

Suite 401 Pacific News Building
238 Archbishop Flores St.
Hagåtña, Guam 96910

Phone: (671) 475-0390
FAX: (671) 472-7951



OFFICE OF THE PUBLIC AUDITOR

Fax

To: John Thos. Brown, Esq. – General Counsel **From:** OPA Procurement Appeals
Fred Nishihira, Esq. – General Counsel

Agency: Island Business System and Supplies **Pages:** 9 (Including cover)
Guam Public School System

CC: **Date:** Monday – 10/27/2008

Fax: 472-5003 / 472-6153 **Phone:** 475-0658 / 477-7293

Re: Decision Re Purchasing Agency's Request to Disqualify Public Auditor *J*
Hearing Officer: OPA-PA-08-011

Urgent For Review Please Comment Please Reply Please Recycle

●**Comments:** See Decision(s) attached and kindly confirm receipt of this message by re-faxing this cover page and along with your agency or firm stamp with date and initials of receiver. Thank you.

Theresa 475-0390 ext 207 fgumataotao@guamopa.org

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.

1 that a fair and impartial hearing cannot be accorded. 5 G.C.A. §9222. Further, a hearing officer
2 shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair
3 and impartial hearing. *Id.* Here, GPSS's request to disqualify the Hearing Officer is not made in
4 the proper form because no affidavit was filed with the request. Guam Law defines affidavits as
5 written declarations under oath, made without notice on an adverse party. 6 G.C.A. §7302.
6 Further, affidavits to be used before any court, judge or officer of Guam may be taken before any
7 officer or person authorized to administer oaths. 6 G.C.A. §7402. Finally, affidavits may be
8 used as specified in the Guam Evidence Code, in any other law of Guam, or in the Guam Rules
9 of Civil Procedure for the purposes stated therein. 6 G.C.A. §7401. GPSS' request for
10 disqualification did not contain, nor was it accompanied by any declaration made under oath
11 properly made before any officer or person authorized to administer oaths. Thus, GPSS' request
12 to disqualify the Hearing Officer is not in the proper form because it does not contain an affidavit
13 as required by 5 G.C.A. §9222.

14 2. Assuming *Arguendo* that GPSS' request to disqualify the Hearing Officer was in the
15 proper form, GPSS fails to show how it cannot be accorded a fair and impartial hearing with the
16 Hearing Officer presently assigned to this matter. Generally, there is a presumption of honesty
17 and integrity in those serving as administrative adjudicators and to prove that an adjudicator is
18 biased, there must be a concrete demonstration of the actual existence of bias, and the mere
19 appearance of bias is insufficient to establish such a concrete demonstration. *Sule v. Guam*
20 *Board of Dental Examiners*, SP0192-02, Page 8, Line 11, Decision and Order dated September
21 16, 2005 (Superior Court of Guam). Further, to determine whether bias exists, a trier of fact
22 must decide what a reasonable person would believe about the administrative adjudicator's
23 partiality given all the relevant facts in the controversy. *Id.* at Line 4, Page 9.

24 GPSS's request relies solely on the Hearing Officer's July 11, 2008, finding in *Town*
25 *House Department Stores dba Island Business Systems & Supplies*, OPA-PA-08-003. In that
26 finding, the Hearing Officer recommended that the Public Auditor find that GPSS's failure to
27 promptly and expeditiously render a decision on IBSS' December 4, 2007 Protest was an act of
28 bad faith. *Id.*, at Line 5, Page 6. Further, this recommendation was based on the Hearing
Officer's finding that, based on the procurement record submitted by GPSS, it is reasonable to

1 conclude that the copier contract is most likely an illegal contract and GPSS' failure to render the
2 statutorily required prompt and expeditious decision on IBSS' protest is intended to prevent
3 review of the copier contract on appeal. *Id.*, at Line 17, Page 6. This is not a concrete showing
4 of actual bias because the enforcement of laws within an agency's statutory authority, adverse
5 rulings against a party, and disparaging descriptions of a party's actions based on the record, by
6 themselves, are not sufficient to show bias.

7 The enforcement of procurement laws and regulations on GPSS is not actual bias. Fact
8 that an agency instituted statutorily authorized adverse regulatory enforcement proceedings
9 against a party prior to the agency's final administrative decision does not demonstrate bias in
10 the final administrative decision. *Navistar Intern. Transp. Corp. v. U.S.E.P.A.*, 941 F.2^d 1339,
11 1360 (6th Cir., 1991). The Public Auditor has the power to compel the production of documents
12 by any employee of the Government of Guam. 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 12,
13 §12103(a). In the prior case, the Hearing Officer's recommendation that the Public Auditor
14 compel GPSS to produce the decision on IBSS's protest was a proper exercise of this authority.
15 *In the Appeal of Town House Department Stores dba Island Business Systems & Supplies*, OPA-
16 PA-08-003, Finding of Hearing Officer, Page 5, Line 12 (July 11, 2008). Thus, the Hearing
17 Officer's recommendation in OPA-PA-08-003 does not demonstrate bias against GPSS in this
18 proceeding.

19 The adverse ruling against GPSS in OPA-PA-08-003 does not show actual bias in this
20 matter. Generally, adverse rulings in administrative proceedings are not by themselves sufficient
21 to show actual bias. *Orange v. Island Creek Coal Company*, 786 F.2d 724, 728 (6th Cir., 1986).
22 Further, the total rejection of an opposed view cannot of itself impugn the integrity or
23 competence of a trier of fact. *Sule v. Guam Board of Dental Examiners*, at Page 8, Line 11.
24 Here, the findings cited by GPSS in OPA-PA-08-003 were based on the undisputed facts in the
25 record in that case and were made despite GPSS' denials of any allegation of improperly
26 procuring copier services in OPA-PA-08-003 and the order compelling GPSS to produce the
27 decision on IBSS' protest was adverse to GPSS. Thus, the adverse ruling against GPSS
28 requiring it to produce the statutorily required decision on IBSS's protest is insufficient to show
actual bias.

1 The Hearing Officer's disparaging description of GPSS's copier contract is not a showing
2 of actual bias. A party attacking an administrative law judge's impartiality must demonstrate
3 that the alleged bias stems from an extrajudicial source and results in an opinion on the merits on
4 some basis other than what the judge learned from his participation in the case. *Colfor Inc. v.*
5 *National Labor Relations Board*, 838 F.2d 164, 168 (6th Cir., 1988). Here, as stated above, the
6 Hearing Officer's findings in OPA-PA-08-003 was based solely on the procurement record
7 submitted by GPSS in that matter. GPSS has failed to produce any evidence showing that the
8 Hearing Officer's finding in OPA-PA-08-003 was based on anything other than the record in that
9 proceeding. Thus, the Hearing Officer's description of the GPSS copier contract in OPA-PA-08-
10 003 which was based on the record in that matter, does not show actual bias.

11 3. Based on the foregoing, GPSS' Request for Disqualification of the Hearing Officer is
12 hereby **DENIED**.

13
14 **SO ORDERED** this 27th day of October, 2008 by:

15
16
17
18 
19 ANTHONY R. CAMACHO, ESQ.
20 Hearing Officer
21
22
23
24
25
26
27
28