

Dep't of Environmental Protection v. Giacia

OATH Index No. 211/16, mem. dec. (Nov. 6, 2015)

Agency's motion to recuse ALJ based upon statements made in previous report issued two years ago denied.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Petitioner
- against -
NICHOLAS GIACIA
Respondent

MEMORANDUM DECISION

JOHN B. SPOONER, *Administrative Law Judge*

This case is a disciplinary proceeding brought by petitioner the Department of Environmental Protection against respondent, Nicholas Giacia. The charges allege that respondent threatened a co-worker. Before me is a motion by petitioner to recuse myself based upon bias.

The trial in this case is currently scheduled before me on November 17 and 18, 2015. On October 22, 2015, counsel for petitioner submitted via e-mail a motion to recuse myself in this case. Respondent did not submit any papers on this motion.

Based upon the discussion below, the motion is denied.

ANALYSIS

This recusal motion made by petitioner here is founded upon statements in *Department of Environmental Protection v. Berlyavsky*, OATH Index No 181/14 (Nov. 26, 2013), a report and recommendation issued some two years ago. The motion is virtually identical to recusal motions made in two past cases, *Dep't of Environmental Protection v. Omotoso*, OATH Index No. 1443/14, and *Dep't of Environmental Protection v. Barquet*, OATH Index No 1632/14. In both

of these cases, petitioner's motions were denied due to a failure to establish a basis for recusal or disqualification.

In petitioner's most recent recusal motion, petitioner's counsel contends that statements in *Berlyavsky* demonstrate an "enmity towards the agency." The remarks in *Berlyavsky* which counsel suggests display bias against the agency include a reference to counsel's "animus toward respondent" and to an argument made by respondent that one of respondent's witnesses was threatened with disciplinary action for arriving early at the OATH hearing. Counsel further contends that, in its decision in the *Berlyavsky* case, the Civil Service Commission "acknowledged" a lack of impartiality in commenting upon the OATH penalty recommendation, which gave the issues of animosity toward respondent "greater weight than they deserved."

None of petitioner's assertions as to alleged bias or impartiality require disqualification from this case under the applicable OATH rules. The rules provide that an OATH administrative law judge "shall be disqualified for bias, prejudice, interest, or any other cause for which a judge may be disqualified in accordance with section 14 of the Judiciary Law." 48 RCNY § 1-27(b). None of the remarks quoted from the two-year-old *Berlyavsky* report demonstrate "bias" or "prejudice" against the Department. Most of the statements quoted are contained in a penalty recommendation, weighing the factors relevant to penalty. Penalty discussions in disciplinary cases, of necessity, involve opinions as to an employee's character and the seriousness of the misconduct found to have occurred. The remark that counsel displayed some "animus toward respondent" was based upon statements made during the *Berlyavsky* trial and cited to in the transcript. The observation was to explain the factors considered in arriving at a penalty recommendation and for no other purpose. Again, as I stated in denying recusal in *Omoso* and *Barquet*, the fact that there was agreement with some of the arguments made by respondent's counsel as to penalty is not a basis for finding bias against the Department, any more than sustaining disciplinary charges would be a basis for finding bias against all employees. In general, a judge's presiding over and rendering decisions in prior cases involving one of the parties has not been held to warrant recusal or disqualification. *Jump v. Jump*, 268 A.D.2d 709 (3d Dep't 2000).

Nor was the decision by the Civil Service Commission that it disagreed with the *Berlyavsky* penalty recommendation a basis for establishing impartiality or bias against the Department. To the contrary, in remarking that the fact-findings in the *Berlyavsky* report were “well reasoned and supported by the evidence,” the Commission suggested that it found no fault with the fairness and impartiality of the adjudication.

For all of these reasons, petitioner’s motion for recusal is hereby denied. I look forward to seeing the parties on November 17.

John B. Spooner
Administrative Law Judge

November 6, 2015

APPEARANCES:

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