



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of Johndel International, Inc. dba JMI-Edison, Docket No. OPA-PA-23-002

Merlyna W. Smith <mwsmith@bsjmlaw.com>

Tue, Jun 6, 2023 at 4:30 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>, Vince Duenas <vduenas@guamopa.com>, Thyrza Bagana <tbagana@guamopa.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, William Brennan <Wbrennan@arriolafirm.com>, "R. Marsil Johnson" <rmarsjohnson@bsjmlaw.com>, Isa Baza <ibbaza@bsjmlaw.com>

Dear Mr. Hernandez:

Attached herewith for e-filing in the above-referenced matter are the following:

1. **Menzies Opposition to the JMI Motion for Appointment of Alternate Administrative Hearing Officer or in the Alternative an Order Directing the Superior Court to Hear this Matter; and**
2. **Interested Party Aircraft Service Joinder to GIAA Motion to Dismiss.**

Kindly acknowledge receipt via return e-mail. Thank you. Should you have any questions, please let us know.

Regards,

Merlyna Weilbacher Smith

Secretary to R. Marsil Johnson

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314-Interested Party Menzies Opposition to Motion For Appointment of Alternate Administrative Hearing Officer OPA PA-23-002.pdf
260K



315-INTERPRESTED PARTY JOINDEDR TO GIAA MOTION TO DISMISS OPA PA-23-002.pdf
181K

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7
8 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **PROCUREMENT APPEAL**

10 **In the Appeal of**) **Docket No. OPA-PA-23-002**
11)
12 **Johndel International, Inc. dba. JMI-**) **MENZIES OPPOSITION TO THE JMI**
Edison,) **MOTION FOR APPOINTMENT OF**
13) **ALTERNATE ADMINISTRATIVE HEARING**
Appellant.) **OFFICER OR IN THE ALTERNATIVE AN**
14) **ORDER DIRECTING THE SUPERIOR COURT**
15) **TO HEAR THIS MATTER**

16 Interested Party AIRCRAFT SERVICE INTERNATIONAL, INC. DBA MENZIES AVIATION
17 (“Menzies”), hereby submits its Opposition to Appellant JOHNDEL INTERNATIONAL, INC. dba
18 JMI-EDISON (“JMI”) Motion for Appointment of Administrative Hearing Officer or in the
19 Alternative an Order Directing the Superior Court to Hear This Matter in the above-captioned
20 Office of Public Accountability (“OPA”) procurement appeal. For the reasons stated below, JMI’s
21 Motion should be denied.

22 **ARGUMENT**

23 **A. The Public Auditor is not bound by the appearance of impropriety standard.**

24 JMI seeks to disqualify the Public Auditor based on an “appearance of impropriety”
25 standard, which is the standard applicable to judicial officers. *Sule v. Guam Bd. of Dental*
26 *Examiners*, 2008 Guam 20, ¶13. A justice or judge should be disqualified in any proceeding where
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1 his impartiality might reasonably be questioned. 7 GCA § 6105(a). However, the Public Auditor
2 is not a judicial officer, or even a member of the judicial branch of government. Thus, the
3 appearance of impropriety standard does not apply here.

4 In fact, the regulations governing the disqualification of the Public Auditor set forth no
5 appearance of impropriety standard at all. The regulations do set forth a procedure the Public
6 Auditor must follow in addressing the issue of disqualification:

7
8 The Public Auditor may recuse herself or himself at any time and notify all parties,
9 or any party may raise the issue of disqualification and state the relevant facts prior
10 to the hearing. The Public Auditor shall make a determination and notify all
11 parties...

12 2 GARR § 12116. Guam’s Administrative Adjudication Act addresses the standard that must be
13 applied. That standard is that “[a] hearing officer...shall voluntarily disqualify himself and
14 withdraw from any case in which he cannot accord a fair and impartial hearing or consideration.”
15 See 5 GCA § 9222. Guam has also adopted an “actual bias” recusal standard for administrative
16 law judges. *Sule*, 2008 Guam 20, ¶17 (holding that “actual bias must be shown to disqualify an
17 administrative law judge”); see also *Bunnell v. Barnhart*, 336 F.3d 1112, 1114 (9th Cir. 2003)
18 (“the appearance of impropriety standard is not to administrative law judges”). Therefore, the
19 actual bias standard is the correct standard to apply in this instant case and the Public Auditor
20 should only be disqualified based on a showing of actual bias. This is a high bar.

21 The actual bias standard requires a substantial showing of personal bias. See *Sule v. Guam*
22 *Bd. of Dental Examiners*, 2008 Guam 20. In *Sule*, the Supreme Court of Guam held that “in order
23 to prove that an [administrative] adjudicator is biased, there must be a concrete showing that bias
24 actually exists. Indeed, a party’s unilateral perceptions of an appearance of bias cannot be a ground
25 for disqualification.” *Sule*, 2008 Guam 20 ¶ 20 (citing *Andrews v. Agric. Labor Relations Bd.*, 623
26 P.2d 151, 157 (1981)). The Court additionally held that “[a]n [administrative] adjudicator shall be
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1 disqualified where bias has been shown; however, the appearance of impropriety shall not
2 constitute bias and shall not be grounds for disqualification. [Administrative] [a]djudicators are
3 presumed to be free from bias.” *Sule*, 2008 Guam 20 ¶ 20 (citing *Goldsmith v. De Buono*, 665
4 N.Y.S.2d 727, 731 (N.Y.App.Div.1997)).

5 JMI’s motion amounts to nothing more than its unilateral perception of an appearance of
6 bias due to the Public Auditor’s shock at JMI’s misconduct in an official proceeding before the
7 Public Auditor. This does not amount to actual bias.

8 JMI argues that disqualification is warranted here in part due to statements made by the
9 Public Auditor during a KUAM News interview discussing his decision to dismiss JMI’s first
10 appeal. See KUAM News Interview “the link”, February 7, 2022, (“KUAM Interview”), available
11 at <https://www.youtube.com/watch?v=B44u6iwlHVY>. However, any statements made by the
12 Public Auditor during this interview fall short of *actual bias* necessary to disqualify him. JMI
13 points to statements made by the Public Auditor that he “was fuming” before the hearing (KUAM
14 Interview, 07:32), that JMI was “caught with their pants down” (KUAM Interview, 7:59), and
15 further likening JMI’s submission of the purported Contractor’s License Bord (“CLB”) findings
16 and decisions (the “Findings & Decisions”) as one where your “significant other lies” (KUAM
17 Interview, 12:20–33).

18 The Public Auditor’s statements served as demonstrative analogies or common expressions
19 used to explain his decision, but when reviewed in context, hardly demonstrate a concrete showing
20 of bias or deep-seated antagonism that would render fair judgment impossible. In fact, a review of
21 the entire 28-minute interview shows that despite being critical of JMI’s actions, the Public Auditor
22 remained calm and level-headed throughout the discussions. Neither his demeanor nor words
23 evidence any bias or unequivocal antagonism necessary to show actual, personal bias.
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1 Every single one of the Public Auditor’s statements flow from his experience as a hearing
2 officer in the first appeal filed by JMI. None of them are reflective of any personal bias he has for
3 Menzies or against JMI. As such, these statements simply fail to show *actual bias* necessary to
4 disqualify the Public Auditor.

5 **B. Even if the Public Auditor were subject to an appearance of impropriety**
6 **standard for disqualification, that standard is not met.**

7 Even assuming that an appearance of impropriety standard did apply to disqualification of
8 the Public Auditor, that standard is not met here. As explained above, judges are subject to
9 disqualification due to the appearance of impropriety when their impartiality might reasonably be
10 questioned. 7 GCA § 6105(a). “As applied to matters of judicial disqualification, Guam applies a
11 reasonable person standard.” *Sule*, 2008 Guam 20, ¶14; *see also Van Dox v. Superior Ct. of Guam*,
12 2008 Guam 7, ¶ 32 (“The appearance of bias is judged from the standard of a ‘reasonable person’
13 who knows all the facts, and understands the ‘contexts of the jurisdictions, parties, and
14 controversies involved’”). “Guam’s rule on judicial disqualification is based upon the federal law.”
15 *Ada v. Gutierrez*, 2000 Guam 22 ¶ 12, n. 2. Hence, federal case law is instructive. *People of Guam*
16 *v. Tennessen*, 2010 Guam 12, ¶ 25.

17
18
19 In discussing the recusal standard applicable to federal judges, the Supreme Court of the
20 United States has explained that “judicial rulings alone almost never constitute a valid basis for a
21 bias or partiality motion...” *Liteky v. United States*, 510 U.S. 540, 555 (1994). The Court explained
22 further:

23 [O]pinions formed by the judge on the basis of facts introduced or events occurring
24 in the course of the current proceedings, or of prior proceedings, do not constitute
25 a basis for a bias or partiality motion unless they display a deep-seated favoritism
26 or antagonism that would make fair judgment impossible. Thus, judicial remarks
27 during the course of a trial that are critical or disapproving of, or even hostile to,
28 counsel, the parties, or their cases, ordinarily do not support a bias or partiality
challenge.

1 *Id.* (internal citations omitted). An example of antagonism that would support an impartiality
2 challenge is a court’s statement in a case involving German-American defendants that, “One must
3 have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans because
4 their hearts are reeking with disloyalty.” *Id.* (internal quotations omitted).
5

6 However, recusal of a judge stemming from their opinion acquired during the course of
7 proceedings is not appropriate:

8 The judge who presides at a trial may, upon completion of the evidence, be
9 exceedingly ill disposed towards the defendant...**But the judge is not thereby**
10 **recusable for bias or prejudice, since his knowledge and the opinion it**
11 **produced were properly and necessarily acquired in the course of the**
12 **proceedings, and are indeed sometimes (as in a bench trial) necessary to**
13 **completion of the judge’s task...If the judge did not form judgments of the**
14 **actors in those court-house dramas called trials, he could never render**
15 **decisions...**Also not subject to deprecatory characterization as “bias” or
16 “prejudice” are opinions held by judges as a result of what they learned in earlier
17 proceedings.

18 *Liteky*, 510 U.S. at 550–51. This is because “[t]he objective appearance of an adverse disposition
19 attributable to information acquired in a prior trial is not...an objective appearance of improper
20 partiality.” *Id.*, n. 2. The U.S. Supreme Court has further explained that expressions which do not
21 establish bias or partiality “are expressions of impatience, dissatisfaction, annoyance, and even
22 anger, that are within the bounds of what imperfect men and women, even after having been
23 confirmed as federal judges, sometimes display.” *Liteky*, 510 U.S. at 555–56.

24 Here, not only do the Public Auditor’s comments fail to show actual bias, but they also fail
25 to show the appearance of improper partiality. While the Public Auditor’s strongly worded
26 decision noted that JMI had committed a “fraud on this tribunal” and that JMI had committed
27 “misconduct” that was “deliberate and egregious”, these determinations stemmed from the Public
28 Auditor’s consideration of evidence and arguments presented during proceedings that were
properly before the Public Auditor. *See* Decision and Order, OPA-PA-21-010 (February 3, 2022)

1 at 6. Without more, no reasonable observer would find that these and other statements referenced
2 by JMI display a deep-seated favoritism or antagonism that would make fair judgment impossible,
3 or go beyond the normal expressions of dissatisfaction or anger which judges, as imperfect men
4 and women, sometimes display. As such, the appearance of impropriety standard is not met, and
5 the Public Auditor should deny JMI's motion for his disqualification.
6

7 **C. JMI had an opportunity to be heard before its prior appeal was dismissed.**

8 Finally, JMI claims throughout its motion that it was not provided a "meaningful
9 opportunity" to respond to the Sunshine Act Request contents submitted by Menzies, which
10 disclosed emails between JMI and the CLB director concerning the origin of the "Findings &
11 Decisions" submitted to the OPA as evidence. *See* Interested Party Aircraft Service International,
12 Inc. DBA Menzies Aviation's Response to Supplemental Authority ("Menzies' Response"), OPA-
13 PA-21-010 (January 24, 2022).
14

15 JMI claims it was "never afforded an opportunity to respond to the Menzies paper," that
16 no hearing was set to discuss sanctions, and that no evidence was taken during an evidentiary
17 hearing or a noticed hearing on that specific issue. *See* JMI Mot. for Appointment of Alternate
18 Hearing Officer ("JMI Mot."), OPA-PA-23-002 (May 19, 2023) at n. 1; *see also* JMI Mot. at 3.
19

20 JMI's claims are entirely dishonest. As the party who introduced the "Findings &
21 Decisions" in the first place, JMI knew that the issue would come up at the hearing on the motion.
22 This is shown by the fact that JMI president Ed Ilaio specifically asked CLB executive director
23 Cecil Orsini to issue the "Findings & Decisions" to help JMI's case at the December 27, 2021
24 hearing:

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1 ----- Original message -----

2 From: "Ed R. Ilao" <ed_ilao@jmiguam.com>

3 Date: 12/13/21 2:59 PM (GMT+10:00)

4 To: Cecil Orsini <cecil.orsini@clb.guam.gov>

5 Subject: Re: JMI response to Menzies' Written Statement (CLB Case No. 2021-09-04)

6 Bro,

7 We will be having a motion hearing before the OPA on Dec 27th. Last day to file
8 documents is on Dec 23rd. Would it be possible for CLB Investigations Section
9 to be able to sign at least the attached sample letter by Dec 22nd? This will really
10 help our case.

11 [ps://mail.google.com/mail/u/0/?ik=c21f4f0d42&view=pt&search=all&permmsgid=msg-f%3A1719802287626560237&simpl=msg-f%3A1719802287626560237](https://mail.google.com/mail/u/0/?ik=c21f4f0d42&view=pt&search=all&permmsgid=msg-f%3A1719802287626560237&simpl=msg-f%3A1719802287626560237) **CLB-002**

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13 See Interested Party Aircraft Service International, Inc. DBA Menzies Aviation's Response to
14 Supplemental Authority ("Menzies' Response"), OPA-PA-21-010 (January 24, 2022).

15 JMI submitted the purported CLB "Findings & Decisions" on December 22, 2021, just
16 prior to the Christmas holiday and the original hearing date of December 27, 2021. That hearing
17 was moved to January 27, 2022 specifically so the parties could have more time to digest the
18 "Findings & Decisions."

19 Menzies used that time to obtain the emails between JMI representative Ed Ilao and CLB
20 executive director Cecil Orsini via Sunshine Reform Act request and submit them on January 24,
21 2022. These emails were no surprise to JMI because they were drafted by its president Ed Ilao.
22 JMI apparently spent that month doing nothing and now claims that it was not given a chance to
23 defend itself.

24
25 When the January 27, 2022 hearing happened, the OPA did in fact give JMI a chance to
26 explain itself. Counsel for JMI did not take advantage of that opportunity and instead told the
27

1 Public Auditor that he was bound by the “Findings & Decisions” despite their obviously fraudulent
2 origin:

3 MR. JOHNSON: It appears that Mr. Ilao drafted the...findings and decisions for
4 the CLB and then emailed that draft to Mr. Orsini and then asked him as a favor to
5 issue a decision, which he did word for word... 6:14–19.

6 ...

7 It’s basically something that was provided to JMI as apparently a favor, I guess, so
8 that it could help sway the Public Auditor’s decision in this motion. 7:12–16.

9 ...

10 MR. RAZZANO: First, just for the record, I’d like to say that obviously, the
11 Sunshine Act request works...all documents that I received with respect to this have
12 been produced. And so there is nothing nefarious that’s going on. In fact, Mr. Ilao
13 made a complaint against Menzies and followed up on that complaint. And there
14 was nothing hidden from any party...I think the characterization of doing a favor
15 for somebody is wrong. I mean, you could look at it any way, but people are allowed
16 to petition the government to make determinations on their behalf. And that’s in
17 fact what went on. 10:12–11:1.

18 ...

19 **I think you have to follow that agency’s decision...The decision is on CLB
20 letterhead. It is signed by the executive director, wasn’t done under duress,
21 wasn’t done with a gun to his head, and courts - - courts regularly and agencies
22 regularly accept things that are drafted by other parties. 13:7–17.**

23 ...

24 MR. JOHNSON: Just briefly. I mean, parties often do file proposed findings of
25 facts and conclusions of law. But that’s usually after a hearing or trial where all
26 parties are allowed to submit proposed findings of fact and conclusions of law. The
27 issue here is that Mr. Ilao used a personal connection in order to get the executive
28 director of the CLB, his bro, to issue a decision, word for word.... 14:18–15:2.

29 *See Defendant Office of Public Accountability’s Submission of Certified Transcripts, CV0095-22*
30 *(Mar. 31, 2023), Transcription of January 27, 2022 Motion Hearing.*

31 As demonstrated above, JMI was obviously given an opportunity to respond and defend its
32 actions at the hearing where it itself made the “Findings & Decisions” an issue. Thus, for JMI to

1 say that it had no “meaningful opportunity” to respond before its appeal was dismissed is entirely
2 and completely dishonest.

3 **CONCLUSION**

4 The Public Auditor need not recuse himself from hearing this matter and there is no need
5 to appoint an alternate hearing officer.

6 The proper standard is not the appearance of impropriety standard advocated by JMI. That
7 standard simply does not apply to hearing officers.

8 The appropriate standard is the actual bias standard, which requires the proponent to
9 substantially demonstrate actual bias. JMI has not shown actual bias in any form. In the absence
10 of such a showing, “[t]ribunals enjoy a presumption that they are not biased.” *Sule*, 2008 Guam
11 20, ¶16 (citing *L.C. and K.C. v. Utah State Bd. of Educ.*, 188 F.Supp.2d 1330, 1338 (D. Utah 2002)).

12 Even if the appearance of impropriety standard was the appropriate standard, JMI has still
13 failed to meet its burden. A judge cannot be rendered biased simply due to his or her reaction to
14 facts presented before the tribunal. *Liteky*, 510 U.S. at 550–51. The mere fact the Public Auditor
15 was shocked by JMI’s actions does not make him biased or create any appearance of impropriety.
16 Anyone would have been shocked by JMI’s actions. For JMI to now claim that the Public Auditor
17 is biased because he reached a conclusion based on what was presented to him in an official
18 proceeding, even an emotional one, is simply absurd and not worth entertaining.

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1 For all the reasons stated above, JMI's Motion for Appointment of Alternate
2 Administrative Hearing Officer or in the Alternative an Order Directing the Superior Court to Hear
3 This Matter should be denied.

4 **BLAIR STERLING JOHNSON & MARTINEZ**
5 A PROFESSIONAL CORPORATION

6 
7 BY: _____

8 **R. MARSIL JOHNSON**
9 *Attorneys for Party in Interest*
10 *Aircraft Service International, Inc.*
11 *dba Menzies Aviation*

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