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OPA-PA-23-002; Objection to Hearing Officer; Motion to Appoint Alternate Hearing Officer

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Fri, Jun 23, 2023 at 3:32 PM

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Hafa Adai Mr. Hernandez,

Please see attached document for e-filing regarding: In The Appeal Of Johndel International, Inc. dba: JMI-Edison; OPA-PA-23-002.

1. Objection to Hearing Officer; Motion to Appoint Alternate Hearing Officer. (5 pages)

Thank you!

Kind Regards,

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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

ARRIOLA LAW FIRM HAGÁTÑA, GUAM 96910

In the Appeal of

Johndel International, Inc. dba. JMI-Edison,

Appellant.

APPEAL CASE NO.: OPA-PA-23-002
 GIAA 2021 Emergency Procurement

**OBJECTION TO HEARING
 OFFICER; MOTION TO APPOINT
 ALTERNATE HEARING OFFICER**

COMES NOW, the A.B. Won Pat Guam International Airport Authority (“GIAA”) which (1) objects to Attorney Josph B. McDonald continuing to serve as Hearing Officer in this matter; (2) objects to Attorney McDonald deciding the question of his competency to continue to serve as Hearing Officer in this Matter, and (3) moves the Public Auditor to (a) hear the challenge to Attorney McDonald’s competency and (b) preside over this procurement appeal or appoint an alternate hearing officer to preside over this procurement appeal.

On May 19, 2023, Johndel International, Inc. dba JMI-Edison (“JMI”) moved the Public Auditor to appoint a hearing officer to preside over this matter arguing that the impartiality of the Public Auditor might reasonably be questioned. See JMI Mot. App’t Admin. Hear. Ofcr. (May 19, 2023). The Public Auditor entered an Order on June 13, 2023 appointing Attorney Joseph B. Mcdonald as hearing officer. The Public Auditor specifically found that the appointment was discretionary and did

not weigh in any manner the arguments related to disqualification or recusal. Order Appt'g Hr. Ofcr. At p.2, n.1 (June 13, 2023).

On June 20, 2023, at a prescheduled motion hearing, on the record, JMI gave notice that JMI's co-counsel Mr. Joseph Razzano represents Attorney Charles McDonald in a personal matter. Attorney Charles McDonald is Attorney Joseph B. McDonald's partner at the McDonald Law Offices. Neither JMI's Counsel Razzano, Walsh and Torres nor Attorney Joseph McDonald provided GIAA with any other information regarding the disclosure.

LAW & ARGUMENT

At the Motion Hearing, the hearing officer stated that "actual bias" was the standard to address any objections to his competency citing a footnote in the Public Auditor's appointment order. See note, quoted *supra* p. 2 (citing Sule v. Guam Board of Dental Examiners, 2008 Guam 20). In Sule, the Guam Supreme Court found that Board Members and a hearing officer of the Guam Board of Dental Examiners were subject to an actual bias standard for recusal when they presided over a peer's disciplinary proceeding as the statutory regulatory agency for a specific profession. 2008 Guam 20 ¶ 19. The Court specifically reasoned, "it is impractical to apply an appearance of impropriety standard *to a proceeding in which members of the same profession* in a small local area are called upon to judge another member of their profession". Id. (*emphasis added*).

This is an adjudicatory and not a disciplinary proceeding and thus GIAA questions whether the Sule actual bias standard and reasoning should apply here. See e.g., Canon 3(E)(1) New York Model Code of Judicial Conduct for State Admin. Law Judges (Apr. 4, 2009) ("a state administrative law judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might

reasonably be questioned. . . .”¹; see also, Ethical Standard 2(D)(1) Oregon Code of Administrative Law Judge Ethics (June 3, 1996).²

Regardless of the standard actually used by the Public Auditor, GIAA objects to Attorney McDonald continuing to hear this matter based on the incomplete disclosure discussed below. GIAA also objects to Attorney McDonald deciding the question of his competency to continue to serve as Hearing Officer in this Matter.

I. GIAA objects to the lack of complete disclosure regarding the McDonald representation.

The OPA procedural rules for procurement appeals grant the public auditor the power to “raise the issue of disqualification and *state the relevant facts* prior to hearing.” 2 GAR Div. 4 § 12116 (*emphasis added*). Then the public auditor “shall make a determination and notify all parties.” Id. Where the Public Auditor is disqualified or recuses himself, a hearing officer is appointed or an OPA staff member is designated to hear the appeal. Id. The regulations expressly contemplate the situation where designated OPA staff or a hearing officer are not able to preside over a case, and specifically allow for an alternate hearing officer or for the case to be taken directly to the superior court. Id.; see also 2 GAR § 12109.

Before deciding on recusal or disqualification, the Public Auditor is required to state the relevant facts prior to hearing. Here, GIAA has no information about the extent of Attorney Razzano’s representation of the Hearing Officer’s Partner. While JMI’s Counsel and the Hearing Officer describe the representation as “personal,” GIAA is still concerned by the inadequate disclosure. GIAA has no ability to determine whether this personal representation could affect the McDonald Law Offices by virtue of Attorney Charles McDonald’s status in the firm. Without more information, GIAA must

¹ Available at: <https://nysba.org/app/uploads/2020/03/ModelALJCode4409.pdf> (last visited June 23, 2023).

² Available at: <https://www.azoah.com/OAHCodeofJudicialConduct.pdf> (last visited June 23, 2023).

register its objection to the lack of complete disclosure of relevant facts that is required prior to any hearing on a question of disqualification or recusal before the Public Auditor. GIAA cannot determine whether any bias on the part of the current officer exists or not, or whether there is any basis that would lead a reasonable observer to question the Hearing Officer's impartiality. See e.g., 7 G.C.A. § 6105 et seq (setting out procedure and basis for challenge to judges or justices presiding over superior and supreme court cases in Guam).

II. The Public Auditor should address the issue of the Hearing Officer's competency.

Section 12116, cited above, empowers *the Public Auditor* to consider questions of recusal and disqualification. Unlike Section 12116, Section 12109 does not specifically empower the Hearing Officer to hear questions concerning his competency to continue to preside on a matter. Notably, the Public Auditor retains the power to appoint an alternative hearing officer on a hearing officer's recusal. See 2 GAR § 12109. When read together, only the Public Auditor can weigh and decide issues of disqualification after the required disclosures of fact are made. GIAA respectfully requests that the Public Auditor decide the question of the current Hearing Officer's competency to continue as hearing officer in this matter. GIAA objects to the Hearing Officer's deciding the issue of his own competency.

III. An Alternate Hearing Officer must be appointed to hear this matter.

Finally, upon review of the incomplete disclosure and based on the arguments raised above, GIAA believes that an alternate hearing officer should be appointed or the Public Auditor should preside. There is sufficient basis to merit disqualification of Attorney Joseph McDonald based simply on the lack of facts which will apprise GIAA of the representational relationship between his partner and JMI's legal counsel of record in this matter. However, even if the OPA disagrees and finds disqualification is not required, the OPA has made clear that Attorney McDonald's appointment was discretionary and not mandatory. GIAA requests therefore that based on the incomplete disclosure

made on June 20, that the Public Auditor exercise the same discretion and preside over this case or appoint an alternative hearing officer.

CONCLUSION

Based on the foregoing, GIAA (1) objects to Attorney Joseph B. McDonald continuing to serve as Hearing Officer in this matter; (2) objects to Attorney McDonald deciding the question of his competency to continue to serve as Hearing Officer in this Matter, and (3) moves the Public Auditor to (a) hear the challenge to Attorney McDonald's competency and (b) to preside over this procurement appeal or appoint an alternate hearing officer to preside over this procurement appeal.

Dated: June 23, 2023.

Respectfully submitted,
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