of
12 multiple counts of “carnal knowledge of a female under age 16”). Finally, “[a] judge cannot be
13 disqualified merely because he believes in upholding the law, even though he says so with
14 vehemence.” *Baskin v. Brown*, 174 F.2d 391, 394 (4th Cir. 1949).

15 In this case, the Board has suggested that Judge Govendo has shown that he is biased against
16 the Board because he represented his son in a lawsuit against MPLA’s predecessor agency in 1990
17 and in writing one letter to the editor in 2002 in which he condemned MPLA, in very strong
18 language, for failing to use public lands for public purposes. Taken together, these acts do seem to
19 suggest a certain bias against MPLA that might well extend to its Board of Directors. Indeed, a
20 casual observer might well conclude that these facts alone arouse reasonable questions about Judge
21 Govendo’s impartiality. However, our reasonable observer, who is aware of both the facts and the
22 law to apply to those facts, would much more likely conclude that it is evidence merely of
23 permissible “generalized policy views” and “an attitude of disapproval . . . because of . . . known
24 conduct” and not of impermissible “deep-rooted” animus.

25 The Board has also suggested that Judge Govendo has a bias against the firing of
26 Government employees, particularly administrators being fired by Government boards of directors,
27 and a bias in favor of terminated employees. The Board bases this suggestion on three letters to the
28 editor written by Judge Govendo in 2002. One of these letters expressed concern with the manner

1 in which then NMC President Kenneth Wright terminated a number of redundant employees. The
2 other two deal with what Judge Govendo apparently viewed as both improper and illegal attempts
3 by the Governor's Council on Developmental Disabilities (GCDD) to remove Thomas J. Camacho
4 as Executive Director. Taken together, these letters might also give the appearance to a casual
5 observer that Judge Govendo has certain biases that might favor the Plaintiff over the Board.
6 However, our reasonable observer, who knows both the facts and the applicable law, would probably
7 note that the letters deal in no way with either the Board or Mr. Hofschneider. In addition, the letters
8 do not seem to betray any impermissible animus against Government boards or an impermissible
9 bias in favor of fired Government workers. At worst, the letter concerning NMC betrays a
10 "generalized policy view" that more care should be taken in terminating Government workers and
11 the GCDD letters show only a concern that the law be upheld, albeit vehemently expressed. Based
12 on all the evidence presented and applying the law, the Court concludes that a reasonable observer
13 would not question Judge Govendo's impartiality in this case.

14 **CONCLUSION**

15 For the reasons stated above, the Court concludes that the Board has not met its burden of
16 showing that Judge Govendo's impartiality could reasonably be questioned. However, in so doing,
17 the Court applied the relevant legal standards, which clearly require proof of more than the mere
18 appearance of some bias. If the Court were applying a standard in which the mere appearance of
19 bias was sufficient, it would have to side with the movant. Judge Govendo's letters, particularly the
20 letter concerning MPLA, do create the appearance of bias, just not an impermissible one. All judges
21 take the bench with certain biases, opinions, and tendencies. A judge is expected to disregard these
22 in the performance of his or her duty. When a judge feels that he or she cannot do so, both our law
23 and ethical canons require that judge to voluntarily recuse. 1 CMC § 3308(b)(1) and Com. R. Judic.
24 Cond. Canon (C)(b)(1).

25 Therefore, this Court will leave the decision up to Judge Govendo. This Court finds no legal
26 reason under 1 CMC § 3308(a) why he must recuse himself. However, the Court does find that the
27 letters do show potential bias against the Board and in favor of the Plaintiff. If Judge Govendo feels
28 that this is a bias he does not in fact possess, or one that he can disregard, then he may certainly

1 continue to preside over the case. If, however, he possesses a bias he cannot disregard, then this
2 Court hopes and trusts that Judge Govendo will follow the command of Commonwealth law and of
3 the Canons of the Code of Judicial Conduct that govern those on the bench and voluntarily recuse
4 himself.

5 SO ORDERED this 22nd day of June 2005.

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/s/
JUAN T. LIZAMA, Associate Judge