



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of JMI-Edison; OPA-PA-23-002

4 messages

RWT Receptionist <receptionist@rwtguam.com>

Thu, Jan 11, 2024 at 4:07 PM

To: jhernandez@guamopa.com

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Dear Mr. Hernandez:

Please see the attached documents to be filed in the above-referenced matter.

1. *Motion to Disqualify Public Auditor (10 Pages)*

Please feel free to contact our office if you have any questions. Thank you

Regards,

Mariah Saldana

RAZZANO WALSH & TORRES, P.C.

139 Murray Blvd. Ste. 100

Hagatna, Guam 96910

(T): 671-989-3009

(T): 671-988-3941

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 **1.11.24 Motion to Disqualify Public Auditor.pdf**
410K

Jerrick Hernandez <jhernandez@guamopa.com>

Thu, Jan 11, 2024 at 4:14 PM

To: RWT Receptionist <receptionist@rwtguam.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Hafa Adai,

Guam OPA confirms receipt of this email.

[Quoted text hidden]

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Best Regards,

Jerrick J.J.G. Hernandez, MA, CGFM, CFE, CICA, CGAP
Accountability Auditor

Office of Public Accountability

+1 671 475 0390 (ext. 204)

jhernandez@guamopa.com

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Jerrick Hernandez <jhernandez@guamopa.com>

Thu, Jan 11, 2024 at 4:40 PM

To: RWT Receptionist <receptionist@rwtguam.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Hafa Adai,

Just wanted to clarify if this motion is for OPA-PA-21-010 instead of OPA-PA-23-002?

On Thu, Jan 11, 2024 at 4:07 PM RWT Receptionist <receptionist@rwtguam.com> wrote:

[Quoted text hidden]

[Quoted text hidden]

Joshua D. Walsh <jdwalsh@rwtguam.com>

Thu, Jan 11, 2024 at 4:42 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: RWT Receptionist <receptionist@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Apologies Mr. Hernandez. We will file a corrected pleading.

Sincerely,

Josh

RAZZANO WALSH & TORRES, P.C.

139 Murray Blvd. Ste. 100

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This message has been sent as a part of discussion between Razzano Walsh & Torres, P.C. and the addressee whose name is specified above. Should you receive this message by mistake, we would be most grateful if you informed us that the message has been sent to you. In this case, we also ask that you delete this message from your mailbox, and do not forward it or any part of it to anyone else. Thank you for your cooperation and understanding.

[Quoted text hidden]



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of JMI-Edison; OPA-PA-21-010

3 messages

RWT Receptionist <receptionist@rwtguam.com>

Thu, Jan 11, 2024 at 4:54 PM

To: jhernandez@guamopa.com

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Dear Mr. Hernandez:

Please see the corrected attached document to be filed in the above-referenced matter.

1. Motion to Disqualify Public Auditor (10 Pages)

Please feel free to contact our office if you have any questions. Thank you

Regards,

Mariah Saldana

RAZZANO WALSH & TORRES, P.C.

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**1.11.24 Motion to Disqualify Public Auditor - Johndel (JMI).pdf**

157K

Jerrick Hernandez <jhernandez@guamopa.com>

Thu, Jan 11, 2024 at 5:03 PM

To: RWT Receptionist <receptionist@rwtguam.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Hafa Adai,

GuamOPA confirms receipt of this email and the attached document.

[Quoted text hidden]

RWT Receptionist <receptionist@rwtguam.com>

Thu, Jan 11, 2024 at 5:03 PM

To: jhernandez@guamopa.com

Dear Mr. Hernandez,

We apologize, we neglected to include the signature. Enclosed herein is the intended filing for OPA-PA-21-010. Thank you.

Regards,

Mariah Saldana

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[Quoted text hidden]



1.11.24 Motion to Disqualify Public Auditor (3).pdf
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*Attorneys for Appellant
JMI-Edison*

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Johndel International, Inc. dba. JMI-Edison,

Appellant.

DOCKET NO. OPA-PA-21-010

**MOTION TO DISQUALIFY
PUBLIC AUDITOR**

Johndel International, Inc. (“JMI”), through its undersigned counsel, respectfully requests that the Public Auditor, Benjamin Joseph F. Cruz (the “Public Auditor”), recuse himself from adjudicating this appeal before the Office of Public Accountability (“OPA”).

I. INTRODUCTION

Prior to proceeding with this appeal on remand from the Superior Court of Guam in CV0095-22, the Public Auditor must first assess his suitability to preside over it. Guam law precludes the Public Auditor from overseeing appeals in cases where a conflict of interest is present or if it appears that the appeal has been prejudged. This preliminary evaluation is essential to uphold the principles of impartiality and fairness.

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II. MEMORANDUM IN SUPPORT OF MOTION

A. RELEVANT PROCEDURAL HISTORY

The recent progression of this matter commenced with an order of remand issued by the Superior Court of Guam (the “Court”) in CV0095-22. This order was precipitated by substantial concerns regarding the manner in which the OPA initially dismissed JMI’s procurement appeal. The Court’s Decision & Order examined significant issues and irregularities in the OPA’s handling of the case, which prompted the order of remand. These issues will be expounded upon in subsequent sections of this motion.

Notably, prior to the Court’s ruling and the subsequent remand, the Public Auditor made a series of remarks during an interview with a local news program. These remarks, discussed in greater detail later in this motion, have raised questions regarding the impartiality and fairness of the administrative proceedings.

Presently, this appeal has circled back to the same Public Auditor who, as established by the Court’s ruling, erred in the earlier dismissal of the complaint. That dismissal was followed by active adverse litigation by the OPA against JMI in the Superior Court, in what the Public Auditor’s counsel admitted was a departure from the normal course as “the OPA does not usually submit briefing in the course of judicial review of its determinations in procurement appeal cases.” Office of Public Accountability Opening Brief, *Johndel Int’l, Inc. dba JMI-Edison v. Office of Public Accountability et. al.* (Superior Court of Guam, July 24, 2023), 1.

This unique situation underscores the critical need for a thorough review of the Public Auditor's ability to preside over this case to ensure that justice is served and the rights of JMI are duly protected. The Public Auditor has not provided notice of an intent to recuse himself from hearing this protest, and this Motion follows.

B. THE PURPOSE AND RESPONSIBILITIES OF GUAM'S PUBLIC AUDITOR.

The Public Auditor plays an essential role in ensuring government accountability and fiscal integrity, as broadly outlined in 1 GCA § 1909. The office's core responsibilities include not only monitoring compliance with legal standards but also producing detailed reports on fiscal activities, crucial for maintaining transparency in government spending. *See generally* 1 GCA § 1909. Pertinent to this motion is the Public Auditor's specific jurisdiction over appeals concerning decisions made under 5 GCA § 5425. 1 GCA § 1909(k).

The Procurement law mandates specific ethical obligations for government employees engaged in the procurement process, which also applies to the officer presiding over a procurement appeal. A critical aspect of these obligations is the duty to maintain impartiality and bolster public confidence in the procurement review process. Government employees are required to perform their duties with impartiality, ensuring fair and competitive access to governmental procurement for responsible contractors. Additionally, their conduct should enhance public trust in the integrity of the territorial procurement organization, as outlined in 5 GCA § 5625.

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III. ARGUMENT

A. STANDARD FOR RECUSAL

In Guam, those who hold the role of Judicial officers like the Public Auditor should disqualify themselves if their impartiality might reasonably be questioned. As explained in *Sule v. Guam Bd. of Dental Examiners*, “Guam’s judicial disqualification statutes call for the disqualification of a judge or justice in any proceeding in which his or her impartiality might reasonably be questioned. 7 G.C.A. § 6105(a) (2005); see also *Ada v. Gutierrez*, 2000 Guam 22 ¶ 12; *Dizon v. Super. Ct. (People)*, 1998 Guam 3 ¶ 8. A judge or justice may also be disqualified if he or she has a personal bias toward a party. 7 G.C.A. § 6105(b)(1).” 2008 Guam 20, ¶ 13.

These standards for recusal comport with Federal guidance on recusals for jurists. 28 U.S.C.A. § 455 outlines the standard for disqualification of a justice, judge, or magistrate. Under §455(a) “Any justice, judge, or magistrate judge of the US shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” According to the report of the House Judiciary Committee, the general standard of section 455(a) was designed to promote the public’s confidence in the impartiality and integrity of the judicial process by saying, in effect, that if any reasonable factual basis for doubting the judge’s impartiality exists, the judge “shall” disqualify himself and let another judge preside. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1110–11 (5th Cir. 1980) (citing 1974 U.S. Code Cong. & Admin.News, pp. 6351, 6354-55.) 455(b) outlines other particularized scenarios in which the judge must disqualify himself which

includes § 455(b)(1), “Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.”

While the Supreme Court of Guam has carved out in *Sule v. Guam Bd. of Dental Examiners*, 2008 Guam 20 ¶ 17, an “actual bias” recusal standard for administrative law judges, that standard does not apply here. While the Public Auditor is not a member of the judicial branch of government, he is no mere agency hearing officer. The Public Auditor on Guam is akin to a Special Magistrate in that he issues legal decisions, as opposed to, for example, a Land Commissioner, which only has the power to make recommendations. More, the Public Auditor is not an internal review at a procuring agency, but rather an outside entity that has specifically been established and given the power to review and determine any matter properly submitted and protested in connection with the solicitation or award or arising from the protest decision of a procuring agency. 5 G.C.A. §§ 5425(a); 5425(e), 5703.

This independent station of decision making likens the public auditor to a jurist, and he should therefore be held to the recusal standards applicable to such jurists. *See, S. Agric. Co. v. Dittmer*, 568 F. Page 8 of 2 Supp. 645, 646 (W.D. Ark. 1983) (“Once a matter has been referred to a magistrate under his dispositive jurisdiction, he effectively becomes the district judge for that case. Removal of a magistrate from a case should then be governed by the same rules as a district judge where recusal becomes an issue.”).

This important judicial role has been recognized by the Office of Public Accountability in past, where the Public Auditor has previously recused herself on an appearance basis, as opposed to an actual bias basis. *See In the Appeal of Far*

East Equipment Co., LLC, OPA-PA-08-001 (The Public Auditor determined that recusal was the preferred course of action since “it is appropriate that the Office of the Public Auditor not be the arbiter in this procurement matter as **the impartiality of the Public Auditor may be questioned**, regardless of whether any specific discussions had taken place”) (emphasis added).

B. THE PUBLIC AUDITOR IS REQUIRED TO RECUSE HIMSELF BECAUSE HE HAS A CONFLICT OF INTEREST.

Stepping from behind the bench to the advocate’s podium, the Public Auditor’s unique position in defending prior proceedings has turned the Office of Public Accountability into an arena where impartiality faces its own trial. In response to JMI’s earlier challenge to the proceedings over which the Public Auditor presided, a significant and unusual action occurred. The Public Auditor engaged the services of counsel to defend the integrity and outcome of those proceedings. This extraordinary step goes beyond the normal scope of a Public Auditor’s administrative and judicial duties and enters the realm of personal interest in the litigation process.

By undertaking a personal defense of the proceedings, the Public Auditor has implicitly aligned with interests seeking to uphold the original, now-overturned rulings. This action casts a shadow on the Public Auditor’s ability to impartially adjudicate the remanded hearings. It represents a rare instance where the arbiter of justice steps into the arena, not as an impartial trier-of-fact, but as a participant with vested interests.

The current situation presents a conflict of interest; The very decision-maker who felt compelled to personally defend their prior rulings is now poised to preside over the remanded hearings stemming from those rulings. This situation

is akin to a federal judge being allowed to preside over remanded sentencing hearings after an appeals court has ruled that their prior decision was wrong. This scenario is antithetical to the principle of impartiality, a bedrock of our legal system.

The dual role of the Public Auditor as both a defender of prior judgments and as an adjudicator of the current proceedings is incongruent with the ethical standards expected of a Public Auditor.

C. THE PUBLIC AUDITOR IS REQUIRED TO RECUSE HIMSELF AS A MATTER OF DUE PROCESS BECAUSE HE APPEARS TO HAVE PREJUDGED AN ELEMENT OF JMI'S APPEAL.

A hearing does not comport with due process if it “is totally devoid of a meaningful opportunity to be heard” because “the decision-maker has predetermined the outcome of the hearing.” *Matthews v. Harney County, Or.*, 23 Sch. Dist. No. 4, 819 F.2d 889, 893,94 (9th Cir. 1987) (quoting *Washington v. Kirksey*, 811 F.2d 561, 565 (11th Cir. 1987)). The test for disqualification hinges on whether an impartial observer can reasonably infer that the agency, prior to the formal hearing, has already made preliminary judgments regarding both the factual and legal aspects of a specific case. *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2nd Cir.), cert. denied, 361 U.S. 896 (1959)).

It is imperative to consider the public’s perception of the Public Auditor’s adherence to the impartiality standards set forth by the Procurement Law. See 5 GCA § 5625. The integrity of the judicial process hinges on this perception. Ensuring that the public views the proceedings as impartial is crucial for upholding the credibility and trust in our legal system.

Following the dismissal of the case, the Public Auditor proceeded to make several media appearances across multiple media platforms to discuss the particulars of the case and expand upon his written decision and order. The Public Auditor declared in a live media extended format interview on February 7, 2022, that JMI had committed both fraud and had significantly angered him.¹ In that interview (“KUAM Interview”), the Public Auditor explained that, prior to the last hearing he afforded JMI, “I was fuming for three days until the hearing.” KUAM Interview, 2:55:29. This was because, in the pre-hearing determination of the Public Auditor, “they had been caught with their pants down.” KUAM Interview, 2:55:55. He also explained, in language not addressed in the OPA’s written decision, that he rejected any argument that his agency owed “collegiality and probity to the other agencies and boards” and that he should not unilaterally disregard other agency determinations. KUAM Interview, 2:56:15.

The Public Auditor also likened JMI’s submission of the CLB decision regarding Menzies to a situation where your “significant other lies” and the alibi provided “is from someone you know is a liar.” KUAM Interview, 3:00:04. The Public Auditor then explained in the media forum—an interview replayed across the full panoply of KUAM traditional, radio, and social media—that he found without a hearing that JMI had committed “fraud on the tribunal” and that JMI’s “action was so egregious that the only thing we could do was dismiss this case.” KUAM Interview, 3:15:05.

¹ See “*The Link: February 7, 2022*”, KUAM News Feb. 7, 2022, <https://www.youtube.com/watch?v=EiUgPhqz8uY>.

The Public Auditor's *sua sponte* decision, however, was not correct. As the Superior Court determined in CV0095-22, "[T]he OPA should have afforded JMI an opportunity to respond, considered lesser sanctions, and examined whether JMI was involved in a pattern or scheme as required under the definition of a fraud on the court." *John Del International, Inc. v. Office of Public Accountability, et. all.*, CV0095-22, Decision and Order re JMI's Petition for Judicial Review (2023).

The Public Auditor's willingness to publicly dissect the decision, raises serious concerns about his ability to reassess the case impartially upon remand. The Public Auditor has not only made public statements prejudging the truthfulness of key individuals of JMI but has also made public statements prejudging the veracity of the Contractor's Licensing Board investigation into the merits allegations made by JMI related this appeal. *See*, KUAM news, *Public auditor clarifies why he dismissed an appeal that led to the contractors licensing board head's resignation*, February 7, 2022 (available at <https://www.kuam.com/story/45817009/public-auditor-clarifies-why-he-dismissed-an-appeal-that-led-to-the-contractors-licensing-board-heads-resignation>) (reporting that the public auditor stated "'It's very hard to believe anything as I said in my decision. It just makes it difficult to accept anything from the CLB.'").

The public statements on a popular show about the dismissal of this case have inevitably reached a wide audience. This not only impacts the perception of impartiality but also affects the broader public trust in the fairness and integrity of the OPA. The appearance of having prejudged the merits of this matter

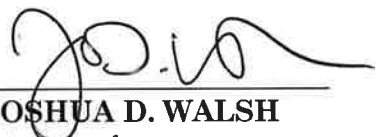
undermines the foundational principle that every individual is entitled to a fair hearing before an unbiased Public Auditor. When the Public Auditor speaks outside the hearing, the words echo within. Given these concerns, it is imperative for the preservation of integrity and the assurance of a fair administrative hearing that Public Auditor Benjamin Cruz recuse himself from further proceedings in this matter, and that a new hearing officer be appointment in this matter in accordance with the Public Auditor's powers conferred in 2 GAR § 12109 and 2 GAR § 12116.

IV. CONCLUSION

Based on the foregoing, JMI hereby respectfully requests that the Public Auditor recuse and disqualify himself from hearing this appeal.

DATED this 11th day of January 2024.

RAZZANO WALSH & TORRES, P.C.

By: 
JOSHUA D. WALSH
Attorneys for
Johndel International, Inc. dba
JMI-Edison