UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 17

Docket No. SF-1221-11-0237-W-6

Kimberly Jones,

Appellant,

v.

Small Business Administration,

Agency.

March 18, 2014

Alan K. Hahn, Esquire, San Diego, California, for the appellant.

Anthony G. Parham, Esquire, Washington, D.C., for the agency.

Kathleen Eldridge, Buffalo, New York, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 This appeal is before the Board on interlocutory appeal from the November 8, 2013 order of the administrative judge staying the proceedings and certifying for Board review her ruling denying the appellant's motion to disqualify both one of the designated agency representatives in this appeal, as well as the agency's entire general counsel's office, due to an alleged conflict of interest. For the reasons set forth below, we AFFIRM the administrative judge's ruling AS MODIFIED by this Opinion and Order, VACATE the stay order, and RETURN

the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On December 31, 2010, the appellant filed an individual right of action (IRA) appeal against her former employing agency alleging that three personnel actions were taken in reprisal for whistleblowing. *Jones v. Small Business Administration*, MSPB Docket No. SF-1221-11-0237-W-1, Initial Appeal File (W-1 IAF), Tab 1. Her appeal was dismissed without prejudice and refiled several times, with the most recent refiling on June 27, 2013. *Jones v. Small Business Administration*, MSPB Docket No. SF-1221-11-0237-W-6, Initial Appeal File (W-6 IAF), Tab 1.

¶3 On July 2, 2013, the agency deactivated its prior representative in the appeal and designated Anthony Parham to represent it. W-6 IAF, Tab 3. On July 15, 2013, the appellant filed a motion to disqualify both Parham and the agency's entire general counsel's office based on an alleged conflict of interest. W-6 IAF, Tabs 8-11. The appellant argued that Parham, in his capacity as an agency attorney, had represented her as one of the management officials named in equal employment opportunity (EEO) complaints filed by other agency employees. W-6 IAF, Tab 9 at 5 of 10. She alleged that she voluntarily shared confidential information with Parham over the course of several months, until Parham told her that he was not representing her individually. *Id.* She further alleged that Parham subsequently demanded that she continue providing information to him, and she complied. *Id.* at 6 of 10. The appellant specifically alleged that she shared her whistleblowing disclosures with Parham. *Id.* She argued that Parham's participation as agency counsel in the instant Board appeal constituted a conflict of interest under California rules of attorney conduct and that the agency's entire general counsel's office should be vicariously disqualified. *Id.* at 8-9 of 10.

¶4 In its response to the appellant's motion, the agency argued that the motion was untimely because the appellant knew by January 2011, more than 2 years before she filed the motion to disqualify both Parham and his office, that the agency's general counsel's office was representing the agency in her IRA appeal and that Parham was an attorney in that office. W-6 IAF, Tab 18 at 4-5 of 11. The agency also argued that Parham was never the appellant's attorney. *Id.* at 5-6 of 11.

¶5 The administrative judge denied the appellant's motion to disqualify Parham. W-6 IAF, Tab 24. Applying the California Rules of Professional Conduct, the administrative judge determined that Parham's participation in the instant IRA appeal did not create a conflict of interest because the appellant never retained Parham as her personal attorney, nor did she consult with Parham about becoming his client. *Id.* at 2-4.

¶6 The appellant moved for reconsideration of the administrative judge's order denying her motion to disqualify. W-6 IAF, Tab 27. She reiterated her argument that she reasonably believed that Parham was representing her individually in the EEO matters, *id.* at 4-6, and that she had consulted with Parham on a legal matter of her own, *id.* at 6-7. The agency opposed the appellant's motion for reconsideration. W-6 IAF, Tab 28. The administrative judge denied the appellant's motion. W-6 IAF, Tab 29.

¶7 The appellant then moved for certification of an interlocutory appeal regarding her motion to disqualify. W-6 IAF, Tab 30. The agency opposed certification. W-6 IAF, Tab 32. After cancelling the scheduled hearing, the administrative judge issued an order reiterating her ruling denying the appellant's motion to disqualify Parham and the general counsel's office and certifying that ruling for interlocutory appeal. W-6 IAF, Tab 34.

ANALYSIS

The administrative judge properly certified her ruling for interlocutory review.

¶8 An "interlocutory appeal is an appeal to the Board of a ruling made by a judge during a proceeding." 5 C.F.R. § 1201.91. Upon motion from either party, or by the administrative judge's own motion, an appeal may be certified for interlocutory review. *Id.* The Board's regulations provide for certification of a ruling for interlocutory review where "(a) The ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) An immediate ruling will materially advance the completion of the proceeding, or the denial of an immediate ruling will cause undue harm to a party or the public." 5 C.F.R. § 1201.92.

¶9 The criteria for certifying a ruling for interlocutory review are met in this case. The issue of the standard for disqualification of an agency counsel and/or general counsel's office based on a conflict of interest is an important question of law about which there is substantial ground for difference of opinion, and an immediate ruling regarding the appellant's request to disqualify the agency counsel will materially advance the completion of this proceeding. Therefore, the administrative judge properly certified her ruling for interlocutory review. *See Collins v. Department of Justice*, 94 M.S.P.R. 62, ¶¶ 11-18 (2003) (considering on interlocutory review whether an appellant's counsel should be disqualified due to an impermissible conflict of interest).

The appellant's motion to disqualify is denied.

¶10 A party to a Board appeal may be represented in any matter related to the appeal. 5 C.F.R. § 1201.31(a). A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. 5 C.F.R. § 1201.31(b). Any party who challenges the designation must do so by filing a motion within 15 days after the

date of service of the notice of designation or 15 days after a party becomes aware of the conflict. *Id.*

The appellant's motion to disqualify the entire general counsel's office is untimely.

¶11 The appellant argues that the agency's general counsel's office must be disqualified because Parham's alleged prior representation of the appellant created a conflict of interest that must be imputed to the entire office. W-6 IAF, Tab 9 at 9 of 10. She argues that "all this kind of litigation flows through [a single] supervisory attorney" and that the entire office must be disqualified because of the assumption "that attorneys, working together and practicing law in a professional association, share each other's and their clients' confidential information." *Id.* (quoting *City & County of San Francisco v. Cobra Solutions, Inc.*, 135 P.3d 20, 25-26 (Cal. 2006)).

¶12 The appellant's theory in support of disqualification of the entire general counsel's office does not depend on Parham's personal involvement in the present appeal. Instead, it depends only on the fact that Parham, who allegedly obtained confidential information through his prior representation of the appellant, works with other attorneys in the office and would therefore be expected to share that confidential information with his colleagues. Therefore, the appellant was aware of the alleged conflict involving the entire general counsel's office as soon as that office entered an appearance in this appeal on January 18, 2011. W-1 IAF, Tab 7. We therefore find that the appellant's July 15, 2013 motion to disqualify the entire general counsel's office was not filed within 15 days after the appellant became aware of the alleged conflict and was therefore filed almost 2½ years late. Although the Board has waived the deadline for filing a motion to disqualify upon a showing of good cause, *see Collins*, 94 M.S.P.R. 62, ¶¶ 9-10,[1] we do not

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[1] The Board in *Collins* was applying a prior version of section 1201.31(b), which required a motion to disqualify to be filed within 15 days after the date of service of the notice of designation. *Collins*, 94 M.S.P.R. 62, ¶ 9. In November 2012, after the

find good cause for the lengthy delay in this case. The agency in *Collins* promptly contacted the appellant's counsel and the administrative judge upon learning of the possible conflict of interest and filed a formal motion to disqualify the appellant's counsel only after informal efforts to resolve the issue were unsuccessful. *Id.*, ¶¶ 5-6. In the present case, the appellant knew that the same office that employed Parham was representing the agency in her IRA appeal in January 2011, yet she took no action regarding that alleged conflict for more than 2 years. We therefore find that the motion to disqualify the agency's general counsel's office is untimely. However, we find that the appellant's motion with respect to disqualification of Parham only was timely filed within 15 days after Parham entered an appearance on behalf of the agency in this appeal.

The appellant has not established that Parham has a disqualifying conflict of interest.

¶13 "[A]n attorney appearing before the Board, whether representing a private party or an agency, will be expected to conform to applicable state rules governing attorney conduct." *Collins*, 94 M.S.P.R. 62, ¶ 17. When a hearing is scheduled to take place, the "applicable state rules governing attorney conduct" are those of the state in which the hearing is to be held. *Id.* Thus, we apply the California legal ethics standards in determining whether a conflict of interest exists in this case. *See* W-6 IAF, Tab 12 at 4 (identifying Glendale, California as the hearing location).

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appellant filed her initial IRA appeal but before the motion to disqualify was filed, the Board amended the regulation to add the phrase "or 15 days after a party becomes aware of the conflict," in order "to acknowledge that a representative's conflict of interest may not be readily apparent to a party wishing to challenge the designation of a representative." 77 Fed. Reg. 62,350, 62,353 (Oct. 12, 2012). We find that this regulatory change does not affect our analysis of the timeliness issue in this case, however, because we find that the appellant became aware of the alleged conflict involving the agency's general counsel's office as soon as that office, which also employs Parham, entered an appearance in this case.

¶14 Courts applying California ethics rules have been cautious in granting motions to disqualify counsel based on conflict of interest "in order to avoid hardships on innocent clients where disqualifications are unnecessarily ordered." *In re Lee G.*, 1 Cal. App. 4th 17, 28 (1991) (citation omitted). "Because a motion to disqualify is most often tactically motivated and can be disruptive to the litigation process, disqualification is considered to be a drastic measure that is generally disfavored." *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 814 (N.D. Cal. 2004). Courts are particularly reluctant to disqualify public counsel, as the appellant asks the Board to do in the instant case, because such disqualifications can result in "increased public expenditures for legal representation," and because of "the potential deprivation to the client of the services of an attorney highly skilled in a particular area of the law." *In re Lee G.*, 1 Cal. App. 4th at 28.

¶15 Rule 3-310(E) of the California Rules of Professional Conduct, upon which the appellant relies in seeking to disqualify Parham from representing the agency in this appeal, provides that "[a] member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." The appellant argues that she was, or should be treated as, Parham's former client for conflict purposes by virtue of their interactions during her time as an agency manager. We disagree.

¶16 The role of a public attorney in representing the interests of individual government officials has been analogized to the representation of corporate officers by corporate counsel. *Ward v. Superior Court*, 70 Cal. App. 3d 23, 32 (1977). Our analysis of cases involving corporate counsel supports the conclusion that no conflict of interest exists in the instant case. For example, in *Meehan v. Hopps*, 144 Cal. App. 2d 284 (1956), at issue was whether corporate counsel could represent the interests of the corporation in litigation against a

former director of the corporation. The court determined that, although the corporate counsel had worked with the former director on several legal matters relating to his official role within the corporation, there was no attorney-client relationship between the former director and the corporate counsel. *Id.* at 290. The court held that the corporate counsel did not have a disqualifying conflict and that the corporate counsel could use information obtained from the former director in the context of representing the corporation. *Id.* at 290-93. The court found no support for the proposition "that an attorney for a corporation is disqualified from representing it in an action brought by it against one of its officers, nor that in such an action the attorney may not use information received from such officers in connection with company matters." *Id.* at 290. Applying the same rationale to the instant case, we find that there was no attorney-client relationship between the appellant and Parham that would prevent Parham from representing the agency in the appellant's Board appeal. *See Cal. Ethics Op. 2001-156*, 2001 WL 34029610, at *3 (Cal. St. Bar Comm. Prof. Resp.) ("[A]n attorney for a governmental entity usually has only one client, namely, the entity itself . . . ."). The appellant's interactions with Parham regarding official agency business did not create a personal attorney-client relationship.

¶17 Although the appellant and Parham never formed an actual attorney-client relationship, the California State Bar Standing Committee on Professional Responsibility and Conduct has warned that "attorneys should note the risk that personal attorney-client relationships could be formed intentionally or inadvertently with government officials if the attorney's conduct and the circumstances create a reasonable expectation on the part of the official that he or she enjoys a personal confidential relationship with the attorney." *Id.* at *3 n.1. We have therefore considered the appellant's allegations in order to determine whether she reasonably expected that she had a personal confidential relationship with Parham. As explained below, we find that, even if the appellant genuinely

believed that she had such a relationship with Parham, that belief was not reasonable.

¶18 In the declaration submitted in support of her motion to disqualify, the appellant states that, when Parham was assigned to assist her in connection with the EEO investigations, he told her "that although the EEO case was technically against the SBA Administrator, that individuals are often accused and could be held liable for their actions, and that he was appointed to defend the case against the agency and me . . . ." W-6 IAF, Tab 9 at 5 of 21. Elsewhere in her declaration, the appellant states:

> This was the first time I had been involved in any EEO complaints, and quite frankly, I just did not know that the case was against the SBA Administrator and not me. Parham told me that although the EEO case was technically against the SBA Administrator, individuals accused like me could be disciplined just because I was accused; hence, I had to share as much information with him as possible to ensure that he can defend me and the agency.

Id. at 8 of 21. She notes that, when she was interviewed by the EEO investigator and the investigator asked whether Parham was there as the appellant's representative, Parham answered, "Yes, that's right." *Id.* at 7 of 21; *see id.* at 20 of 21. The appellant states that, because Parham gave that answer to the EEO investigator, she "didn't question the fact that he was representing me, protecting my interests." *Id.* at 8 of 21.[2]

¶19 We find that the appellant reasonably believed that Parham was representing her interests in the EEO investigation. However, by the appellant's own account, Parham told her that he was appointed to defend the case against both the appellant and the agency, W-6 IAF, Tab 9 at 5 of 21, and that she needed to provide him with information to assist him in defending both her and the

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[2] The agency disputes the appellant's account of what Parham told her about his role in the EEO investigation. W-6 IAF, Tab 18 at 6 of 11. We need not resolve any factual disputes, however, because we find that the appellant has not established a basis for disqualifying Parham, even if we accept all of her allegations as true.

agency, *id.* at 8 of 21. There is no indication that the interests of the appellant and the agency with respect to the EEO investigations were ever at odds, and therefore Parham's representation of the agency's interests also served to protect the appellant's interests. Parham never told the appellant that he would protect her personal interests even if those interests were contrary to the interests of the agency. Yet the appellant seems to have concluded that Parham, an attorney employed by the agency, was representing her personal interests in other matters, even if those interests differed from those of the agency; she also seems to have concluded that information she provided to Parham while they were both performing their official duties as agency employees would be kept confidential from agency management. *See id.* at 7 of 21 ("I now know that [Parham] did not just keep the information to himself, he shared it with other General Counsel, Human Capital Management staff, and senior managers."). To the extent the appellant believed Parham would keep matters she shared with him confidential from their common employer, or that he would represent her interests against those of the agency, we find no reasonable basis for that belief. We therefore conclude that the appellant has not demonstrated that Parham's representation of the agency in this IRA appeal creates an impermissible conflict of interest.

ORDER

¶20 Accordingly, we AFFIRM the administrative judge's ruling AS MODIFIED by this Opinion and Order, VACATE the stay order, and RETURN the appeal to

the administrative judge for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.