United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. FEDERAL CONSTRUCTION GROUP, Respondent.	OSHRC DOCKET No. 12-0097

DECISION ON MOTION FOR DISQUALIFICATION AND ORDER REISSUING DECISION

This case is before me on remand from the Occupational Safety and Health Review Commission ("Commission"). The Commission's instructions on remand are for me to consider a motion filed by Federal Construction Group, ("Respondent") for my disqualification under § 2200.68(b) of the Occupational Safety and Health Review Commission's Rules of Procedure ("Commission Rules"). For the reasons that follow, Respondent's motion is DENIED and I hereby reissue my decision in the above-captioned case dated August 12, 2012.

Background

On June 6, 2012, I presided over the first day of a two day hearing in this case.[1] The parties all ate lunch in the same small cafe which was chosen because it was the only one within walking distance of Nexsen Pruet's law office. During lunch, I sat at a table with OSHA Compliance Officer ("CO"), Clarence Moore and the assigned court reporter, David Garcia-Ledford. I engaged in light conversation with Messrs. Moore and Garcia-Ledford during the brief lunch period, in close proximity to the other parties. The conversation was unrelated to the case at bar[2]. All of the parties ate lunch or were seated in the same small cafe including Respondent, his witnesses and his attorney. On June 20, 2012, the hearing of this case resumed and concluded at the North Carolina Central University School of Law in Durham, North Carolina with the consent of the parties. On August 13, 2012, the decision in this case was issued and thereafter docketed on August 28th.

On September 14, 2012, Respondent filed his Petition for Discretionary Review ("Petition"). On October 11, 2012, the Commission remanded the case me for consideration of Respondent's claim under § 2200.68(b) of the Commission Rules. In the Commission's Remand Order, Respondent, now appearing *pro se*, was given 14 days to submit an affidavit in support of his motion for disqualification.[3] On October 22, 2012, Respondent moved for an extension of time in which to file his affidavit(s). I granted an extension until November 27, 2012, giving the Secretary 14 days thereafter to file a response. On November 27th, Respondent filed four (4)

[1]The hearing initially convened at the Bankruptcy Court located at 300 Fayetteville Street in downtown Raleigh, North Carolina. Upon realizing that the courtroom originally reserved was no longer available and the conditions in the new space provided would not be adequate, the undersigned sought to change locations. Counsel for Respondent offered the conference room at his law firm and the parties agreed to the new location.

[2] Affidavits filed in support of the Secretary's Response in Opposition to Respondent's Motion for disqualification note that the conversation topics included sports, the local law school, and the legal job market.

[3] Respondent was represented by counsel from the firm of Nexsen Pruet during the hearing of the underlying case.

affidavits in support of his motion.[4] On December 11th, the Secretary filed her brief in opposition to Respondent's motion along with supporting affidavits.[5] I have included my declaration with this decision.

Discussion

Among other things, Respondent alleged an *ex parte* communication between the OSHA Compliance Officer, Clarence Moore and me concerning the merits of this case. The Administrative Procedure Act ("APA") defines an *ex parte* communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given…" 5 U.S.C. § 551(14). The APA further clarifies the prohibition against *ex parte* communications as follows:

> [N]o interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication **relevant to the merits of the proceeding**.

5 U.S.C. § 557(d)(1)(A) (emphasis added).

Rule 105 of the Commission Rules, titled "Ex parte communication" states in pertinent part:

> (a)…[T]here shall be no ex parte communication **with respect to the merits of any case** not concluded, between any Commissioner, Judge, employee or agent of the Commission who is employed in the decisional process and any of the parties or intervenors, representatives or other interested parties.

29 C.F.R. § 2200.105(a) (emphasis added).

[4] Respondent filed his own affidavit along with those of Ms. Debbie Perillo, Messrs. William Fields and Jerry Peterson.
[5] Along with her brief, the Secretary submitted the affidavits of CO Moore and Industrial Hygienist, David McLemore.

Rule 2200.68 of the Commission Rules, titled "Disqualification of the Judge" states in pertinent part:

> Any party may request the Judge, at any time following his designation and **before the filing of his decision**, to withdraw on ground of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

29 C.F.R. § 2200.68(b) (emphasis added).

This is a case of first impression for the Commission; therefore, I must look to other precedent for guidance. In so doing, I recognize that it is my duty, as the judge against whom the affidavits have been filed, to pass upon the legal sufficiency of the facts alleged in the affidavits and their timeliness. *Berger v. U.S.*, 255 U.S. 22, 33-35 (1921); *U.S. v. Townsend*, 478 F2d 1072, 1073 (3d Cir. 1973); *Simmons v. U.S.*, 302 F.2d 71, 75 (3d Cir. 1962). In passing on the affidavit to recuse on the grounds of bias or prejudice the facts alleged in the affidavit must be accepted as true and I may not question either the truth of the allegations or the good faith of the pleader. *See Berger*, 255 U.S. at 36; *Townsend*, 478 F.2d at 1073. This question cannot be raised, even though I know to a certainty that the allegations of bias and prejudice are false. *Morse v. Lewis*, 54 F.2d 1027, 1031 (4th Cir. 1932); *Mims v. Shapp*, 541 F.2d 415, 417 (3d Cir. 1976). The affidavit, however, is strictly construed against the affiant, for a judge is presumed to be impartial. *U.S. v. Garrison*, 340 F.Supp. 952, 956 (E.D. La. 1972). It has been held that a trial judge has as much obligation not to recuse himself when there is no reason to do so as he does to recuse himself when there is reason. *Smith v. Danyo*, 441 F.Supp.71, (D.C. Pa. 1977), *aff'd.,* 585 F.2d 83 (3d Cir. 1978). The test is whether, assuming the truth of the facts alleged, a reasonable person would conclude that a personal as distinguished from a judicial bias exists. *E.g. Berger*,

255 U.S. at 33-34, *U.S. v. Thompson*, 483 F.2d 527, 528 (3d Cir. 1973); *Townsend*, 478 F.2d at 1074.

At no time during the course of the hearing or before the issuance of the decision in this case was I advised of an issue arising from the lunch discussion with CO Moore and the court reporter, as required for effective disqualification under Commission Rule 68. In fact, the record reflects that on June 20th, at the start of the hearing I asked, "Counsel, just before we start this morning, are there any preliminary matters that we need to take care of from the last time?" Respondent's Attorney, David Garrett responded, "None from Respondent." (Tr. 249). Instead, Respondent, now acting *pro se,* waited until after I issued my decision to voice his concern in an email and in his Petition.

In the instant case, Respondent has alleged that I ate lunch with one of the government's witnesses, CO Moore. Further, Respondent alleges that I had a conversation with CO Moore during lunch.[6] Neither Respondent, nor any of his supporting affiants (Peterson, Fields and Perillo) states that they overheard me discussing the case. Instead, they all assume that I must have been discussing the case because, in their opinion, my decision reflects a bias in favor of the government. First, I concede that I did eat lunch with CO Moore and the court reporter which was not wise. Additionally, the parties, their attorneys and witnesses were all seated at tables nearby at the same time. While it is true that CO Moore and I did engage in discussion during lunch, at no time did I discuss the case with CO Moore or any other witness outside of the hearing. In his affidavit, CO Moore states that I advised him that sitting together for lunch would not be a problem as long as there was no discussion of the case. Moreover, Respondent's allegation that I must have been discussing the case was not a concern at the time of the hearing,

[6] Affiant Jerry Peterson went further to say that he saw the undersigned talking to CO Moore while "walking out of the building." What he does not say is that I followed the parties to the café chosen for lunch because I was not familiar with the area and had no idea of its exact location.

but only came to the fore after he received an unfavorable ruling. However, as noted by Justice Scalia in *Cheney v. U.S. District Court for the District of Columbia*, the decision whether a judge's impartiality can "reasonably be questioned" is to be made in light of the facts as they existed, and not as they were surmised or reported. 541 U.S. 913, 914 (2004).

The APA and the Commission Rules concerning *ex parte* communications are clear in their prohibition against discussions concerning the merits of a case. My discussion with CO Moore during lunch did not rise to the level of a prohibited *ex parte* communication under the APA or the Commission Rules. The time for disqualification under Rule 68 of the Commission Rules passed prior to the rendering of this decision, making Respondent's motion for disqualification untimely, and therefore barred. My decision in this case is based solely on my evaluation of the evidence adduced at trial and not upon any personal bias alleged by Respondent. Finally, Respondent is not without recourse since the Commission's Remand Order made it clear that it may file another Petition, asking the Commission to review this ruling and the underlying Decision and Order. Accordingly, Respondent's Motion for Disqualification is DENIED. I hereby reissue my decision in the underlying case (Docket No. 12-0097) dated August 12, 2012.

SO ORDERED.

Date: December 21, 2012
Washington, D.C.

/s/Keith E. Bell
Keith E. Bell
Judge, OSHRC