COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
BUREAU OF SPECIAL EDUCATION APPEALS

In Re: Newton School District, Southborough School District & New England Center for Children

BSEA # 1306409 & # 1306414

RULING ON PARENTS' REQUEST FOR RECUSAL

This Ruling addresses the question of whether I should recuse myself in a dispute where the principal issue involves Parents' request for a stay-put order against two school districts and the New England Center for Children.

Parents have requested my recusal on the basis of my disclosure statement regarding Southborough School District's attorney (Matthew MacAvoy). Parents were given until April 23, 2013 to file any argument on this issue. Parents have not filed any argument nor have they asked for an extension of time to do so. I therefore focus on Parents' attorney's letter to me dated March 28, 2013, in which recusal is requested.[1]

In their letter, Parents take the position that my disclosure statement establishes an appearance of partiality or conflict of interest, which appearance is sufficient to require recusal even if as the Hearing Officer, I would, in fact, be impartial.

My disclosure statement provided, in relevant part, as follows:

> From 1990 until July 1999, I was employed by the Massachusetts Department of Mental Health (DMH) as Special Assistant for Human Rights. My responsibilities generally included oversight of the DMH human rights system.
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> During the time of my employment at DMH, Matthew MacAvoy represented psychiatric patients at Taunton State Hospital and was a member of the human rights committee at Westborough State Hospital. I supervised the human rights officers at both of these state hospitals. A number of times, I spoke with Mr. MacAvoy regarding human rights within DMH.

[1] Parents are represented by attorney Katherine Martin. Newton School District (through its attorney Angela Smagula) has filed an opposition to the recusal request, including written argument. Southborough School District (through its attorney Matthew MacAvoy) has explicitly advised me that it takes no position regarding recusal. The New England Center for Children has not filed on this issue.

> Mr. MacAvoy later became a Hearing Officer at the BSEA. While Mr. MacAvoy was a BSEA Hearing Officer, I first applied for a position as Hearing Officer at the BSEA (I believe it was in the fall of 1998). I was not offered this position. In 1999 (I believe it was in the spring), there were two openings for a Hearing Officer position, and I re-applied. I was then offered a position as a Hearing Officer, and began work at the BSEA in July 1999.
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> During the time when I applied for and was being considered for a Hearing Officer position, I spoke to Mr. MacAvoy on several occasions to learn about the positions and what it might be like to work at the BSEA. In addition, during the 1999 application process (after Mr. MacAvoy had left the BSEA), Mr. MacAvoy and I had lunch (at my suggestion) so that I could learn more about the role of Hearing Officer and the BSEA.
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> On one occasion, I asked Mr. MacAvoy to speak to the BSEA on my behalf regarding my application for a Hearing Officer position. This occurred during the time of the interviewing process with respect to my first application (in 1998) when Mr. MacAvoy was a BSEA Hearing Officer. At that time, I asked Mr. MacAvoy if he would be willing to speak with Jackie Belf-Becker (then Acting Director of the BSEA) to explain to her my work at DMH. My recollection is that Mr. MacAvoy responded that he had already given his input to Ms. Belf-Becker regarding me.
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> Since becoming a BSEA Hearing Officer in July 1999, my only substantive discussions with Mr. MacAvoy have been within my role as a Hearing Officer.

When faced with a recusal motion, the decision-maker (whether judge or hearing officer) is required to engage in a two-part analysis of whether there is impermissible bias. The first level of inquiry is for the decision-maker to examine his conscience and emotions, and determine whether his presiding over this matter would be free from prejudice.[2]

I have made this examination by carefully considering Parents' concerns. I have concluded that I will be able to preside over this matter without prejudice to any party and that I therefore should not recuse myself on this basis.

The second part of the recusal analysis requires that I make an objective, fact-based inquiry as to whether there is a reasonable basis for Parents' concerns regarding my

[2] See *Demoulas v. Demoulas Super Markets, Inc*., 428 Mass. 543, 546 n. 6 (1998); *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991); *Lena v. Commonwealth*, 369 Mass. 571, 575 (1976) (when faced with a question of his capacity to rule fairly, the decision-maker must first consult his own emotions and conscience; if he concludes that he does not lack the capacity to act fairly and impartially, the decision-maker must then attempt an objective appraisal of whether this was a proceeding in which his impartiality might reasonably be questioned).

ability to be fair and impartial. The First Circuit Court of Appeals has explained this objective inquiry as follows:

> The statute requires a judge to step down only if the charge against her is supported by a factual foundation and the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality.[3]

More recently, the First Circuit has explained that recusal may be required if there are

> facts that would prompt a reasonable question in the mind of a well-informed person about the judge's capacity for impartiality in the course of the trial and its preliminaries.[4]

A review of Massachusetts standards begins with Article 29 of the Massachusetts Declaration of Rights which establishes the right to judges who are "free, impartial and independent".[5] The Massachusetts Supreme Judicial Court (SJC) has indicated that the protections contained within this constitutional mandate are generally no greater than are provided for pursuant to Massachusetts conflict of interest law, to which I now turn.[6]

SJC Rule 3:09, Canon 3A, section 3(C)(1) requires a judge to recuse himself whenever "his impartiality might reasonably be questioned." Circumstances where a judge's impartiality might reasonably be questioned include instances where the judge "has a personal bias or prejudice concerning a party. . . ."[7] A comparison of these state standards with the above-described federal recusal standards indicates that they are substantially the same. And, as with the federal standard, the state code of conduct requires an "objective appraisal" of whether the decision-maker's impartiality might reasonably be questioned.[8]

These state and federal standards are, essentially, the "appearance" standard that forms the basis of Parents' recusal request. I therefore review case law relevant to this standard.

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[3] *In Re: United States*, 666 F.2d 690, 695 (1st Cir. 1981) (emphasis in original) (internal quotations omitted), quoted with approval in *In re United States*, 158 F.3d 26 (1st Cir. 1998). See also *Cigna Fire Underwriters v. MacDonald & Johnson*, 86 F.3d 1260 (1st Cir. 1996).

[4] *In re Bulger*, 2013 LW 979075 (1st Cir. 2013).

[5] Article 29 provides in part: "It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

[6] See *Varga v. Board of Registration of Chiropractors*, 411 Mass. 302, 306 (1991).

[7] SJC Rule 3:09, Canon 3A, Section 3(C) (1): "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party . . . ."; *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991).

[8] See *Demoulas v. Demoulas Super Markets, Inc*., 428 Mass. 543, 546 n. 6 (1998) and cases cited therein.

In a case involving allegations of bias by an arbitrator, the trial judge found that the arbitrator had nominated the attorney for one of the parties (Coughlan Construction Company) to be general counsel to the Utility Contractors Association, of which the arbitrator was founder, treasurer, president, member of the board of directors, and life member. There were other aspects of the relationship, including the attorney's representation of a company belonging to one of the arbitrator's brothers. The appellate court found that the "trial judge was well justified in treating the arbitrator's association with Coughlan's counsel as a professional relationship in matters unrelated to the arbitration dispute". The appellate court concluded that there was no impermissible bias as a result of the arbitrator's nomination of a party's attorney to be general counsel to the Utility Contractors Association.[9]

Similarly, the SJC found no justification for disqualification of a trial judge as a result of his having written a letter for one of the prosecution's witnesses, recommending that he be admitted to the Massachusetts bar. The letter was written nearly thirty-five years before the trial.[10]

A review of cases more generally reveals that the courts are reluctant to establish any criteria that automatically results in recusal. Even where there may be a significant potential for impermissible bias (either actual or by appearance), the recusal determination typically turns on the facts.[11]

For example, when faced with the question of whether a judge should recuse himself when his son or daughter is employed by one of the parties in the dispute, a careful inquiry of the entire factual context is used to resolve the matter, rather than establishing a per se rule of recusal.[12] The factual analyses in these reported cases have generally concluded with a finding of no recusal.[13]

In a decision dismissing a claim for recusal of the trial judge based on the appearance of impermissible prejudice as a result of the judge's potential gratitude towards one of the parties, the First Circuit put this issue in context as follows:

> Even, however, if one may assume the survival of some residue of gratitude [towards defendant] after such a period [of time], it is beyond contemplation that such gratitude would be of the weight necessary to cause a judge to jettison his impartiality and . . . violate his deepest professional and ethical commitments as a judge.[14]

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[9] *Coughlan Construction Company, Inc. v. Town of Rockport*, 23 Mass. App. Ct. 994, 997 (1987).
[10] *Commonwealth v. Levanthal*, 364 Mass. 718, 724-725 (1974).
[11] See, e.g., *In re United States*, 158 F.3d 26 (1st Cir. 1998) ("Typically, cases implicating section 455(a) are fact-specific, and thus sui generis.")
[12] See, e.g., *Southwestern Bell Telephone, Co. v. FCC*, 153 F.3d 520, 522-523 (8th Cir. 1998).
[13] *Id.* and cases cited therein.
[14] *In Re: United States*, 666 F.2d 690, 696 (1st Cir. 1981).

What can be gleaned from these cases is that an employment recommendation (or reference) or discussions regarding a potential employment position should not, by themselves, result in an automatic or *per se* recusal—rather, the entire factual context should be carefully considered.

My relationship with Mr. MacAvoy has been a professional relationship which has been neither close nor personal. The employment discussions and reference referenced in my disclosure statement were isolated instances of professional courtesy which did not change our overall relationship. And, importantly, the discussions and employment reference occurred approximately fourteen years ago. Since becoming a BSEA Hearing Officer in July 1999, my only substantive discussions or contact with Mr. MacAvoy have been within my role as a Hearing Officer.

I conclude that an objective, knowledgeable member of the public would find that these facts do not provide a reasonable basis for doubting my impartiality.

Accordingly, Parents' request for recusal is DENIED.[15]

By the Hearing Officer,

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William Crane
Date: May 2, 2013

[15] I reached the same conclusion regarding a recusal request involving Mr. MacAvoy in *In Re: Marblehead Public Schools*, BSEA # 02-2828, 8 MSER 84 (3/19/02).