THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ERWIN DIGGS Employee	
v.	OEA Matter No.: 1601-0041-06
DISTRICT OF COLUMBIA PUBLIC SCHOOLS, DEPARTMENT OF TRANSPORTATION Agency	Date of Issuance: July 31, 2007

OPINION AND ORDER
ON
MOTION FOR INTERLOCUTORY APPEAL

Erwin Diggs ("Employee") was a bus driver with the District of Columbia Public Schools, Department of Transportation ("Agency"). Agency removed him from this position effective March 8, 2006 based on the charges of negligent behavior stemming from an alleged speeding incident and theft. In anticipation of being terminated, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 7, 2006. Agency filed its response on May 9, 2006.

This case has not come before us in the usual posture wherein one of the party's has appealed to us by filing a Petition for Review of the Initial Decision. In fact the Initial Decision has not been issued in this appeal. Nevertheless, we are being asked in this early stage of the proceedings to make a ruling on the issue of whether the Administrative Judge assigned to this appeal should be disqualified from continuing on with this case.

The events leading up to this point began when the Administrative Judge convened the prehearing conference. A prehearing conference is for the purpose of, *inter alia*, narrowing the issues that are in dispute. The employee and his or her attorney, if any, as well as a representative from the agency and the agency's attorney are all required to attend. During the May 26, 2006 conference, the Administrative Judge refused to let Keith Pettigrew, an agency director, remain in the courtroom while certain issues were being discussed.[1] At that point Agency's attorney, Brian Hudson, declared that he had no authority to proceed without Mr. Pettigrew being present in the courtroom. Thus the conference ended.

At some point after the prehearing conference, Agency and Employee both submitted their lists identifying potential witnesses. On September 9, 2006, the Administrative Judge issued an Order Convening a Hearing. In that order not only did the Administrative Judge schedule an evidentiary hearing for October 31, 2006, she also listed the names of those persons whom both Agency and Employee had submitted as witnesses. Except for directing Agency to identify the specific nature and relevance of the testimony to be presented by each witness and stating (in a footnote) that one of

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[1] Apparently Agency had already indicated that Mr. Pettigrew was a potential witness. Therefore, the Administrative Judge ordered him to leave the courtroom during the conference.

Agency's witnesses would be tentatively allowed, it is unclear as to whether the mere listing of Agency's witnesses meant that the Administrative Judge had in fact *approved* those persons for testifying at the upcoming evidentiary hearing.[2] Neither party can infer anything from this September 9, 2006 Order.

Thereafter, on October 2, 2006 the Administrative Judge issued an Order Convening a Status Conference. The status conference was held on October 13, 2006. Even though there is no order detailing what took place during the status conference, it appears the discussion was heated for it ended abruptly with the Administrative Judge making a statement which Agency interpreted to mean that she had already determined to rule in favor of Employee.

On October 19, 2006 the Administrative Judge issued an Order to postpone the evidentiary hearing. Then on November 1, 2006 the Administrative Judge issued an Order in which she rescheduled the hearing for November 28, 2006.

Before the hearing actually convened on November 28, 2006, Agency filed a Motion for Disqualification of Administrative Judge accompanied by an affidavit. Agency contended therein that the Administrative Judge was biased against it and that she had demonstrated such alleged bias in the following manner: (a) by refusing to accept the Transportation Administrator's authority to appear before the Office and defend against Employee's claims; (b) by barring Mr. Pettigrew from the proceedings; (c) by not allowing Mr. Pettigrew and another individual to testify at the evidentiary hearing; (d) by approving as witnesses certain individuals submitted by Employee even though Employee

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[2] Employee was also directed to identify the specific nature and relevance of the testimony to be presented by each of his witnesses.

failed to give justification for those witnesses; (e) by engaging in *ex parte* communication with Agency's General Counsel; and (f) by declaring that she would rule in Employee's favor despite not having held an evidentiary hearing.

On February 28, 2007 the Administrative Judge issued an Order Denying Motion To Disqualify Administrative Judge. The Administrative Judge addressed each point raised by Agency in its motion and found that "[u]pon examination of the affidavit, this Judge finds that the grounds set forth do not overcome the presumption of honesty and integrity that accompanies administrative adjudicators, and therefore, are not sufficient to warrant her withdrawal."[3] She concluded by stating that the parties can be assured "that a thorough and fair adjudication will follow."[4]

On March 12, 2007 Agency followed the aforementioned order with a Motion For Interlocutory Appeal To The Board Of The "Order Denying Motion To Disqualify Administrative Judge." It too was accompanied by an affidavit that outlined the same points referenced in its November 28, 2006 Motion to Disqualify. Agency's motion requests that we issue a ruling disqualifying the Administrative Judge. On March 15, 2007 the Administrative Judge issued an Order Granting Motion For Interlocutory Appeal To The Board.

We begin our analysis by giving a brief explanation of what an interlocutory appeal is. An interlocutory appeal is an appeal that is taken before there has been a final ruling on a case. Some interlocutory appeals bear upon the merits of a case while others

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[3] *Order Denying Motion To Disqualify Administrative Judge* at 8.
[4] *Id.*

involve collateral issues that are not determinate of the final outcome. According to OEA Rule 617 *et seq.* the following rules apply to interlocutory appeals:

> 617.1 An interlocutory appeal is an appeal to the Board of a ruling made by an Administrative Judge during the course of a proceeding. . . .The Board shall make a decision on the issue and the Administrative Judge shall proceed in accordance with that decision.
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> 617.2 A party seeking review by interlocutory appeal must file a motion for certification within five (5) business days of service of the Administrative Judge's determination. The motion shall include arguments in support of both the certification and the determination to be made by the Board.
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> 617.3 The Administrative Judge shall grant or deny a motion for certification. If certification is granted, the record shall be referred to the Board.
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> 617.4 At the discretion of the Administrative Judge, the proceeding may be stayed during the time an interlocutory appeal is pending. The Board may stay a proceeding during the time an interlocutory appeal is pending.

We do not believe that any of Agency's claims pertaining to bias are the proper subject of an interlocutory appeal at this stage in the proceedings. According to rule 617.1, the Administrative Judge must have made a ruling on the issues in dispute before the matter can be considered ripe for our consideration. The Administrative Judge has not issued a ruling with respect to any of the issues which Agency claims demonstrate judicial bias. Because these issues are not currently subject to our review through the interlocutory appeal process, we must deny Agency's motion for interlocutory appeal.

Even though Agency's claims are not ripe for us to consider pursuant to the interlocutory appeal process, we nevertheless believe it is appropriate at this stage of the proceedings to offer guidance to the Administrative Judge and the parties on the issue of judicial bias. In the case of *York v. United States*, 785 A.2d 651, 655 (D.C. 2001), the District of Columbia Court of Appeals recognized that "[p]ublic confidence in a fair and impartial judiciary is essential. . ." The Court went on to state that "[i]n order to preserve the integrity of the judiciary, and to ensure that justice is carried out in each individual case, judges must adhere to high standards of conduct. . . .Thus even if there is no bias in fact, an appearance of bias or prejudice requires recusal if it is sufficient to raise a question in the mind of 'the average citizen' about a judge's impartiality."[5] However, a judge has an obligation *not* to recuse himself when it is not required.[6] With this in mind the Court reasoned that affidavits of bias must be strictly scrutinized.

We believe the Court's admonition in *York* is instructive to the case at bar. In its affidavit, Agency states that the Administrative Judge has refused to recognize the Transportation Administrator's authority to appear before this Office. We see nothing in the record to support such a claim. Agency claims next that the Administrative Judge displayed bias by barring Mr. Pettigrew from the proceedings. It appears that Agency has designated the Transportation Administrator as the agency representative. In view of this fact it is the Transportation Administrator, not Mr. Pettigrew, who should be, and is entitled to be, present at all of the proceedings in this appeal. Furthermore, if in fact Agency plans to call Mr. Pettigrew as a witness, we believe it is entirely appropriate for

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[5] *Id.*

[6] *Kreuzer v. George Washington Univ.*, 896 A.2d 238, 249-50 (D.C. 2006).

the Administrative Judge to bar him from the preliminary proceedings. With respect to Agency's next claim of bias, that the Administrative Judge would not allow Mr. Pettigrew and another individual to testify, it is unclear on the face of the September 9, 2006 Order whether the Administrative Judge had actually approved all of the individuals Agency submitted as potential witnesses. However it is clear that the Administrative Judge directed both Agency and Employee to submit a statement identifying the specific nature and relevance of the testimony to be presented by all of their witnesses. We do not find this directive to be unreasonable. Therefore, once Agency has complied with this directive, we see no reason why the Administrative Judge would not approve Mr. Pettigrew and the other individual for testifying at a subsequent evidentiary hearing. This same reasoning also applies to Employee's witnesses. Agency also claims that the Administrative Judge displayed bias by engaging in *ex parte* communications with Agency's General Counsel. In the February 28, 2007 Order the Administrative Judge explains that the only communication she had with Agency's General Counsel was for the purpose of ensuring that an agency representative would be present at the October 13, 2006 Status Conference. The Administrative Judge counters this claim by stating that she never spoke with the Transportation Administrator who is the person that removed Employee.

Perhaps most troubling of all is Agency's last claim that the Administrative Judge displayed bias by declaring that she would rule in Employee's favor despite not having held an evidentiary hearing. As we have already noted, there is no order or transcript that we can rely upon to ascertain what exactly was said during the October 13, 2006 Status Conference. So while we do not know the exact words exchanged between the

Administrative Judge and Agency, we do know that Agency interpreted the Administrative Judge's comment to mean that she was prepared to find in Employee's favor even in the absence of an evidentiary hearing.

If, at that stage in the proceedings, the Administrative Judge had been genuinely inclined to rule in favor of Employee, we believe she would have done so. The fact that she did not issue such a ruling is indicative to us of the fact that either Agency misinterpreted what may have been said by the Administrative Judge or that the Administrative Judge perhaps spoke out of frustration. As the Administrative Judge has stated, Agency's attorneys have been combative and have engaged in obstructive behavior almost from the beginning of this appeal. Nonetheless, whatever the Administrative Judge may have said, she assured the parties in the February 28, 2007 Order that she would be thorough and fair in her adjudication of this matter. We are satisfied that the Administrative Judge assigned to this appeal can and will render a fair and impartial decision. Echoing what the Court stated in *York*, this Administrative Judge has the obligation to not recuse herself when it is not required.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Motion for Interlocutory Appeal is **DENIED**.

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Keith E. Washington

Barbara D. Morgan

Richard F. Johns