BEFORE THE PUBLIC EMPLOYEE RELATIONS BOARD
STATE OF KANSAS

KANSAS ASSOCIATION OF PUBLIC EMPLOYEES (KAPE), Petitioner, vs. DEPARTMENT OF ADMINISTRATION, Technical Unit, Respondent.	Case No. 75-CAE-11-1994
KANSAS ASSOCIATION OF PUBLIC EMPLOYEES (KAPE), Petitioner, vs. DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, Respondent.	Case No. 75-CAE-13-1994

RULING ON MOTION TO DISQUALIFY PRESIDING OFFICER

Disqualification - Who Determines

On January 3, 1994, the Department of Administration and the Department of Social and Rehabilitation Services ("Department") filed an objection to the Public Employee Relations Board's ("PERB's") appointment of Monty Bertelli to serve as the presiding officer in the above-captioned prohibited practice complaints, and a motion to disqualify him pursuant to K.S.A. 77-514. In its pleading, the Department states:

> *"Respondents respectfully request the Board to grant this motion and withdraw Mr. Bertelli's appointment as*

Presiding Officer and appoint an impartial Presiding Officer to hear and determine the above captioned cases."

A party may seek disqualification of a presiding officer who is not impartial. This is codified in K.S.A. 77-514:

> *"b. Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest.*
> *"c. Any party may petition for disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later."*

As the Department points out in its motion, *"no case law appears to interpret this statute,"* and correctly concludes that the judicial disqualification rule can be used for guidance in this case. The underlying principle for disqualification of judges is that no judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. 48A C.J.S., Judges, § 98, p. 707. In the absence of actual bias or prejudice, a judge has the right and duty to hear a case to its conclusion, and should not use the test for disqualification to avoid sitting on a difficult or controversial case. 48A C.J.S., Judges, § 108, p. 731. As concluded by the court in Federal Trade Comm. v. Cement Institute, 333 U.S. 683 (1947) an administrative agency cannot possibly be under stronger compulsions in respect to disqualification than a court. *See also* 1 Am.Jur.2d., Administrative Law, §63, p. 859. Therefore, the common-law rule of

disqualification applicable to judges extends to every tribunal exercising judicial or quasi-judicial functions, *See* 39 A.L.R. 1470; 34 A.L.R.2d. 539. Consequently, an administrative officer exercising judicial or quasi-judicial power is disqualified to sit in a proceeding in which he has prejudged the case, or in which he has a personal or pecuniary interest, where he is related to an interested person, or where he is biased or prejudiced or labors under a personal ill-will toward a party. 1 Am.Jur.2d., Administrative Law, §64, p. 861.

In order that a judge may be disqualified, there must exist a ground authorized by law to disqualify him. 48A C.J.S., Judges, § 107, p. 726. K.S.A. 20-311d(c) sets forth the grounds which may be alleged for disqualifying a judge in Kansas. The pertinent grounds here are:

> *". . . (2) The judge is otherwise interested in the action.*
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> * * * * *
>
> *"(5) The party or the party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice or interest of the judge such party cannot obtain a fair and impartial trial or fair and impartial enforcement of post judgement remedies. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interests exists."*

Under K.S.A. 77-514, the filing of a motion for recusal does not automatically effect ouster of the presiding officer. The legal sufficiency of facts alleged, as distinguished from

conclusory assertions must be passed upon. *See* U.S. v. Nehus, 368 F.Supp. 435, 437 (WD Pa., 1973). The Department, by its motion, would infer that the determination of sufficiency is to be made by the PERB, However, a review of the Kansas Administrative Procedures Act, K.S.A. 770-501 et seq. reveals the Department's motion is misdirected. K.S.A. 77-514(d) provides:

> *"d. A person whose disqualification is requested shall determine whetherto grant the petition stating facts and reasons for the determination."*

Such a motion is properly addressed to and ruled upon by the presiding officer himself, and not the PERB. This provision of K.S.A. 77-514(d) appears to conform to the practice adhered to by the Kansas courts prior to adoption of K.S.A. 20-311(d). As stated in Flannery v. Flannery, 203 Kan. 239, 241 (1969):

> *"However, the fact of disqualification, that is, the existence of bias or prejudice or of conflict of interest on the part of a judicial officer is a matter which must be established. In this state a judge may not be disqualified by the simple expedient of a certificate filed by a litigant alleging bias, prejudice or conflicting interest, although such a rule exists in some jurisdictions by legislative enactment. Ordinarily, it may be said, absent circumstances which of themselves would tend to cast doubt as to the fairness of whatever judgement the judge might pronounce, the question of bias or prejudice on the part of a court rests largely within the conscience of the court itself."*

See also Hulme v. Woleslagel, 208 Kan. 385, 389 (1972)[the challenged judge is permitted to determine his own state of mind]. This is also the practice presently employed in the federal court

system. *See* 28 U.S.C.A. §144; *See also* U.S. v. Nehus, 368 F.Supp. 435, 437 (WD Pa., 1973); Bumpus v. Uniroyal Tire Co., 385 F.Supp. 711, 713 (ED Pa. 1974); U.S. v. Hall, 424 F.Supp. 508, 535 (1975).

Standard To Be Applied

K.S.A. 20-311d(b) requires a party seeking to disqualify a judge to file an affidavit setting forth facts legally sufficient to establish the judge is not impartial. No such provision is found in K.S.A. 77-514, and, in fact, the statute is silent on the form the disqualification petition must take. Some guidance, however, is to be found in K.A.R. 84-2-2(g) which states:

> *"Upon appointment by the board of a presiding officer to perform any of its functions, the parties must file within three days any objection to the person appointed. The objection must contain a statement setting forth the reasons for the party's position."* (Emphasis added).

While K.S.A. 77-514 does not require an affidavit, it would appear the standards to be applied in determining whether an affidavit is legally sufficient to warrant disqualification of a judge can reasonably be applied to determine whether the petition filed pursuant to K.S.A. 77-514(b) sets forth reasons legally sufficient to disqualify a presiding officer.

Interest in the Matter

The Department alleges *"Mr. Bertelli announced at the pre-hearing conference in the current case that he was glad to get a chance to redefine his rulings on some of the issues in the "Savings Clause" case [KAPE v. State of Kansas, Dept. of Administration, Case No. 75-CAE-12/13-1991] in more detail than he did when he initially ruled upon them. Further, he indicated a desire at the pre-hearing conference in the current case to rule on Mr. Dickhoff's request for attorney fees."* The apparent ground for disqualification here is one of interest in the matter.

It is a well-established principle that no judge should sit in any case in which he is directly or indirectly interested. 46 Am.Jur.2d, Judges, §97, p. 161. The principle applies to administrative agents or other arbiters of questions of law or fact not holding judicial office. Re Heirich, 140 N.E.2d 825 (Ill. 1957). The interest that disqualifies a judge must be a present and personal one. 46 Am.Jur.2d, Judges, §100, p. 164; Re Heirich, 140 N.E.2d 825 (Ill. 1957). An interest to disqualify an administrative officer acting in a judicial capacity may be small, but it must be an interest direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial or merely speculative or theoretical. Andover v. Oxford County, 29 A. 982 (Me. 1894); 1 Am.Jur.2d., Administrative Law, §64, p. 861.

Here, the presiding officer is not a member of the employee bargaining unit whose terms and conditions of employment may be affected by any resulting decision. Neither is he a member of the Kansas Association of Public Employees who is representing those employees in the meet and confer process. There are no facts in the Department's motion to support a conclusion that the presiding officer has any personal or pecuniary interests in the pending memorandum of agreement, not does the Department appear to so argue.

As evidenced by the above citation from the Department's motion, the basis for the Department seeking to disqualify the presiding officer on the grounds of interest appears to lay in the presiding officer's interest in the legal issues raised by the prohibited practice compliant. Ordinarily, the interest required of a judge in order that he may be disqualified, must be in the subject matter of the litigation, and not merely in the legal question involved. A mere interest in an abstract question that may be involved therein, in which the judge may have some interest, is not sufficient. 48A C.J.S., Judges, § 120, p. 777. A judge is not disqualified because he is interested in the question to be decided where he has no direct and immediate interest in the judgment to be pronounced. State ex rel. v. Sage Stores Co., 157 Kan. 622, 626 (1943). Additionally, pride of opinion in maintaining the propriety of his previous action will not

disqualify a judge. 46 Am.Jur.2d, Judges, §102, p. 165; Re Bishop, 250 F. 145 (CA9 1917); Bersch v. Beto, 254 F.Supp. 257 (DC Tex. 1963).

Bias and Prejudice

— *Three-Prong Test*

The test for disqualification on the grounds of bias or prejudice requires a showing of bias or prejudice in fact rather than merely an appearance of impartiality or the mere apprehension of it. *See* U.S. v. Conforte, 457 F.Supp. 641, 657 (1978); In re Hale's Estate, 2 NW2d 775, 778 (1942). In order to satisfy the burden required to establish bias, the moving party must meet a threefold test. U.S. v. Thomas, 299 F.Supp. 494, 499 (ED Mo. 1968).

> First, the affidavit must state facts with sufficient particularity. Only the facts contained therein are relevant, not conclusions.
>
> Second, the facts must be such as to convince a reasonable man that a bias or prejudice exists.
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> Third, in addition to establishing that a particular prejudice or bias is harbored by a judge is of such a nature that it has, or may have, closed his mind to justice, the factual allegations must also show that this bias is personal, as opposed to judicial in nature.

The general rule followed throughout the United States is that the words *"bias"* and *"prejudice"* as used in connection with the disqualification of a judge, refer to the mental attitude or disposition of the judge toward a party to the litigation and not

to any views that he might entertain regarding the subject matter involved. State v. Foy, 227 Kan. 405, 411 (1980). Bias and prejudice mean a hostile feeling or spirit of ill will against one of the litigants, or undue friendship favoritism toward one. State ex rel. v. Sage Stores Co., 157 Kan. 622, 625 (1943). As stated in State v. Foy, 227 Kan. 405, 411 (1980), *"Bias and prejudice requires antagonism and animosity toward the party or his counsel or favoritism towards the adverse party or his counsel."*

"Bias" as applied to a judge is defined as a mental predilection or prejudice toward a party to the litigation; a leaning of the mind; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. Pacific & Southwest Annual Conference of the United Methodist Church v. Superior Court, 147 Cal.Rptr. 44 (1978). *"Prejudice"* such as provides cause for disqualification, is a condition in the mind that imports the formation of a fixed anticipatory judgement as distinguished from opinions which yield to evidence. People v. Robinson, 310 N.E.2d 652 (Ill. 1974); 48A C.J.S., Judges, § 109, p. 732.

Bias or prejudice must be of a substantial nature, and of a character calculated to prevent or impede a judge's impartiality and sway his judgement. State v. Cole, 136 Kan. 381 (1932). Where bias and prejudice are not of such a character, the judge is not disqualified and may deny a reclusal motion. 48A C.J.S., Judges, §

109, p. 732; State v. Foy, 227 Kan. 405 (1980); Leverenz v. Leverenz, 183 Kan. 79 (1958); and Walker v. Meschke, 178 Kan. 149 (1939).

First Prong - Particularity of Facts Alleged

Bias or prejudice on the part of a judge will not be presumed. U.S. v. Menk, 406 F.2d 124 (CA.Ind. 1969). So, it has been held that actual bias or prejudice must be shown. State v. Solem, 220 Kan. 741 (1976); 48A C.J.S., Judges, § 109, p. 732. In fact, the law presumes that a judge is unbiased and unprejudiced in the matters over which he presides, 48A C.J.S., Judges, § 108, p. 731; U.S. v. Hall, 424 F.Supp 508 (1976); Taylor v. U.S., 429 U.S. 919 (1976); 48A C.J.S., Judges, § 98, p. 708-09, and the facts presented to support disqualification must be strong enough to overcome the presumption in favor of trial judge's impartiality. 48A C.J.S., Judges, § 140, p. 830; In re Evans, 411 A.2d 984 (D.C. 1980).

Since a judge is presumed to be impartial, the information contained in the motion is strictly construed against the moving party. There is, therefore, a substantial burden upon the moving party, 46 Am.Jur.2d, Judges, §220, p. 242-43; Molinaro v. Watkins-Johnson CEI Division, 359 F.Supp. 474, 746 (CD Md. 1973), to sufficiently demonstrate by more than a mere prima facie showing, but not beyond a reasonable doubt, that the judge's personal bias

or prejudice against the party is of such a nature and intensity that it would render the judge unable to give the party a fair trial. 48A C.J.S., Judges, § 150, p. 851 and § 140, p. 834.

It is generally held that a moving party seeking disqualification for bias or prejudice must specifically state the objective or definitive facts supporting the challenge to disqualification of the judge, and must identify and carefully delineate time, place, persons, occasions, and circumstances supporting the belief of bias or prejudice against the party or in favor of the opponent. 48A C.J.S., Judges, § 141, p. 836; *See* State v. Logan, 236 Kan. 79, 85 (1984); U.S. v. Partin, 312 F.Supp. 1355, 1359 (ED Pa. 1970); U.S. v. Haldeman, 559 F.2d 31 (DC App. 1977)[Allegations were insufficient to trigger disqualification where they completely lacked specificity and definiteness as to time, place, persons and circumstances, and provided no basis for finding of bias or prejudice but could accurately be characterized as opinion]. Where the basis for disqualification is an extrajudicial statement of the judge, the substance of the statement must be included. Hodgson v. Liquor Salesmen's Union, 444 F.2d 1344 (CA.NY 1971).

It is the actual existence of prejudice on the part of a judge, not the mere apprehension of it by a party which disqualifies. In re Hale's Estate, 2 N.W.2d 775 (Ia. 1942). A statement that contains nothing but conclusions and sets forth no

facts constituting a ground for disqualification may be ignored. 46 Am.Jur.2d, Judges, §210, p. 234-35; Shakin v. Bd. of Med. Examiners, 62 Cal.Rptr. 274, 286 (1967); State v. Chappell, 344 So.2d 925 (Fla. 1977)[Bare allegations of prejudice should not suffice to require a judge to recluse himself]; Benedict v. Seiberling, 17 F.2d 831 (DC Ohio 1927)[Document must state the facts and reasons for the belief that the personal bias or prejudice exists]; Re Sawyer, 41 Hawaii 270 (1956)[An allegation that the judge *"has a bent of mind against"* a party and *"a personal bias and prejudice towards"* that party, *"which makes it impossible for him to be impartial and to give assurance of impartiality in his proceeding"* is insufficient]; Berger v. U.S., 255 U.S. 22 (1920)[The reason and facts for the belief the litigant entertains must give fair support to the charge of a bent mind that may prevent or impede impartiality of judgement]; Shakin v. Bd. of Medical Examiners, 62 Cal.Rpr. 274 (1967)[A notice of disqualification that declares that the court has "a natural bias or prejudice against the constitutional rights of an individual" shows so little basis for claiming bias or prejudice against the moving party as to justify a conclusion that the charge of disqualification is sham and frivolous].

The fact that one party is discontent with the judge assigned to try litigation, or would prefer some other judge, is not in itself ground for judge to disqualify himself. McLaughlin v. Venore

Transp. Co., 244 F.Supp. 802 (D.C.Mass. 1965); U.S. v. Nehas, 368 F.Supp. 435 (D.C. Penn. 1973). Neither are litigants entitled to have a judge disqualify himself merely because they fear an adverse decision. U.S. v. Cowden, 545 F.2d 257 (CA1 1976). While a party is not required to face a judge where there is a reasonable question of impartiality, it is not entitled to a judge of its choice. U.S. v. Hall, 424 F.Supp. 508, 535 (1975).

a. Favoritism

The Department first contends the presiding officer has demonstrated bias or prejudice by showing favoritism toward the Kansas Association of Public Employees. The motion seeks to establish the favoritism by alleging *"Mr. Bertelli admitted openly in the pre-hearing conference in the current case that he asks Jerry Powell and Paul Dickhoff when questions arise as to what the Board has previously done or what Mr. Powell and Mr. Dickhoff think on an issue."*

Those familiar with the operations of the Public Employee Relations Board are aware that no digest of prior Board orders exists. There is nothing written the presiding officer can consult to discern what issues have been addressed by the PERB, or how the PERB has ruled on those issues. It is essential that similar issues be decided consistently, or that an explanation for the

deviation be provided, if the presiding officer is to avoid a charge of arbitrariness.

The only resource of prior Board orders, policies and past procedures readily available to the presiding officer is its past Executive Directors; Mr. Powell and Mr. Dickhoff. There is nothing unreasonable in the presiding officer availing himself to that source of information, provided neither is a party to the action for which the information is sought. It could be argued that not making use of this resource is unreasonable.

The mere fact that the presiding officer may speak with individuals whose occupation brings them into contact with the PERB, or may discuss matters which are before the PERB for consideration, without more, will not be sufficient to warrant disqualification. *See* Re Georgia Paneling Supply, Inc., 581 F.2d 520 (CA5 1978)[Occupance of ex parte conference between bankruptcy trustee and claimant's attorney does not, by itself, demonstrate extrajudicial bias of prejudice requiring judge to recuse self]. As concluded by the court in Bumpus v. Uniroyal Tire Co., 385 F.Supp. 711 (ED Pa. 1974):

> *"It must be said that I, like every other judge, claim personal friendship with many officials and people in the area. There would be very few cases upon which a judge would be qualified to sit if this were ground for reclusion."*

Here there are no facts alleged by the Department that Mr. Bertelli asked Mr. Dickhoff any questions concerning previous PERB orders on

issues raised in the instant cases, or sought his opinion concerning the merits or how the cases should be decided. Bias or prejudice of a judge must be based on more than mere conclusory allegations, and subjective conclusions or opinions that bias or the appearance of impropriety may exist. Bumpus v. Uniroyal Tire Co., 385 F.Supp. 711 (D.C.Penn. 1974).

The motion does state, *"This behavior precludes the possibility of an impartial hearing when Mr. Dickhoff is a party to the proceeding and is the one who has couched the prohibited practice complaint."* There is no direct statement of fact that Mr. Dickhoff did so discuss these cases with Mr. Bertelli, or any facts delineating the *"time, place, persons, occasions and circumstances"* establishing bias or prejudice. Any connection between past conversations with Mr. Dickhoff about prior Board action must be inferred.

An allegation of bias or prejudice may not be premised on inference, speculation, or conjecture, or subjective belief or feelings, and ordinarily, where the motion contains allegations based on opinion, hearsay or rumor, it is insufficient. Hodgson v. Liquor Salesmen's Union, 444 F.2d 1344 (CA.NY 1971); 48A C.J.S., Judges, § 142, p. 837. Similarly, for purposes of determining whether disqualification is warranted, legal arguments cannot provide the prima facie basis required. Bumpus v. Uniroyal Tire Co., 385 F.Supp. 711 (D.C.Penn. 1974).

The Department also seeks to establish bias and prejudice by alleging *"Mr. Bertelli has shown his favoritism and preference to Mr. Dickhoff in conversations which occur ex parte and in front of Respondents."* The Department, however, leaves one to speculate as to the content of those *"conversations."* Again, there are no facts delineating the *"time, place, persons, occasions and circumstances"* supporting the allegation. Additionally, as explained above, where the basis for disqualification is an extrajudicial statement, the substance of the statement must be included. No such statement appears in the Department's motion. This allegation is, at best, merely conclusory, and therefore not legally sufficient to warrant disqualification.

b. Prior orders

The Department's motion next points to the presiding officer's Initial Order in KAPE v. State of Kansas, Dept. of Administration, Case No. 75-CAE-12/13-1991, ("Savings Clause"), as an example of Mr. Bertelli's *"lack of impartiality."* Specifically, the motion alleges *"Mr. Bertelli found contrary to the agreed upon facts and ordered ratification of terms in a Memorandum of Agreement yet to be finalized by the parties" and that he "also found the plain meaning of the statute to be 'legislative dicta.'"*

Ordinarily, rulings against a litigant are not a basis for disqualification of a judge on the grounds of bias or prejudice. 48A C.J.S., Judges, § 111, p. 745. The mere fact that a judge has ruled adversely to a party in the past does not mandate finding that he is not impartial so as to require disqualification. Crider v. Keohane, 484 F.Supp. 13 (WD OK 1979); Barnes v. United States, 241 F.2d 252 (CA9 1957); 46 Am.Jur.2d, Judges, §167, p. 199; State ex rel. Miller v. Richardson, 229 Kan. 238 (1981)[Recitation of adverse rulings made during prior proceedings not sufficient to require disqualification of judge.]; U.S. v. I.B.M. Corp., 475 F.Supp. 1372 (DCNY 1979)[Fact that the defendant lost a majority of its objections and motions indicated not bias of the judge, but rather lack of merit to the objections and motions]. This general principle has been codified in K.S.A. 20-311d(d) sets forth:

> *"any affidavit filed pursuant to this section, the recital of previous rulings or decisions by the judge on legal issues . . . shall not be deemed legally sufficient for any belief that bias or prejudice exists."*

A preconceived opinion as to the law or a misconception of it is not enough to disqualify a judge. Neither will an erroneous opinion of the law constitute sufficient evidence of bias or prejudiçe on the part of the judge to require disqualification. 46 Am.Jur.2d, Judges, §169, p. 201. There can be no disqualification of a judge for bias to pass on questions of law alone. Calhound v. Superior Court, 331 P.2d 648 (Cal 1958).

A holding of a trial judge is not evidence of his disqualification to try the case, on the ground of prejudice, where the appellate court reaches the same conclusions on the merits. Piuser v. Sioux City, 262 NW 551 (Ia 1977); 46 Am.Jur.2d, Judges, §221, p. 243. In the "Savings Clause" case, the Department sought review of the initial order which it now cites as evidence of bias and prejudice. The PERB rejected the Department's argument and upheld the presiding officer's Initial Order. That initial order became the Final Order of the Board. It should be noted that in the "Savings Clause" case the Department did not cite bias and prejudice of the presiding officer as a basis for review by the PERB or by the district court.

c. Predetermination of issues

The final allegation concerns comments made by Mr. Bertelli *"during Mr. Leitnaker's testimony in AFSCME v. D.O.C. that indicate a clear predetermination on the issues."* The examination of Mr. Lietnaker by Mr. Bertelli was undertaken pursuant to K.A.R. 84-2-2(f)(1) which provides:

> *"Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the presiding officer shall have the power to call and examine witnesses, and to introduce into the record documentary and other evidence."*

That examination covers approximately 38 pages of the transcript. The Department's motion fails to identify which comments or questions by Mr. Bertelli during Mr. Lietnaker's testimony it considered established *"a clear pre-determination of the issues,"* and therefore lacks the specificity required for disqualification.

Assuming, arguendo, that the Department considers the entire examination of Mr. Lietnaker as evidencing a pre-determination of the issues, the motion is still not legally sufficient. Bias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case. *See* 46 Am.Jur.2d, Judges, §168, p. 200. Disqualification of a judge is not required simply because the fact that the judge had definite views concerning the law of a particular case, or from the fact that the judge had strong feelings about a particular class of persons. Blank v. Sullivan & Cromwell, 418 F.Supp. 1 (DC NY 1975). An administrative agency may have an underlying philosophy in approaching a specific case. When performing a quasi-judicial function, agency personnel are assumed to be individuals of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. This assumption is not disturbed by proof that a judge both held and expressed strong views on a matter that had come before him previously. U.S. v. Morgan, 313 U.S. 409 (1940). 1 Am.Jur.2d., Administrative Law, §65, p. 862.

The mere formation of an opinion and the expression of that opinion has been held not to disqualify an officer or agency from passing upon the merits of a particular controversy. Federal Trade Comm. v. Cement Institute, 333 U.S. 633 (1947)[The Federal Trade Commission is not disqualified by bias to issue to issue a cease and desist order against a combination of manufacturers to maintain a multiple basing point-pricing system because all its members have, as a result of an ex parte investigation, formed an opinion which it expressed prior to the hearing. The court concluded that ex parte investigation did not necessarily close the minds of the members to evidence to be adduced on hearing.]; 1 Am.Jur.2d., Administrative Law, §65, p. 862. The fact that a judge may have an opinion as to the merits of the case does not make him biased or prejudice. Mere opinion which can be removed by evidence is insufficient to disqualify a judge. Judicial views in prior litigation involving similar issues will not disqualify. *See* Denis v. Perfect Parts, Inc., 142 F.Supp. 259 (DC Mass. 1956)[A case alleging patent infringement may be assigned to a judge who has previously upheld the patent's validity and found it infringed, although it is not unreasonable for a second defendant to feel his chances of success lessened because of the circumstances]. The question is not whether the trial judge believes the accused is guilty, but whether the trial judge can give him a fair trial. State v. Hendrix, 188 Kan. 558 (1961).

The KAPE v. D.O.C. case marked the third time that the issues raised in that case had been ruled upon by the presiding officer. The law and tests to be applied to the evidence had been consistently stated in the prior two cases, i.e. KAPE v. State of Kansas, Dept. of Administration, Case No. 75-CAE-10/11-1991, and KAPE v. State of Kansas, Adjutant General's Office, Case No. 75-CAE-9-1990. It should have come as no surprise to the parties or witnesses that the presiding officer's line of questioning would be fashioned in a manner to elicit evidence upon which the law and tests could be applied. A review of the initial order reveals that the testimony received from Mr. Lietnaker through Mr. Bertelli's questions was specifically used and cited.

Neither will the manner in which the presiding officer examined Mr. Lietnaker support disqualification. A judge is not disqualified because he vigorously examines a party or witness from the bench. Blizard v. Frechette, 601 F.2d 1217 (CA1 1979); 48A C.J.S., Judges, § 111, p. 742-43; Nateman v. Greenbaum, 582 So.2d 643 (Fla. 1991)[A trial judge did not have to be disqualified form hearing a case where the wife alleged that he had an improper tone and demeanor and had relied on personal experiences to challenge the wife's testimony, because a judge's disbelief in a witness's testimony is not a basis for disqualifications.]; U.S. v. International Business Machines, 475 F.Supp. 1372 (SD NY 1979)[Allegations that judge interrupted testimony of defendant's

witnesses numerous times and asked numerous questions, and was guilty of hostile and insulting comments and gestures were legally insufficient to support claim of bias since questioning of witnesses by judge is practice permitted by statute.]; U.S. v. International Business Machines, 475 F.Supp. 1372 (SD NY 1979)[Judge's aggressive questioning is not ground for disqualification, and defendant made no showing that court's treatment stemmed from extrajudicial source rather than duty to protect record]. Likewise, the mere expressions showing impatience or irritation on the part of a judge are not grounds for disqualification. 48A C.J.S., Judges, § 118, p. 772.

Critical statements and comments of a judge directed against a moving party, or his counsel or witnesses, in the course of proceedings, have been held insufficient to establish disqualifying personal bias or prejudice on the judge's part, whether discreet or indiscreet, U.S. v. Valenti, 120 F.Supp. 80 (DC N.J. 1954), even though such remarks may have been intemperate, objectionable, or otherwise inappropriate. Smith v. Danyo, 585 F.2d 83 (CA Pa. 1978); Re International Business Machines Corp, 618 F.2d 923 (CA2 1980)[Judge's questions of witnesses, interruption of testimony, and insistence on clarification may be prompted by struggle to determine facts and not necessarily personal prejudice]; Sperry Rand Corp. v. Pentronix, Inc., 403 F.Supp. 367 (DC Pa. 1975)[Allegations pointing only to the judge's comments without any

showing that the judge's statements were founded on attitude of extrajudicial origin, were insufficient to disqualify judge]; An allegation of bias or prejudice may not be grounded on a charge of bias that is judicial in nature; rather, the basis asserted must be rooted in extrajudicial sources]; U.S. v. IBM Corp, 475 F.Supp. 1372 (DCNY 1979)[Allegations of prejudice which were based on judge's alleged hostile treatment of defense witnesses and which were not accompanied by a showing that court's treatment of witnesses stemmed from an extrajudicial source rather than from its duty to protect the record, were legally insufficient to support claim of bias]. *See also* 48A C.J.S., Judges, § 143, p. 838.

Neither does any inference of the presiding officer's attitude toward Mr. Lietnaker at any point in the examination justify reclusal. A simple negative opinion about a defendant does not automatically constitute *"personal bias or prejudice"* requiring disqualification. Where not of extra-judicial origin but arose, rather, out of numerous judicial proceedings before the judge.

> *"It cannot reasonably be argued that such opinions, formed by the judge on the basis of facts learned in prior proceedings [over a 15 year period] required disqualification.. Such a rule would mandate that a defendant be entitled to a different judge each time he is tried. . . . Clearly the law does not require such a result.* U.S. v. Conforte, 457 F.Supp. 641, 658 (1978).

See also Molinaro v. Watkins-Johnson CEI Division, 359 F.Supp. 474 (D.C. Mo. 1973)[Where adverse attitude is created by what is

presented during course of trial, disqualification of judge for bias or prejudice is not appropriate in as much as it could lead to crippling of the courts]; U.S. v. Boffa, 513 F.Supp. 505 (DC Del. 1981)[Judge who has presided over previous case involving alleged illegal strike by union of which defendant in the instant case was president and in which judge found that defendant's story was not credible, was not required to recuse himself where there was no showing of bias, prejudice or lack of partiality which was extra-judicial in nature; U.S. v. Mirkin, 649 F.2d 78 (CA1 1981)[Although judge must often make findings about defendant's credibility in pretrial suppression hearing, this without more will not serve to disqualify judge].

Clearly, the Department's motion does not state facts supporting the disqualification of Mr. Bertelli with sufficient particularity to meet the requirements of the first prong of the three-prong test. Accordingly, the Department has not satisfied its burden to establish bias and prejudice.

Second Prong - Reasonable Man Standard

The second prong of the test to establish bias and prejudice is that the allegations stated in the reclusal motion must rest upon a factual basis. The test is not the subjective belief of movant but whether facts have been presented that, assuming their truth, would lead a reasonable person reasonably to infer that bias

or prejudice existed. *See* U.S. v. Corr, 434 F.Supp. 408 (DC NY 1977)[Reclusal was not justified where petitioner simply asserted his belief that court *"no longer possesses a dispassionate view of the facts"*]; *See also* 48A C.J.S., Judges, § 140, p. 732-33 [Such alleged facts and reasons, if true, must fairly support the allegation that bias or prejudice or a bent of mind may prevent a fair decision on the merits, and must be such that a sane and reasonable mind might fairly infer bias or prejudice on the part of the judge]; Parrish v. Bd. of Commissioners, 524 F.2d 98 (CA5 1975)[Moving party is required to show evidence that *"would convince reasonable man that bias exists"*]; U.S. v. DeLuna, 763 F.2d 897 (CA8 1985)[Disqualification is appropriate only if facts provide what objective, knowledgeable member of public would find to be reasonable basis for doubting judge's impartiality].

As the court concluded in State v. Griffen, 241 Kan. 68, 72 (1987), the standard to be applied to a charge of lack of impartiality is:

> *"whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even, necessarily in the mind of the litigant filing the motion, but rather in the mind of a reasonable person with knowledge of all the circumstances."*

Reviewing the Department's Motion, while it may contain conclusions, inferences, opinions and general statements of where facts may be found, it cannot be said that it contains facts of

sufficient particularity to overcome the presumption of impartiality and thereby convince a reasonable man that Mr. Bertelli has shown bias or prejudice toward the Department. Accordingly, the second prong of the three-prong test has not been satisfied.

Third Prong - Bias must be "Personal"

Personal Bias

The disqualifying bias or prejudice must be two-fold: 1) personal, or directed against a party; and 2) extrajudicial. U.S. v. Carignan, 600 F.2d 762 (CA2 1979). *"Personal bias"* is to be distinguished from *"judicial bias."* The distinction is between a judicial determination derived from evidence and lengthy proceedings before the court, as opposed to a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have their origins in sources *"beyond four corners of courtroom."*; The former is a *"judicial bias,"* while the later is a *"personal bias."* In re Evans, 411 A.2d 984 (D.C. 1980).

"Personal bias" is characterized by an attitude of extra-judicial origin, and is clearly the prejudice guarded against. It is the significant word in K.S.A. 20-311d(c)(5). *See* U.S. v. Valenti, 129 F.Supp. 80 (DC NJ 1954)[It is not the mere possession of definite views regarding the law or the conduct of a party, or

even a prejudgment of the matters in controversy, that results in disqualification of a trial judge for bias and prejudice; rather it is an attitude of personal enmity toward the party seeking to disqualify or in favor of the adverse party to the detriment of the former]. *See also* 46 Am.Jur.2d, Judges, §166, p. 197.

A judge may not be disqualified for *"judicial bias,"* and judicial knowledge properly acquired is not sufficient basis for disqualification. *See* U.S. v. IBM Corp, 475 F.Supp. 1372 (DCNY 1979); Molinaro v. Watkins-Johnson CEI Division, 359 F.Supp. 474, (CD Md. 1973); Hawaii-Pacific Venture Capital Corp. v. Rathbard, 437 F.Supp. 230 (DC Hawaii 19); Board of Ed. v. Pisa, 389 NYS2d 938 (1976); 48A C.J.S., Judges, § 117, p. 770; Grider v. Boston Co., 773 SW2d 338 (Tex. 1989)[Plaintiff's motion for reclusal properly failed where it contained no allegations of personal bias from an extrajudicial source but contended only that the trial judge exhibited an antagonistic attitude toward them and that his rulings were consistently unfair]. Ordinarily, a trial judge is not required to recluse himself when the alleged bias arises from a source within the *"four corners of the courtroom."* In re Evans, 411 A.2d 984 (D.C. 1980). The *"four corners of the courtroom"* test is really an alternative formulation of the rule that bias must be personal rather than judicial before recluse will be required.

Extrajudicial

Mere prior knowledge by judge of facts concerning a party is not in itself sufficient to require disqualification, and facts learned by judge in his judicial capacity cannot be basis for disqualification. U.S. v. Patrick, 541 F.2d 381 (CA7 1976). The motion must ordinarily demonstrate personal bias or prejudice stemming from an extrajudicial source and opinions formed during the course of judicial proceedings on the basis of the evidence presented and the conduct observed by the judge, are not the *"personal bias or prejudice"* required to disqualify. King v. U.S., 434 F.Supp. 1141 (DC NY 1977). So, the bias or prejudice alleged must have its basis in other than what the judge learned from his participation in either the pending case or a prior case, and merely showing that the judge has made adverse rulings, actions or statements during the course of the litigation, or in some other case, is insufficient. See Oswald v. State, 221 Kan. 625 (1977); 48A C.J.S., Judges, § 143, p. 838; King v. U.S., 434 F.Supp. 1141 (DCNY 1977)[Opinions formed during the course of judicial proceedings on the basis of evidence presented and conduct observed by the judge are not the personal bias or prejudice required for disqualification]. Out-of-court comments reflecting an opinion developed through participation in a prior case did not require disqualification. In re Corrugated Container Antitrust Litigation,

614 F.2d 958 (CA Tex. 1980) *See also* Perez v. Boston Housing Authority, 400 N.E.2d 1231 (Mass. 1980)[That the judge in course of proceedings formed a negative impression of parties litigant, who were public officials, and of certain board employees, based on his appraisal of their performance, was not ground for assertion of disqualifying bias]. A simple negative opinion about a defendant does not automatically constitute *"personal bias or prejudice"* requiring disqualification of a judge. U.S. v. Conforte, 457 F.Supp. 641 (DC Nev. 1978). The unfavorable opinion of a witness or a party which a hearing officer may entertain as a result of evidence received in a prior or connected hearing involving that individual is not *"bias"* in the invidious sense but is, in effect, a judicially determined finding which may properly influence such officer in a subsequent proceedings. *See* MacKay v. McAlexander, 268 F.2d 35 (CA Or. 1978). It has also been held that a judge's statements or comments with respect to the credibility of a party are not grounds for disqualification where they are based on the evidence produced, or otherwise are derived from what the judge learned from his participation in the case. 48A C.J.S., Judges, § 118, p. 773.

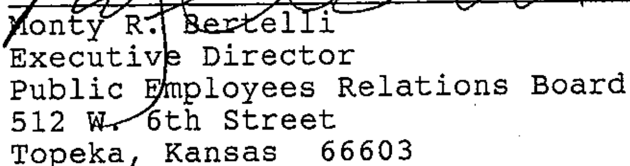
Applying this standard to the Department's motion, it is clear that personal bias has not been sufficiently shown. With regard to the challenged remarks, any bias that might be found can only be called judicial in nature rather than personal. In fact, the

affiant does not recite any facts showing an extra-judicial basis for the bias charged, nor can one even be inferred from the facts that are alleged. Further the allegation, especially considering its total lack of particularity, is not one that could convince a reasonable man that such bias exists, that it is extrajudicial in nature, or that it is of such a degree as to close the Court's mind to justice. *See* Molinaro v. Watkins-Johnson CEI Division, 359 F.Supp. 474, 746 (CD Md. 1973).

Conclusion

Considering the Department's motion to disqualify the presiding officer it must be concluded that it is factually insufficient on its face to require disqualification in this case. This decision is guided by the sound principle that it is as much the presiding officer's obligation not to recuse himself when there is no occasion to do so, as there is an obligation to recuse when the facts so warrant. *See* U.S. v. Ming, 466 F.2d 1000 (CA 7, 1972). For the reasons stated above, it is ordered that the motion for disqualification be, and the same hereby is, denied

Dated this 16th day of February, 1994.



Monty R. Bertelli
Executive Director
Public Employees Relations Board
512 W. 6th Street
Topeka, Kansas 66603

REVIEW

Generally, matters concerning disqualification of judges are not directly appealable but are reviewable on the appeal from the final judgment. See, 4 Am.Jur.2d, Appeal and Error, § 88. Rulings on the legal sufficiency of facts in a motion to recuse a presiding officer are considered interlocutory in nature, and are reviewable on appeal of any initial order along with other alleged errors. See U.S. v. Nehus, 368 F.Supp. 435, 437 (WD Pa., 1973). The decision of the trial judge will not be disturbed by the reviewing court unless it constitutes an abuse of discretion or is clearly erroneous. 48A C.J.S., Judges, § 154, p. 859. Additionally, where the appellate court tries the case de novo, it has been held that any error in granting a change in judges is immaterial, and will not be considered on appeal, 46 Am.Jur.2d, Judges, §222, p. 244.

CERTIFICATE OF SERVICE

I, Sharon Tunstall, Office Specialist for Employment Standards and Labor Relations, of the Kansas Department of Human Resources, hereby certify that on the 16th day of February, 1994, a true and correct copy of the above and foregoing Order was deposited in the U.S. mail, first class, postage prepaid, addressed to:

Petitioner: Scott A. Stone
Kansas Association of Public Employees
1300 SW Topeka Boulevard
Topeka, Kansas 66612.

Respondents: Linda J. Fund
Department of Administration
Room 107, Landon Building
900 Jackson
Topeka, Kansas 66612

Linda Jane Kelly
Social & Rehabilitation Services
Docking State Office Building, 6th Floor
915 Harrison
Topeka, Kansas 66612

Sharon Tunstall