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Re: OPA-PA-23-002 Decision on Purchasing Agency's Objection to Hearing Officer and Motion to Appoint Alternative Hearing Officer

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Thank you,
 Jerrick Hernandez, Auditor
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**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

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In the Appeal of)
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Johndel International, Inc. dba JMI-Edison,)
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Appellant.)
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_____)

Appeal No: OPA-PA-23-002

**DECISION ON PURCHASING
AGENCY'S OBJECTION TO HEARING
OFFICER AND MOTION TO APPOINT
ALTERNATE HEARING OFFICER**

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1 This is the Hearing Officer’s Decision on Purchasing Agency Guam International Airport
2 Authority’s objection to the undersigned’s appointment and presiding over this procurement
3 appeal. For the reasons set forth below, GIAA’s Objection is overruled, and its Motion is
4 denied.

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6 **The Administrative Adjudication Law provides authority for hearing officers to rule on**
7 **self-disqualification in procurement appeals to the OPA.**

8 GIAA recognizes that there is no express prohibition in the Guam Procurement Law (the
9 “Procurement Law”), 5 GCA § 5001 *et. seq.* or the Procurement Regulations (“Procurement
10 Regs.”), 2 GAR Div. 4. Ch. 12 *et seq.* for hearing officers to disqualify themselves. However,
11 GIAA also argues that there is no express authority in the Procurement Law or the Procurement
12 Regs. the for the undersigned to self-disqualify from an appeal to the Office of Public
13 Accountability. Likely keying on the terms of the undersigned’s appointment as hearing officer,
14 *see* Order Appointing Hearing Officer, Jun. 13, 2023 (“Pursuant to 2 GAR Div. 4 § 12109,
15 attorney JOSEPH B. McDONALD is appointed to act as the hearing officer for all further
16 proceedings with respect to OPA-PA-23-002 and shall have and may exercise any and all
17 relevant powers and authorities conferred on hearing officers, as provided for under the
18 Procurement Law and regulation.”), GIAA seeks to circumscribe the hearing officer’s self-
19 disqualification authority to the Procurement Law and regulation in order to get the Public
20 Auditor himself to decide whether the undersigned is subject to disqualification.
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23 The lack of rules is not the issue in administrative matters that determine a party’s rights,
24 but whether a party’s due process rights are violated. *Carlson v. Perez*, 2007 Guam 6. The
25 Public Auditor has authority to appoint a hearing officer pursuant to the Procurement Law.
26 5 GCA § 5701 (b); *see also* Procurement Regulation 2 GAR Div. 4 § 12109. A hearing officer
27 has the authorities stated in § 12109, including the authority to rule on motions and other
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1 procedural items on pending matters. *Id.* § 12109 (d). While it may be that § 12109 does not
2 expressly provide for self-disqualification, the general provisions of the Administrative
3 Adjudication Law (“AAL”), 5 GCA § 9200 *et seq.* provide procedures for an officer of the
4 territory of Guam, who is authorized by law to adjudicate contested cases, to decide the legal
5 rights, duties or privileges of specific parties after an agency hearing. AAL § 9200; *see also id.*
6 § 9102 (defining officers of the territory as an agency in application of the AAL). Thus, under
7 AAL § 9222, a hearing officer “shall voluntarily disqualify himself and withdraw from any case
8 in which he cannot accord a fair and impartial hearing or consideration.” *Id.* Accordingly, the
9 general procedures of the AAL, including the procedure for disqualification shall be used to
10 determine whether the undersigned must self-disqualify from this appeal. If the undersigned
11 cannot accord a fair and impartial hearing, under Procurement Regs. 2 GAR Div. 4 § 12116, the
12 Public Auditor may order that this appeal be taken to the Superior Court.
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15 **Proceedings prior to this ruling.**

16 JMI filed its Notice of Appeal on April 10, 2023. On May 19, 2023, JMI moved for
17 appointment of alternate administrative hearing officer or, alternatively an order sending this
18 appeal to the Superior Court. Menzies opposed. On June 13, 2023, the Public Auditor, without
19 deciding on JMI’s objection, appointed the undersigned to hear this appeal pursuant to 2 GAR
20 Div. 4 § 12109 and authorized the exercise of all relevant powers and authorities conferred on
21 hearing officers as provided for under the Procurement Law and regulation.
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23 At the hearing held on June 20, 2023, attorney for Appellant Johndel Int’l, Inc. dba JMI-
24 Edison (“JMI”), Josh Walsh, disclosed that his law firm partner, Joseph Razzano, represented
25 Charles H. McDonald II (“Charles”) on a personal matter that was unrelated to this appeal.
26 Charles is the undersigned’s partner at McDonald Law Office (hereinafter, the “McDonald
27 Firm”). Attorney Walsh also stated on the record that he had no knowledge of Charles’ personal
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1 matter but that, it did not have to do with the McDonald Firm. The undersigned stated that he
2 had no personal knowledge of the matter disclosed by attorney Walsh and remarked that,
3 whatever it was, it was likely privileged. GIAA and Interested Party Aircraft Service Int'l, Inc.
4 dba Menzies Aviation ("Menzies") were heard on attorney Walsh's disclosure, and all parties
5 were provided the opportunity to file written objections, after which the objection would be
6 heard at a hearing set for June 28, 2023.
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8 The only party to file a written objection was GIAA. *See* Objection to Hearing Officer
9 and Mot. to Appoint Alt. Hearing Officer, June 23, 2023. At the June 28, 2023 continued
10 motions hearing held to decide the issue of GIAA's objection, JMI stated it had no position on
11 GIAA's objection, and Menzies' attorney, R. Marsil Johnson, confirmed that Menzies did not
12 file objections. GIAA's counsel, attorney William Brennan, presented the Purchasing Agency's
13 arguments on its objection.
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15 **Reasoning and grounds for this ruling.**

16 GIAA's written objection is based on (i) the lack of complete disclosure by the Public
17 Auditor regarding Charles' personal legal matter, and on arguments (ii) that the undersigned
18 lacking express authority do decide his own recusal and (iii) that, the standard for recusal of
19 hearing officers in procurement appeals is not actual bias, but where a hearing officer's
20 impartiality might reasonably be questioned. Objection, 3-4 (citing NY Model Code of Judicial
21 Conduct for State Admin. Law Judges (Apr. 4, 2009)) (requiring that a New York State
22 Administrative Law Judge be disqualified where the judge's impartiality might reasonably be
23 questioned).¹ GIAA rejects the standard announced in *Sule v. Guam Bd. of Dental Examiners*,
24 2008 Guam 20 to decide on a hearing officer's disqualification in a procurement appeal. That
25 case held that a hearing officer in an administrative disciplinary hearing was to be recused where
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28 ¹ New York State Administrative Law Judges

1 there was actual bias. *See id.* ¶ 19. GIAA’s written Objection was not accompanied by an
2 affidavit stating grounds for disqualification, as is required by Procurement Reg. § 12222.

3 The authority for a hearing officer in a procurement appeal to decide his own
4 disqualification was provided for *supra*, leaving whether this hearing officer acting under the
5 authority granted by the Public Auditor must disclose Charles’ privileged client-attorney
6 communications; and, whether the Public Auditor should apply the standard applied by New
7 York’s administrative law judges instead of the standard applied to hearing officers by *Sule*.

8 An attorney’s professional responsibility is to hold attorney-client communications in
9 strictest confidence, which communications are privileged against disclosure, unless waived by
10 the client, or compelled by a court. GIAA concedes that there is no mechanism available in a
11 procurement appeal to compel Charles’ disclosure of privileged communications. The
12 undersigned has no lawful right or privilege to demand disclosure of Charles’ privileged
13 communications in a matter not dealing with the McDonald Firm. Without facts to show other
14 than the existence of an attorney-client relationship in an unrelated matter; while GIAA may
15 demand more and complain that it is forced into a tautology, a complete disclosure of the
16 relevant and available facts has been made.
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19 Even if the OPA was to apply the standard enforced on NY state administrative law
20 judges, GIAA’s position remains untenable. First, it must be noted that, like with Guam’s
21 hearing officer self-disqualification procedure, NY state judges, too, are authorized to self-
22 disqualify. *See Model Code of Judicial Conduct for State Administrative Law Judges Cannon 3*
23 *(E)* (“A state administrative law judge shall disqualify himself or herself in a proceeding...”).
24 Second, the standard of impartiality enforced on NY state administrative law judges appears to
25 include actual personal bias or prejudice concerning a party, among certain other situations:
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1 A state administrative law judge shall disqualify himself or herself in a proceeding
2 in which the judge's impartiality might reasonably be questioned, including but not
3 limited to instances where: (a) (i) the state administrative law judge has a **personal**
4 **bias or prejudice concerning a party**, or (ii) the state administrative law judge
5 has **personal knowledge of disputed evidentiary facts** concerning the proceeding;
6 (b) the state administrative law judge knows that: (i) the state administrative law
7 judge **served as a lawyer in the matter in controversy**, or (ii) a **lawyer with**
8 **whom the state administrative law judge previously practiced law served**
9 **during such association as a lawyer concerning the matter**, or (iii) the state
10 **administrative law judge has been a material witness concerning it**; (c) the state
11 administrative law judge knows that he or she, individually or as a fiduciary, or the
12 judge's spouse, or **a person known by the judge to be within the sixth degree**
13 of relationship to either of them, or the spouse of such a person: (i) **is a party** to the
14 proceeding; (ii) **is an officer, director or trustee** of a party; (iii) **has an economic**
15 **interest in the subject matter in controversy**; (iv) **has any other interest that**
16 **could be substantially affected by the proceeding**; or (v) **is likely to be a**
17 **material witness** in the proceeding; or (d) the state administrative law judge knows
18 that the judge or the judge's spouse, or **a person known by the judge to be within**
19 **the fourth degree** of relationship to either of them, or the spouse of such a person,
20 **is acting as a lawyer in the proceeding**... . *Id.* Cannon 3(E)(1).

21 None of the disqualifying situations is present here.

22 That *Sule* arose from a disciplinary hearing and not a procurement appeal is not sufficient
23 enough of a distinction to depart from that authority. Although it carefully articulated its
24 reasoning as applied to administrative discipline, nothing in *Sule* suggests that our Supreme
25 Court would distinguish on such basis. The *Sule* court simply distinguished judges and justices
26 from administrative law judges, analyzed how federal courts look for actual bias of
27 administrative adjudicators, and agreed that actual bias is the standard to be applied to hearing
28 officers. *Sule* ¶¶ 14-19. Moreover, in the cases cited by the *Sule* court to derive its reasoning,
not all were disciplinary matters. *See id.* ¶ 16-18 (citing *Roberts v. Morton*, 549 F.2d 158, 164
(10th Cir.1976), cert. denied, 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95 (1977) (mining claims);
L.C. and K.C. v. Utah State Bd. of Educ., 188 F.Supp.2d 1330, 1338 (D.Utah 2002) (rights to
child's special education and parents' rights to challenge classifications and placement); *Bunnell*
v. Barnhart, 336 F.3d 1112, 1114 (9th Cir.2003) and *Keith v. Barnhart*, 473 F.3d 782, 788 (7th
Cir.2007) (both cases dealing social security benefits).

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Ruling.

In administrative matters where the rights of parties are to be decided, what is required is due process, whether afforded by formally adopted, specific agency rules, or otherwise generally applicable procedural rules. *Carlson*, 2007 Guam 6 ¶ 30. A complete disclosure of the available facts has been made by the OPA. GIAA put forth no facts that even allow it to speculate on whether disqualification may be had. GIAA’s own authority holds, like does *Sule*, that actual bias is required. GIAA fails to show that the undersigned cannot accord a fair and impartial hearing or consideration. GIAA’s objection, therefore, is overruled, and its motion is denied.

Dated this 30th day of June, 2023 by:



Joseph B. McDonald
Hearing Officer for OPA-PA-23-002



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-23-002 Decision on Purchasing Agency's Objection Hearing Officer and Motion to Appoint Alternative Hearing Officer

Jerrick Hernandez <jhernandez@guamopa.com>

Fri, Jun 30, 2023 at 4:19 PM

To: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, William Brennan <wbrennan@arriolafirm.com>, "R. Marsil Johnson" <rmarsjohnson@bsjmlaw.com>

Cc: Thyrsa Bagana <tbagana@guamopa.com>, GIAA Official <official@guamairport.net>

Hafa Adai,

Please see attached Decision on Purchasing Agency's Objection Hearing Officer and Motion to Appoint Alternative Hearing Officer for OPA-PA-23-002. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

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Best Regards,

Jerrick J.J.G. Hernandez, MA, CFE, CGAP, CICA
Accountability Auditor

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