

**BEFORE THE  
MERIT SYSTEM PROTECTION BOARD  
FOR  
MONTGOMERY COUNTY, MARYLAND**

**IN THE MATTER OF**

**[REDACTED],**

**APPELLANT,**

**AND**

**MONTGOMERY COUNTY  
GOVERNMENT,**

**EMPLOYER**

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**CASE No. 18-19**

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**ORDER DENYING MOTION FOR DISQUALIFICATION**

Having reviewed and considered Appellant’s Motion for Disqualification of Hearing Examiner and the opposition thereto, the Merit System Protection Board (MSPB or Board) hereby denies that motion for the reasons stated herein.<sup>1</sup>

On February 1, 2018, the Board consolidated MSPB Case Nos. 16-09, 16-11, 16-12, 17-02, 17-04, 17-08, and 17-23 into this case, MSPB Case No. 18-19. In the February 1, 2018, order, and pursuant to Montgomery County Code, § 33-12(c) and Montgomery County Personnel Regulations, § 35-2(b), the Board also ordered that MSPB Case No. 18-19 be referred to the Montgomery County Office of Zoning and Administrative Hearings for a Hearing Examiner to conduct an evidentiary hearing and rule on motions. The order further required the Hearing Examiner to provide the Board with a report and recommendation that included proposed findings of fact and conclusions of law, and a proposed decision. The Board’s order explicitly specified that the Hearing Examiner’s findings and recommendations would be subject to written exceptions by the parties and oral argument to the Board prior to the Board reaching a final decision.

Appellant’s motion asserts that the Hearing Examiner and the Office of Zoning and Administrative Hearings (OZAH) have a conflict of interest due to the “command influence” of the Chief Administrative Officer (CAO). Appellant further argues that it would be futile and inappropriate for the matter to be remanded to the Hearing Examiner because the grounds for

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<sup>1</sup> Board Chair Angela Franco did not participate in this decision.

recusal are clear and significant, and because of OZAH's failure to disclose the alleged conflict of interest. Finally, Appellant contends that a remand would be inappropriate because the Hearing Examiner and OZAH have prejudged the motion.

In the Board's view, alleged bias by a Hearing Examiner without final decision making authority is an issue that must be exhausted. *Cf. Public Service Commission v. Wilson*, 389 Md. 27 (2005); *Board of Dental Examiners v. Fisher*, 123 Md. App. 322, cert. denied, 352 Md. 335 (1998). Moreover, in May the Board rejected an interlocutory appeal filed by the Appellant. The Board found that the Hearing Examiner's orders were not subject to interlocutory appeal because they do not finally determine rights and liabilities, have immediate legal consequences or result in irreparable harm. *See Order Dismissing Interlocutory Appeal*, MSPB Case No. 18-19 (May 16, 2018).

In an apparent attempt to sidestep the Board's recent decision concerning interlocutory appeals, Appellant makes the curious argument that the Motion for Disqualification is not actually interlocutory because a motion for recusal was never presented to the Hearing Examiner:

This is not an interlocutory appeal of an order of Hearing Examiner . . . because, as shown below, [the Hearing Examiner] has not yet ruled on any motion relating to her recusal because there is no motion before her. Had a motion been made and had she ruled, an appeal of that order would have been interlocutory. Instead, this Motion is being appropriately directed first to the Board, given OZAH's prejudice and bias, and its refusal to disqualify itself is inconsistent with the provisions of the Maryland Code of Judicial Conduct.

Motion for Disqualification, p. 1, n. 2. Appellant may not avoid her obligation to exhaust her administrative remedies by this stratagem. A request for recusal must first be addressed to the decision maker who is being accused of bias. *See Miller v. Kirkpatrick*, 377 Md. 335, 358 (2003); *Conwell Law LLC v. Tung*, 221 Md. App. 481, 516-17 (2015). Although for this reason alone Appellant's motion should be denied, in the interests of judicial economy, and to avoid further unnecessary delay, the Board will also address the merits of Appellant's motion.

We begin by noting that it is a longstanding and bedrock principle of law that a trial judge is presumed to be impartial, and that a party asserting bias has a heavy burden of proof to overcome that presumption. *Attorney Grievance Comm'n v. Blum*, 373 Md. 275, 297 (2003); *Jefferson-El v. State*, 330 Md. 99, 107 (1993); *Karanikas v. Cartwright*, 209 Md.App. 571, 579 (2013). *See* 3 W. Blackstone, *Commentaries on the Laws of England* 361 (1st ed. 1769) ("the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea"). Similarly, as administrative decision makers the Hearing Examiner and Director of OZAH are entitled to a strong presumption of impartiality, honesty, and integrity. *See Withrow v. Larkin*, 421 U.S. 35 (1975); *Maryland Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 24 (2011); *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397, 410 (1999).

We have carefully reviewed Appellant's motion and discern no basis to find that the Hearing Examiner or the Director of OZAH have a bias against Appellant, or that they are unable to conduct the hearing fairly and objectively.

Regarding the alleged impropriety of the Office of the County Attorney (OCA) providing counsel to the Hearing Examiner or the Director of OZAH, both have expressly stated that they have not sought counsel from the OCA. Appellant is thus contesting the *possibility* of such consultation. It is quite possible that the situation may never come to pass. We refuse to engage in speculation or to conclude that the mere possibility that the Hearing Examiner may someday consult with OCA is a basis for her disqualification.

Moreover, as we have previously found, such consultation with OCA by administrative decision makers would not necessarily be improper. MSPB Case No. 17-23 (May 8, 2017). As we discussed in that decision, in *Consumer Protection Division v. Morgan*, 387 Md. 125, 193–94 (2005), the Maryland Court of Appeals expressly rejected an argument that the combination of prosecutorial and adjudicatory functions in the Office of the Attorney General, on its face, necessarily “makes the adjudicatory process farcical” and violates due process. If the Hearing Examiner ever decides that it would be beneficial to consult with an attorney in the OCA Appellant will be free to present facts and arguments to the Hearing Examiner explaining why she believes that an actual conflict exists regarding the particular attorney who may have been appointed to act as OZAH's counsel.

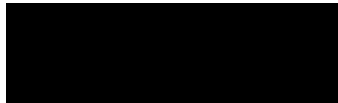
Appellant's allegations that the CAO and County Executive exercise indirect “command influence” on the Hearing Examiner and OZAH, because they have authority to propose the budget and to refer cases to OZAH, are speculative and baseless. The CAO, who reports directly to the County Executive, is only charged with supervision of “departments, offices, and agencies of the Executive Branch.” Montgomery County Charter, § 211. OZAH, however, is a unit of the Legislative Branch and does not report to the CAO and County Executive. It is the County Council that has ultimate say over the OZAH budget. This lack of command and control by the County Executive and CAO is a critical distinction from the situation addressed in *Mayer v. Montgomery County*, 143 Md. App. 261 (2002). Unlike in *Mayer*, the Hearing Examiner is not a subordinate of the County Executive or CAO.

The Board declines to assume that the Hearing Examiner will fail to perform her job with independence and integrity, or unthinkingly follow any advice provided by an attorney acting as her counsel. *Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 24 (2011). Appellant has not demonstrated that the Hearing Examiner has any bias, that is, a predisposition for or against either party based on factors unrelated to the facts of record. Appellant does not cite to any evidence which would support a finding of bias on the part of the Hearing Examiner. Her claim that there is pre-judgment bias because in the course of these proceedings, but prior to the filing of the Motion for Disqualification, OZAH and the Hearing Examiner attempted explain the actual reporting responsibilities of OZAH are without merit. It is difficult for us to imagine that a reasonable person, knowing all the facts, would believe that the Hearing Examiner is biased. *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397 (1999).

In her Reply to Respondent's Opposition to Motion for Disqualification of Hearing Examiner Appellant now suggests that a hearing is no longer necessary and that the Board should decide her grievance appeals on the record after the parties submit briefs. Having decided that there is no basis for disqualifying the Hearing Examiner, and that the record would benefit from her findings and recommendations, the Board declines Appellant's suggestion that we rescind the referral to OZAH and decide the matter on the record. Pursuant to Montgomery County Code, § 33-12(c) and Montgomery County Personnel Regulations, § 35-2(b), the Board on February 1, 2018, referred these consolidated grievance appeals to a Hearing Examiner to conduct a hearing and issue a report and recommendations to the Board with proposed findings of fact and conclusions of law, and a proposed decision. The Hearing Examiner shall continue carrying out the delegation contained in the Board's February 1 order.<sup>2</sup> After the Hearing Examiner has fulfilled her responsibilities, either party may waive their right to present oral argument on the record to the Board prior to the Board reaching a final decision.

For the above reasons, it is hereby **ORDERED** that the Motion for Disqualification of Hearing Examiner is hereby **DENIED**.

For the Board  
August 22, 2018



Michael J. Kator  
Vice Chair

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<sup>2</sup> We believe the Hearing Examiner has the authority to determine the appropriate scope and extent of the hearing, and to consider any requests from the parties to issue her report and recommendations without the necessity of an evidentiary hearing.