THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
HAROLD DARGAN,	)	
Employee	)	OEA Matter No. 1601-0091-13R20
	)	
v.	)	
	)	Date of Issuance: March 25, 2021
D.C. FIRE AND EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER ON
MOTION FOR INTERLOCUTORY APPEAL

Harold Dargan ("Employee") worked as a Paramedic with the D.C. Fire and Emergency Medical Services Department ("Agency"). On April 24, 2013[1], Agency issued a final notice of removal. Employee was charged with a "violation of the D.C. Fire and Emergency Medical Services Department Bulletin No. 83, which reads in relevant part: General Policy – All D.C. Fire and EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-IP, or EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification."[2]

On May 13, 2013, Employee filed a Petition for Appeal with the Office of Employee

[1] The final decision notice was misdated March 24, 2013.
[2] *Petition for Appeal,* p. 6-7 (May 13, 2013).

Appeals ("OEA"). Agency filed its Answer to Employee's Petition for Appeal on June 13, 2013. On October 20, 2015, the OEA Administrative Judge ("AJ") issued his Initial Decision. He found that Agency initiated its termination action against Employee within the required time period provided in D.C. Code § 5-1031. According to the AJ, Employee was removed for failing to maintain the required Department of Health ("DOH") certification. The AJ reasoned that while Bulletin No. 83 allowed for three testing opportunities, the total number of tests allotted was not mandatory. He explained that the three testing opportunities was the maximum number of tests that could be taken before an adverse action was required. The AJ opined that after Employee's second failed attempt, Agency was not required, under Bulletin No. 83, to allow him another retest. Consequently, he ruled that Employee's termination should be upheld.[3]

Employee appealed the matter to the Superior Court for the District of Columbia. The Court found that there was substantial evidence in the record to support the AJ's decision that Agency initiated the adverse action in a timely manner. Additionally, the Court held that Employee's due process rights were not violated. Accordingly, it upheld the AJ's decision.[4]

The matter was then appealed to the District of Columbia Court of Appeals. The Court found that there was not substantial evidence in the record to determine that Employee was administered the psychomotor exam on any of the dates specified by OEA. The Court also determined that the AJ focused on the wrong certification. It explained that Bulletin No. 83's National Registry of EMTs ("NREMT") certification policy, issued in 2010, set forth the new procedures for the new obligation adopted in 2009 for all emergency services providers to maintain NREMT certification, in addition to the DOH certification. The Court reasoned that the testing procedures of Bulletin No. 83 applied to the former certification, not the latter. As a

[3] *Initial Decision*, p. 9-13 (October 20, 2015).
[4] *Harold Dargan v. D.C. Office of Employee Appeals*, 2015 CA 008873 P(MPA) (D.C. Super. Ct. February 7, 2017).

result, the Court remanded the matter for OEA to determine which procedures should have been followed to deny Employee's DOH recertification, before terminating him for not having a current DOH certification; whether the procedures were followed in the matter; and whether Employee was provided proper notice of the decision not to recertify him, if he was entitled to such notice. Therefore, it remanded the matter to OEA for further consideration.[5]

After conducting a telephonic status conference, the AJ issued a Post-Conference Order on April 28, 2020. He determined that an evidentiary hearing was warranted to resolve the issues remanded by the D.C. Court of Appeals. The AJ explained that the issues to be addressed during the hearing were: (1) what are the requirements (NREMT, DOH certification, etc.) that Employee must meet in order to be recertified as an EMT I/99; (2) what are the procedures that Agency must follow in recertifying or decertifying Employee as an EMT I/99; (3) did Agency follow all the required procedures (decertification, proper notice, etc.) before terminating Employee; and (4) if so, should Agency's termination be upheld. Additionally, he ordered the parties to submit their list of approved witnesses and documentary evidence to conduct the evidentiary hearing.[6]

On June 29, 2020, the AJ issued an order which outlined the issues to be addressed during the October 13, 2020 virtual evidentiary hearing.[7] However, prior to the scheduled hearing, Employee's Counsel filed a Request to Disqualify the AJ. Counsel explained that he has appeared before Senior Administrative Judge Lim in previous matters. He noted that the subsequent appeals to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals in *Latisha Porter v. D.C. Fire and Emergency Medical Services* and

[5] *Harold Dargan v. D.C. Office of Employee Appeals*, et al., No. 17-CV-253 (D.C. 2019).
[6] *Post Conference Order* (April 28, 2020).
[7] *Hearing Order* (June 29, 2020). The issues outlined in this order were the same as those provided in the April 28, 2020 order. It also included a list of approved witnesses, and the instructions for requesting subpoenas for other witnesses.

Robert Johnson v. D.C. Fire and Emergency Medical Services, resulted in reversals or remands of Judge Lim's decisions. As it related to the current appeal, Employee's Counsel argued that Judge Lim significantly reduced the number of issues to be addressed at the hearing; precluded much of the evidence; and limited many of Employee's witnesses. Specifically, Counsel contended that Judge Lim eliminated consideration of whether Agency complied with the ninety-day rule, as ordered on remand by the District of Columbia Court of Appeals. Employee's Counsel asserted that Judge Lim refused to allow six witnesses that he intended to present. Counsel also objected to Judge Lim's requirement that he provide the witnesses and their email addresses because all, but one, of the witnesses were current or former Agency employees, so Agency was aware of their known locations and email addresses. Counsel concluded by arguing that Judge Lim's failure to render impartial decisions in the past, and his failure to do so in this appeal, represented his desire to uphold his Initial Decision despite the remand, or it represented his personal bias against Counsel.[8]

Subsequently, on September 29, 2020, the parties filed a joint motion to postpone the evidentiary hearing until the disqualification issue was resolved.[9] On October 1, 2020, the AJ issued an order granting the parties' motion to postpone the virtual hearing. Additionally, he ordered Agency to submit its response to Employee's Motion to Disqualify by October 8, 2020.[10]

On October 8, 2020, Agency filed its Opposition to Employee's Request to Disqualify. It asserted that Employee participated in Office of Human Rights ("OHR") proceedings which involved allegations of discrimination and retaliation. Agency explained that these issues were outside of the purview of OEA's jurisdiction and were irrelevant in the present matter. Agency

[8] *Employee's Request to Disqualify* (September 7, 2020). It should be noted that the request was emailed on Saturday, September 5, 2020. However, it was received by OEA on the next business day, September 7, 2020.
[9] *Joint Motion to Continue Evidentiary Hearing* (September 29, 2020).
[10] *Order Postponing Hearing and Setting Deadline* (October 1, 2020).

also contended that Employee erroneously represented that the AJ significantly reduced the number of issues to be addressed during the evidentiary hearing. It explained that during the June 29, 2020 telephonic Status Conference, the AJ identified the same four issues in his April 28, 2020 Post-Conference Order. Moreover, Agency provided that the issue of proper notice included compliance with the ninety-day rule. Therefore, it requested that Employee's motion be denied.[11]

On October 13, 2020, the AJ issued an Order Denying Employee's Motion to Disqualify. He explained that the evidence pertaining to Employee's allegations of discrimination were raised before OHR and were not within OEA's jurisdiction. Additionally, the AJ reasoned that he did not disallow the issue involving the ninety-day rule, as proper notice was included among several issues to be decided. He concluded his order by addressing the *Porter* and *Johnson* decisions raised by Counsel and his claims of bias.[12]

Employee's Counsel filed a Motion for Certification on October 20, 2020. He moved for the AJ to certify his order denying Employee's request that he disqualify himself in the matter, pursuant to OEA Rule 616. He maintains the same arguments made in his Request to Disqualify.[13] Employee filed a Supplement to his Request to Disqualify. He cited to a recent D.C. Court of Appeals decision, *Butler v. Metropolitan Police Department, et al.,* No. 18-CV-1238 (D.C. 2020), and claimed that the Court concluded that the consideration and calculation of the ninety-day rule by Judge Lim was determined without substantial evidence. Employee posited that because of this decision, the AJ will once again improperly construe the ninety-day

[11] *Agency's Opposition to Employee's Request to Disqualify*, p. 1-4 (October 8, 2020).
[12] *Order Denying Employee's Motion to Disqualify* (October 13, 2020).
[13] *Motion for Certification of Senior Administrative Judge's Denial of Employee's Request to Disqualify* (October 20, 2020).

rule without substantial evidence; thus, requiring another set of appeals.[14]

On October 22, 2020, the AJ issued an order certifying this matter to the OEA Board under OEA Rule 616.4.[15] The order provided the Judge's rationale for denying Employee's Counsel's Motion to Disqualify. In accordance with the order, the matter was stayed pending the resolution of the interlocutory appeal of his disqualification before the Board.[16]

Interlocutory Appeals

OEA Rule 616.1 provides that "an interlocutory appeal is an appeal to the Board of a ruling made by an Administrative Judge during the course of a proceeding. The Administrative Judge may permit this appeal if he or she determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate consideration. The Board shall make a decision on the issue and the Administrative Judge shall proceed in accordance with that decision." As a result of the order certifying this matter to the Board, we will consider the issues raised in Employee's Counsel's motion on interlocutory appeal.

Disqualification

Employee's Counsel requested that the AJ disqualify himself as outlined in OEA Rule 620.2.[17] OEA Rule 620.2 provides the following:

> At any time following the assignment of the appeal to an Administrative Judge, and before issuance of an initial decision in the matter under § 631, a party may request the Administrative Judge to disqualify himself or herself on the grounds of personal bias or other disqualification, by serving and filing a motion promptly upon the discovery of the alleged facts, with an affidavit setting forth, in detail, the matters alleged to constitute grounds for disqualification.

In compliance with OEA Rule 620.2, Employee's Counsel filed a request for Judge Lim to

[14] *Supplement to Employee's Request to Disqualify*, p. 1-2 (November 9, 2020).
[15] The Board received notice of this order on February 9, 2021.
[16] *Order Certifying Judge's Denial of Employee's Motion to Disqualify* (October 22, 2020).
[17] *Employee's Request to Disqualify* (September 7, 2020).

disqualify himself on the grounds of personal bias.[18] He also filed a motion setting forth his allegations constituting grounds for disqualification.[19]

The issue of disqualification or recusal of judges has been addressed by the D.C. Court of Appeals. In *In re M.C.*, 8 A.3d 1215 (D.C. 2010), the Court held that the standard for determining whether recusal of a judge is required, is an objective one, where an observer could reasonably doubt the judge's ability to act impartially. The Court reasoned that recusal is required if an objective, disinterested observer, fully informed of the facts underlying the grounds on which recusal was sought, would entertain a significant doubt that justice would be done in the case. Furthermore, the Court in *Gibson v. U.S.*, 792 A.2d 1059 (D.C. 2002), found that there need not be a finding of actual bias or prejudice in order to find a violation; rather, it need only to be concluded that the facts might reasonably cause an objective observer to question the judge's impartiality. Moreover, in *Gillum v. U.S.*, 613 A.2d 366 (D.C. 1992), the Court held that to be legally sufficient, the allegation of bias must include facts that (1) are material and stated with particularity; (2) if true, would convince a reasonable person that bias exists; and (3) show that bias is personal as opposed to judicial in nature (citing *In re Bell*, 373 A.2d 232, 234 (D.C.1977)); see also *Gregory v. United States*, 393 A.2d 132 (D.C.1978). Finally, in *York v. U.S.*, 785 A.2d 651 (D.C. 2001), the Court ruled that because the disqualification of a judge may disrupt and delay the judicial process, affidavits of bias are strictly scrutinized for form, timeliness, and sufficiency."

After reviewing the facts presented on interlocutory appeal, this Board believes that no reasonable observer would question Judge Lim's impartiality in this case thus far. One of Employee's Counsel's claims rests on the assertion of Judge Lim's personal bias based on the

[18] *Id.* at 11.
[19] *Id.* and *Supplement to Employee's Request to Disqualify* (November 9, 2020).

reversal or remand of other decisions he rendered. Employee's Counsel cited to *Porter* to support his claim of personal bias. However, the *Porter* case involved a charge of insubordination, and Judge Lim's ruling was ultimately upheld by the D.C. Court of Appeals in this matter.[20] Thus, this Board does not see how the facts or issues raised in *Porter* are germane to those in the current appeal. Moreover, there is no correlation between Judge Lim's ruling in *Johnson*, which involved attorney's fees, and the current appeal. Although the *Butler* decision involved one of the issues raised in the current case – the ninety-day rule – the facts are substantially different from those raised on appeal here. Consequently, this Board could not conclude that because the *Butler* matter was remanded to Judge Lim, that it would impact his impartiality in the current matter. Thus, it is this Board's belief that Counsel's allegations regarding past remands would fail to convince an observer, reviewing the facts, to doubt that justice would be done in this case. As will be discussed below, this Board similarly concludes that Employee's Counsel's other allegations would also fail to convince an objective person that bias exists.

Reduction of Issues Considered on Remand

Employee's Counsel argued that Judge Lim significantly reduced the number of issues to be addressed at the hearing and precluded much of the evidence and many of Employee's witnesses. Specifically, Counsel contends that Judge Lim eliminated consideration of the ninety-day rule, as ordered on remand.[21] The District of Columbia Court of Appeals remanded the matter for Judge Lim to consider what procedures, if any, should have been followed to deny Employee's DOH recertification before terminating him for not having a current DOH certification, and whether these procedures were followed in Employee's case. The Court

[20] *Latisha Porter v. District of Columbia Office of Employee Appeals and District of Columbia Fire and Emergency Medical Services*, No. 17-CV-1273 (D.C. 2019).
[21] *Employee's Request to Disqualify* (September 7, 2020).

further ordered that "because the answer to these questions could impact whether [Employee] was given proper notice of an adverse action under D.C. Code § 5-1031, i.e., whether [Agency] denied him notice of a decision not to recertify him, if he was entitled to such separate notice, we remand that issue to . . . OEA as well."[22]

Judge Lim's April 28, 2020 and June 29, 2020 orders provide that the following issues would be addressed by the parties on remand:

1. What are all the requirements (National Registry of EMTs ("NREMT"), Department of Health certification, etc.) that Employee must meet in order to be recertified as an EMT I/99?
2. What are the procedures that Agency must follow in recertifying or decertifying Employee as an EMT I/99?
3. Did Agency follow all the required procedures (decertification, proper notice, etc.) before terminating Employee's employment?
4. If so, should Agency's termination of Employee's employment be upheld?

The issues outlined by Judge Lim clearly restate those ordered by the Court of Appeals to consider on remand. In questions number one and two, Judge Lim ordered the parties to outline the requirements and which procedures should have been followed to deny Employee's DOH recertification. In question number three, he ordered the parties to address whether the required procedures were followed. Finally, in questions three and four, he asked the parties to consider whether Employee was given proper notice of an adverse action and if the termination action should be upheld. Thus, Employee's Counsel's argument that Judge Lim significantly reduced the number of issues to be addressed at the hearing lacks merit on its face.

Limiting Witnesses

Employee's Counsel asserts that Judge Lim refused to allow six witnesses that he intended to present. OEA Rule 623.1(d) provides that "the Administrative Judge may convene a prehearing conference to consider whether [they] will order an evidentiary hearing to expedite

[22] *Harold Dargan v. D.C. Office of Employee Appeals*, et al., No. 17-CV-253 (D.C. 2019).

the presentation of evidence, including, but not limited to, *restricting the number of witnesses* (emphasis added)." Additionally, the D.C. Court of Appeals held in *Hurt v. U.S.*, 337 A.2d 215 (D.C. 1975); *Johns v. U.S.,* 434 A.2d 463 (D.C. 1981); and *Howard v. U.S.*, 867 A.2d 967 (D.C. 2005), that the number of witnesses permitted to testify is within the trial court's discretion. Judge Lim did not provide his rationale for limiting certain witnesses in his order denying Employee's motion. However, Agency explained in its Opposition to the Motion to Disqualify, that Employee's Counsel was unable to provide basic information about the six witnesses, such as their positions; the nature of their testimonies; and the relevance of their testimonies to the issues on appeal.[23] Therefore, in accordance with OEA Rule 623.1(d) and the above-mentioned D.C. Court of Appeals' decisions, it was within Judge Lim's authority to limit the number of Employee's witnesses.

Employee's Counsel also objected to Judge Lim's requirement that he provide the witnesses and their email addresses that he intended to call. Counsel argued that all, but one, of the witnesses are current or former Agency employees. Thus, he alleged that Agency had access to their known locations and email addresses.[24]

As it relates to witnesses employed by the government, OEA Rule 627 provides the following:

> 627.2 Each District of Columbia government agency shall make its employees available to furnish sworn statements or affirmation or to appear as witnesses at depositions and hearings when the Administrative Judge requests. When providing such statements or testimony, witnesses shall be on official duty status.
>
> 627.3 Witnesses not employed by the District of Columbia government may be required to appear by subpoena at the cost of the moving party.

On May 26, 2020, Employee and Agency filed a Joint Response to Post-Conference Order. In

[23] *Agency's Opposition to Employee's Request to Disqualify*, p. 3 (October 8, 2020).
[24] *Employee's Request to Disqualify* (September 7, 2020).

that filing, the following people were requested by Employee to be called as witnesses:

1. Employee
2. Anitia Massengale
3. David Miramontes
4. A. Bachelder
5. James Follin
6. Gerald Coles
7. Michael Willis
8. Kimmara Lee
9. Brian Amy, MD
10. Robert W. Austin
11. NREMT designee
12. All witnesses identified by Agency[25]

In his September 11, 2020 filing, Employee provided an email exchange with Agency's Counsel where she provided that she was working to obtain email addresses for Employee's witnesses, Dr. Miramontes, Kenneth Jackson, and Gerald Coles because they were no longer employed by Agency. She also offered email addresses for Edward Mills, James Follin, Dr. Robert Holman, Robert Austin, and Dr. Brian Amy.[26] Thus, despite Employee's Counsel's protests on this issue, the record shows that Agency complied with OEA Rule 627 by providing email addresses for government employee witnesses for whom they had current information. Employee's Counsel was not required to provide this information, as he contends.[27] Accordingly, his argument on this issue fails.

Conclusion

After a thorough review of the allegations of bias raised by Employee's Counsel, this Board finds that the allegations are meritless. Employee's Counsel failed to show facts that are material; he failed to provide facts that would convince a reasonable person that bias exists; and he failed to show personal bias. An observer would not reasonably doubt the judge's ability to act impartially in this matter. Consequently, we uphold Judge Lim's decision not to disqualify himself in this case.

[25] *Joint Response to Post Conference Order* (May 26, 2020).
[26] *Employee's Response to Senior Administrative Judge's Order*, p. 3 (September 11, 2020).
[27] Additionally, the AJ's June 29, 2020 Order included a list of approved witnesses, and the instructions for requesting subpoenas for other witnesses to comply with OEA Rule 627.3.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Motion on Interlocutory Appeal is **DENIED.**

FOR THE BOARD:

_____
Clarence Labor, Jr. Chair

_____
Patricia Hobson Wilson

_____
Jelani Freeman

_____
Peter Rosenstein

_____
Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.