Grievance Administrator,

Petitioner,

v

Michael H. Jacobson, P-15409,

Respondent.

Case No 97-70-GA

Decided: October 15, 1997

MEMORANDUM OPINION OF BOARD CHAIRPERSON DENYING MOTION TO DISQUALIFY HEARING PANEL CHAIRPERSON

A hearing was held in this matter on June 4, 1997 before Tri-County Hearing Panel #21 which has been assigned to hear this matter. On August 8, 1997, the Grievance Administrator filed a motion to disqualify the panel Chairperson. Pursuant to MCR 9.115(F)(2), this motion is to be decided by the Board Chairperson under the guidelines of MCR 2.003. Because the motion fails to establish grounds for disqualification, it is denied.

The motion to disqualify panel chairperson Allen Zemmol asserts that during an initial hearing "Chairperson Zemmol exhibited bias against Petitioner's position as well as Petitioner's counsel." The motion also asserts: "Petitioner believes that Chairperson Zemmol cannot be a fair and impartial jurist."

Attached to the motion are the affidavits of three witnesses, the daughter and sons of complainant, who were present at the hearing. These affidavits essentially reflect the views of these witnesses that the chairperson was rude and condescending to counsel for the Administrator and that he conducted "the hearing as if his mind was made up . . . ."

The brief in support of the motion argues that MCR 2.003(B) "has been construed by the courts to require the disqualification of a judge without a showing of actual bias and prejudice, if the facts upon which the disqualification request is based, create a

likelihood of bias and/or an appearance of bias." In a reply brief, the Administrator specifically refers to MCR 2.003(B)(1) and argues that the Chairperson was required to be disqualified under this rule because of the panel's exposure to a "flagrantly improper statement" and the Chairperson's reaction to it.

Pursuant to MCR 2.003(B)(1), a judge is disqualified when he or she "is personally biased or prejudiced for or against a party or attorney." Our Supreme Court has recently held that:

> MCR 2.003(B)(1) requires a showing of actual bias. Absent actual bias or prejudice, a judge will not be disqualified pursuant to this section. [Cain v Dep't of Corrections, 451 Mich 470, 495 (1996). Emphasis in original.]

A party challenging a judge on the basis of bias or prejudice "must overcome a heavy presumption of judicial impartiality." Cain, 451 Mich at 497.

In addition to actual bias, a party seeking disqualification must show that the judge's bias is "'personal' in nature." Cain, 451 Mich at 495. Ordinarily, this means that "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." Cain, 451 Mich at 495-496. In explaining this "extrajudicial source" rule, the Michigan Supreme Court quoted from a United States Supreme Court opinion construing a similiarly-worded federal disqualification statute:

> "First, judicial rulings alone almost never constitute valid basis for a bias or partiality motion. . . . In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. . . . Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep seated favoritism or antagonism that would make fair judgment

> impossible." [Cain, 451 Mich at 496, quoting Liteky v United States, 510 US 540, 555; 114 S Ct 1147, 1157; 127 L Ed 2d 474 (1994).]

Continuing its discussion of the extrajudicial source rule, our Supreme Court provided examples of types of judicial conduct during a proceeding which do not result in disqualification. Remarks "'that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.'" Cain, 451 Mich at 497 n 30, quoting Liteky, supra. Also insufficient to establish bias or partiality are "'expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display.'" Id.

Having carefully reviewed the motion, supporting affidavits, and the record in this matter, I conclude that the motion should be denied for several reasons. First, the affidavits relate primarily subjective impressions of the affiants (e.g., the chairperson was "rude," "took sides," and was "very critical" of and "clearly biased against" counsel). The affidavits are largely conclusory and do not "give fair and adequate support for the conclusion asserted." US v Cohen, 644 F Supp 113, 116 (ED Mich, 1986).

Second, even where minor detail was provided in the affidavits (e.g., the Chairperson "reprimanded" counsel and "cut [counsel] off"), the record does not support these characterizations. Chairperson Zemmol expressed his concern that the panel and the Attorney Grievance Commission were being used as a "collection agency." This was based upon a letter from complainant's counsel outlining the terms of a financial settlement between complainant and respondent, and expressing complainant's desire that these proceedings be discontinued.

The record evidences that there may have been a misunderstanding between counsel for the Administrator and the Chairperson over whether counsel was aware of complainant's position. After that issue was resolved, further colloquy ensued, and counsel for the Administrator conceded that the panel's concerns were legitimate but also asserted that the case involved

more than a monetary dispute. I find no evidence of bias or prejudice with respect to a party, counsel or position asserted.

Adjudicators frequently ask questions, take positions for the sake of understanding an argument, and may even propose hypothetical resolutions to sharpen their grasp of the issues or to ensure that they have all of the facts necessary to render a proper decision. What occurred here was nothing more than the normal give-and-take between counsel and a judge or panel during oral argument. The record falls drastically short of demonstrating that a reasonable person would conclude Chairperson Zemmol was biased or prejudiced. US v Cohen, supra, 644 F Supp at 116.

The panel and its Chairperson are no doubt aware of MCR 9.115(B), which states, in part: "The unwillingness of a complainant to prosecute, or a settlement between the complainant and the respondent, does not itself affect the right of the administrator to proceed."[1] They are also aware that restitution is an important sanction, MCR 9.106(5), which may be ordered in an appropriate case. I am confident that the Chairperson and panel can impartially hear this matter and determine whether a violation of the Michigan Rules of Professional Conduct has occurred, and, if so, the appropriate discipline to be imposed.

Albert L. Holtz, Board Chairperson

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[1] The Administrator argues that the Chairperson should be disqualified because he was exposed to, and influenced by, the letter by complainant's counsel attached to respondent's motion to adjourn. While I agree that the contents of the letter are immaterial at this stage of the proceedings, I disagree with the Administrator's argument that the Chairperson's disqualification is required. The Administrator does not argue that the letter regarding settlement of the underlying dispute is, per se, so prejudicial that any panelist exposed to such information must automatically be disqualified. Indeed, that a complainant has reached an accommodation with a respondent and is thus reluctant to testify at the time of hearing often becomes apparent to hearing panels. The panels, however, are capable of disregarding irrelevant matters and discharging their duty to make findings of fact and conclusions of law regarding the allegations before them. Despite the Administrator's arguments to the contrary, I am not convinced by the Chairperson's comments that he is incapable of distinguishing between complainant's monetary dispute with respondent and the allegations of professional misconduct before him.