

In the Matter of the Petition for Reinstatement of
N.C. DEDAY LARENE, P-16420,
Petitioner.

Case No. 96-286-RP

Decided: March 10, 1997

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

The Grievance Administrator has filed a motion to disqualify hearing panel member James Burdick, a member of Tri-County Hearing Panel #27 which has been assigned to hear the reinstatement petition of N.C. DeDay LaRene. In accordance with MCR 9.115(F)(2), such a motion is to be decided by the Board's chairperson under the guidelines of MCR 2.003. The motion fails to establish sufficient grounds for disqualification and it is therefore denied.

In support of disqualification, the Grievance Administrator cites two cases for the proposition that a judge can be disqualified without the showing of actual bias or prejudice. The first of these, In re Disqualification of 50th District Court Judge (People v Perkins), 193 Mich App 209 (1992) was based upon the ongoing financial relationship between a judge who had an ownership interest in a building and defense counsel whose office was in that building. There, the Court of Appeals noted that defense counsel's payment of property taxes and mortgage payments on the building directly benefited the judge before whom defense counsel was appearing and therefore gave the appearance of impropriety In re Disqualification of 50th District Court Judge, *supra* at p. 14.

By contrast, it is not alleged that there is any ongoing financial or professional relationship between petitioner and panelist Burdick in this case. The petition for reinstatement in this case was filed in December 1996. Panelist Burdick properly filed a written disclosure pursuant to MCR 9.115(F)(2)(a). He disclosed that he contracted with petitioner for some research services in early 1996 but that he had no social relationship with the petitioner and could remain impartial and objective.

The second case cited in support of disqualification, People v Lowenstein, 118 Mich App 775 (1982), also recites that a showing of actual bias may not be necessary where a relationship between a judge and a party creates such a likelihood of bias or appearance of bias that the judge could not properly balance the competing interests of the court and the party. In that case, it was determined that the magistrate could not reasonably maintain a neutral and detached attitude toward a criminal defendant in light of the defendant's threatening telephone call to the magistrate a few days earlier.

The cases cited by the Administrator both predate the Supreme Court's discussion of judicial qualification standards in Cain v Department of Corrections, 470 Mich 470 (1996). In that case, the Court outlined the two means generally available to obtain the disqualification of a judge. First, a party may seek disqualification on the grounds enumerated in MCR 2.003 (he

court rule to be used by the Board chairperson in ruling upon the disqualification of a hearing panelist). The Court emphasized that the party seeking disqualification must overcome a presumption of judicial impartiality and must establish actual bias or prejudice.

Disqualification may also be granted under the theory that the right to a fair and impartial adjudicator is a constitutional right under the Fourteenth Amendment. Cain, supra, citing Crampton v Department of State, 395 Mich 347 (1975). The Court noted, however, that disqualification under a due process theory will generally be available only in extreme cases.

The case at hand presents neither a showing of actual bias or prejudice as required by Cain or a likelihood of bias or prejudice analogous to any of the examples discussed in Crampton.

It should not be inferred from the foregoing that disqualification of a hearing panelist will never be granted based solely upon an appearance of impropriety. The Attorney Discipline Board has traditionally recognized that the unique nature of these proceedings may require disqualification when that is necessary for the Board to fulfill its obligation to do justice and to satisfy the appearance of justice. Grievance Administrator v Joseph W. Moch, ADB 131-88 (ADB 1991). However, as former Board Chairperson Elaine Fieldman noted in a memorandum opinion denying a motion for disqualification in Grievance Administrator v John F. Ogurek, 90-55-GA (ADB 1992):

However, where there is no allegation of actual bias or prejudice and disqualification is sought solely on the basis that bias or the appearance of bias is "likely" or "probable," the moving party must demonstrate more than a mere suspicion or more than a mere possibility of bias. As stated in another matter, the appropriate test for an appearance of bias is the test which has been adopted under the federal rules governing the disqualification of judges, that is, whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal is sought would entertain a significant doubt that justice would be done in the case. Pepsico v McMillan, 764 F2d 458, 460 (1985).

In this case, the sole argument in favor of disqualification is that petitioner's fitness and competence to resume the practice of law are issues to be determined by the panel and that panelist Burdick's action in contracting with petitioner for legal research services during the period of his suspension suggests that the panelist may have already determined the issue of petitioner's fitness to resume the practice of law.

A review of the criteria for reinstatement in MCR 9.123(B)(1)-(7) amply demonstrates that the primary focus of such a proceeding is on the petitioner's "fitness" rather than "competence."

The panelist hired petitioner to do a limited amount of legal research more than one year ago. I am not persuaded that a reasonable observer would necessarily draw the conclusion that

the panelist made any judgment concerning petitioner's understanding of the standards imposed on attorneys, his fitness to represent other persons in matters of trust or confidence or any of the other criteria in MCR 9.123(B).