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Decision 91-10-013 October 11, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Allied Temporaries,)
 Complainant,)
 vs.) Case 90-04-044
 (Filed April 25, 1990;
 GTE Sprint,) Amended July 10, 1990)
 Defendant.)

Law Offices of Joseph O'Sullivan, by Walter Cook, Attorney at Law, and Women and Minority Business Enterprise Advocates, Inc., by Clarence Hunt, for Allied Temporaries, Inc., complainant.
Cheryl Houser, Attorney at Law, for US Sprint Communications Company Limited Partnership, defendant.

OPINION

This is a complaint by Allied Temporaries, Incorporated (Allied) against GTE Sprint (Sprint). The complaint alleged that by rejecting Allied's request for contracts, Sprint violated the equal protection provisions of the California Constitution, § 453a of the Public Utilities (PU) Code and General Order (GO) 156. Sprint denies all of the allegations in the complaint.

The Administrative Law Judge filed his proposed decision on August 28, 1991. No comments to the proposed decision were filed.

The Commission makes the following findings and conclusions.

Findings of Fact

1. Allied is a corporation. Clarence Hunt (Hunt) is an African-American who owns all of the common stock of Allied. Hunt is the president and chief executive officer of Allied, which qualified as a Women and Minority Business Enterprise, as defined in PU Code § 8282 and GO 156.

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2. Hunt is the president of a corporation named Women and Minority Business Enterprise Advocates, Inc. (Advocates).

3. US Sprint Communications Company Limited Partnership is a successor in interest of GTE Sprint. It responded to the complaint and participated in this matter. For continuity and clarity, it will also be referred to herein as Sprint.

4. Sprint is a telephone corporation whose gross annual revenues exceed \$25,000,000 and is within the purview of PU Code § 8283 and § 1.1.1 of GO 156.

5. A hearing on motions was held before Administrative Law Judge (ALJ) Donald B. Jarvis on August 29, 1990. Advocates Hunt appeared on behalf of Allied. Cheryl Houser (Houser), Esq. appeared for Sprint.

6. A duly noticed public hearing on the merits of the complaint commenced before ALJ Jarvis on September 27 and 28, 1990. In addition to Hunt, the Law Offices of Joseph O'Sullivan by Walter Cook, Esq. (Cook) also appeared on behalf of Allied.

7. The taking of evidence was not completed by the end of the hearing day on September 28, 1990. At that time Karl Cropsey (Cropsey), Sprint's manager of human resources was on the witness stand under cross-examination. Cropsey is located in Kansas City, Missouri. At the conclusion of that day's session ALJ Jarvis from the bench continued the hearing to January 8, 1991.

8. At Allied's request, the January 8, 1991 hearing was continued by agreement of the parties to March 26, 1991. Thereafter, again at Allied's request and by agreement of the parties, the matter was continued to June 18 and 19, 1991. Cook was notified of these dates on March 22, 1991 in a letter from Houser. Witness Cropsey was under an order to be present on June 18 and 19, 1991.

9. On June 4, 1991, Cook's secretary wrote to ALJ Jarvis the following:

"I am writing to inform you that Mr. Karl Cropsey, Sprint's manager of human resources, has been notified of the hearing dates of June 18 and 19, 1991, and has been ordered to be present on those dates."

"I am also writing to inform you that Mr. Karl Cropsey, Sprint's manager of human resources, has been notified of the hearing dates of June 18 and 19, 1991, and has been ordered to be present on those dates."

"I am also writing to inform you that Mr. Karl Cropsey, Sprint's manager of human resources, has been notified of the hearing dates of June 18 and 19, 1991, and has been ordered to be present on those dates."

"Dear Judge Jarvis:

"Please be advised that Mr. Cook will not appear at the evidentiary hearing scheduled for June 18, 1991. This office has been attempting to reschedule this hearing for a later date in July, or any other dates available to our calendars, to accommodate Mr. Cook's vacations which were previously set for May 1991.

Very truly yours,

/s/ Robert C. Chabrefy
Robert C. Chabrefy
Secretary to Walter C. Cook"

ALJ Jarvis responded to the letter on June 7, 1991 with the following:

"Dear Mr. Chabrefy:

"C.90-04-044 - ALLIED TEMPORARIES V. GTE SPRINT"

"This is a reply to your letter of June 4, 1991¹⁰ about a continuance in the above-entitled matter.

"If the parties agree to a continuance I am prepared to grant it to a date acceptable to the parties consonant with my calendar. If there is no agreement, a formal motion should be filed and served on the opposing party. The motion should be verified or contain an appropriate affidavit or declaration.

"I note the following state of the record. On September 28, 1990, after two days of public hearing, the matter was continued for further hearing on January 8, 1991, a date to which the parties agreed. At the time of adjournment, Karl Cropsey, defendant's manager of human resources, was on the witness stand. Mr. Cropsey is located in Kansas City, Missouri. He was under cross-examination. At that time, Mr. Cropsey was directed to return for further examination on January 8, 1991.

"At Allied's request the matter was continued by agreement of the parties to March 26, 1991.

Thereafter, again at Allied's request and by agreement of the parties, the matter was again continued to June 18 and 19, 1991. Attorney Cook was notified of these dates on March 22, 1991 in the letter by opposing counsel, a copy of which is appended to this letter. Witness Cropsey is under an order to be present on June 18 and 19, 1991.

"Any formal motion for a continuance should address the question of why attorney Cook on March 22, 1991 agreed to a trial date on June 18 and 19, 1991, if he had a vacation scheduled at that time, or why he agreed to those dates and subsequently scheduled a vacation."

Very truly yours,

/s/ Donald B. Jarvis
Donald B. Jarvis
Administrative Law Judge"

10. On June 4, 1991, Hunt telephoned the Chief Administrative Law Judge and requested a continuance in the matter and the removal of ALJ Jarvis on the grounds of alleged bias. Hunt stated that he was unwilling to proceed to hearing before ALJ Jarvis. On June 6, 1991 the Chief Administrative Law Judge confirmed the telephone conversation with the following letter to Hunt:

"Dear Mr. Hunt:

"This will confirm our telephone discussion of June 4 wherein you indicated that Allied Temporaries' counsel will be out of town at the time hearings are scheduled in the above matter, and I advised you to file a formal motion requesting a continuance. In rendering this advice, I assumed that you had already attempted to reach an agreement with US Sprint's counsel as to a mutually acceptable alternative hearing date. If you have not taken that preliminary step, you should certainly do so in the interests of expediency.

"You also stated that you seek the removal of the assigned Administrative Law Judge (ALJ) due

to alleged bias, and that you are unwilling to proceed to hearing on June 18 before the currently assigned ALJ. As I indicated during our conversation, the Commission's Rules of Practice and Procedure do not allow for automatic disqualification of an ALJ for bias, and under relevant California case law, a moving party is required to set forth legally sufficient facts to demonstrate bias in order to prevail (Andrews v. Agricultural Labor Relations Bd (1981) 28 Cal. 3d 781, 792).

"If you choose to file either or both of the above motions, you must do so in accordance with Article 2 of the Commission's Rules of Practice and Procedure. Among other things, these rules require that such motions be served on all parties of record.

Very truly yours,

/s/ Lynn T. Carew
Lynn T. Carew
Chief Administrative Law
Judge"

11. On June 17, 1991, Allied filed a "Motion for Continuance; Motion to Dismiss Judge Donald Jarvis; Declaration". The motion sought a continuance and the removal from the proceeding of ALJ Jarvis.

12. The matter came on regularly for hearing on June 18, 1991 before ALJ Jarvis. Counsel for Sprint, Houser, and witness Cropsey were present. No one was present to represent Allied. ALJ Jarvis recessed the hearing for a period of time in case counsel for Allied had been delayed. After the recess there was still no one present to represent Allied. ALJ Jarvis noted the state of the record and the motion for continuance and recusal. Sprint moved for dismissal of the complaint with prejudice. ALJ Jarvis ruled that:

"I am going to submit that [Allied's] motion for disposition by the Commission and I'm going to

submit the entire matter subject to the following: Unless the Commission disposition of the motion vacates the submission that I am presently going to submit the matter on because I feel unless that motion is granted, the motion should be dismissed for lack of prosecution."

13. On July 31, 1991, Commissioner Daniel Wm. Fessler issued an "Assigned Commissioner's Ruling on Allied Temporaries, Inc.'s Motion to Dismiss Administrative Law Judge" which denied Allied's motion filed on June 17, 1991. The Commission adopts the findings, conclusions, and ruling of Commissioner Fessler. A copy of the ruling is attached as Appendix A.

14. On July 9, 1990, Allied filed a "Declaration of Clarence Hunt; Request for Eligibility" which sought intervenors fees and expenses or compensation from the Advocates Trust Fund for Cook and Advocates."

15. The Advocates Trust Fund of the California Public Utilities Commission was established on October 11, 1982. The specific purpose of the Trust "is to receive, hold and, from time to time, disburse funds from either income or principal solely to defray expenses, including attorneys' fees and expert witness fees directly related to litigation or representation of consumer interests in 'quasi-judicial complaint cases,' as defined in Consumers Lobby Against Monopolies vs. Public Utilities Commission, 25 Cal. 3d 891 (1979) where the California Public Utilities Commission...has jurisdiction to make attorney fee awards." The Trust provides that:

"1.3 Attorneys fees may be awarded only where it is clearly and convincingly demonstrated that the private party has made a direct, primary and substantial contribution to the result of the case. Fees will be awarded from the Advocates Trust Fund where complainants have generated a common fund but that fund is inadequate to meet reasonable attorney or expert witness fees, where a substantial benefit has been conferred upon a party or members of an ascertainable class of

persons but no convenient means are available for charging those benefited with the cost of obtaining the benefit, or where complainants have acted as private attorneys general in vindicating an important principle of statutory or constitutional law, but no other means or funds is available for award of fees."

16. The request for eligibility for compensation does not meet the requirements of Section 1.3 of the Trust.

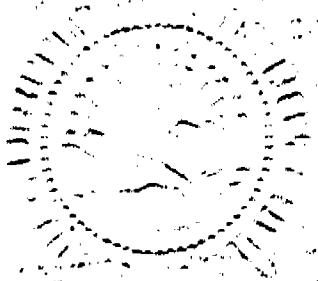
Conclusions of Law

1. The granting of a continuance was not warranted in this matter.
2. No grounds for removing the assigned ALJ were established in this matter.
3. The complaint should be dismissed with prejudice for lack of prosecution.
4. The request for eligibility for compensation should be denied.

ORDER

IT IS ORDERED that:

1. Case 90-04-044 is dismissed with prejudice.



2. Allied's request that attorney Walter Cook or Women and Minority Business Enterprise Advocates, Inc. be found eligible for compensation from the Advocates Trust Fund is denied.

This order becomes effective 30 days from today.

Dated October 11, 1991, at San Francisco, California.

JOHN B. OHANIAN

DANIEL Wm. FESSLER

NORMAN D. SHUMWAY

Commissioners

Commissioner Patricia M. Eckert,
being necessarily absent, did
not participate.

WALDO

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CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY

NEAL J. JOHNSON, Executive Director

DWF
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
In the Matter of Allied
Temporaries, Inc. v. US Sprint) Case 90-04-044

ASSIGNED COMMISSIONER'S RULING ON
ALLIED TEMPORARIES, INC.'S MOTION TO
DISMISS ADMINISTRATIVE LAW JUDGE

Allied Temporaries, Inc., has filed a Motion to Dismiss Administrative Law Judge Donald Jarvis (Motion) in Case (C.) 90-04-044. The Motion was filed on June 17, 1991, as part of a document entitled "Motion for Continuance, Motion to Dismiss Donald Jarvis, Declaration".

Allied Temporaries filed this complaint against GTE Sprint, alleging that Sprint discriminated against Allied because it was a contractor owned by a black American. The case went to hearing before Administrative Law Judge Jarvis.

On September 28, 1990, Administrative Law Judge Jarvis granted a continuance of hearing in C.90-04-044, Allied Temporaries v. GTE Sprint, until January 8, 1991. Defendant's manager of human resources, Karl Cropsey, faced cross-examination that day, and was expected to continue when the hearing resumed. Both parties agreed to the continuance. Allied requested two more continuances, to March 26, 1991, and June 18, 1991. GTE Sprint agreed to both. The record does not disclose why Allied sought the continuances.

On October 19, 1990, the assigned Administrative Law Judge filed a proposed decision in C.90-03-038, Allied Temporaries, Inc., v. Southern California Gas Company. On March 26, 1990, the assigned Administrative Law Judge filed a proposed decision in C.90-03-035, Allied Temporaries, Inc., v. Pacific Bell. The decisions, later adopted by the Commission as D.91-05-025 and D.91-06-024 respectively, granted Allied no relief.

Allied asserts in its Motion that the assigned Administrative Law Judge is biased against the "intended rights" of Women and Minority-owned Business Enterprises. Specifically, Allied alleges that the Administrative Law Judge is "totally opposed to any and all interpretations of PU Code § 8281 et seq., and General Order 155 that will fairly and equitably enforce the intended rights of minority contractors under the subject legislation". Allied further alleges the Administrative Law Judge is "totally in favor of any and all public utility management decisions even if those decisions violate the intent

of established California legislative policy protecting minority business enterprise procurement rights and benefits". Finally, Allied claims the Administrative Law Judge has "attempted to rewrite the intent of PU Code § 8281 et seq." (Motion, p. 2). As examples of this alleged bias, Allied cites without elaboration the Administrative Law Judge's decisions in C. 90-03-028 and C.90-03-035.

In passing on Allied's motion my first reference is to the Public Utilities Code and then to the Commission's Rules of Practice and Procedure. Neither contains any provision for the disqualification on motion of an Administrative Law Judge. Indeed, in 1958 this Commission held that a motion to disqualify an Examiner because of alleged bias had no basis in law. 56 CPUC 219.

Our 1958 decision may not be the last word. In 1981 the California Supreme Court applied a section of the Code of Civil Procedure to the disqualification of a judicial officer. *Andrews v. Agricultural Labor Relations Board*, 28 Cal.3d 781 (1981). At issue was an administrative regulation governing the disqualification of Administrative Law Officers (ALOs) appointed by the Agricultural Labor Relations Board. The court applied Code of Civil Procedure § 170(a)(5), now superseded: "No justice or judge shall sit or act as such in any action or proceeding . . . [w]hen it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him." It interpreted the statute to require a moving party to allege and prove legally sufficient facts to demonstrate the judicial officer's bias before the court could decide whether the bias would render a fair trial before that judge improbable.

Andrews teaches that in the absence of a statute or regulation specifically directed at an agency, the Code of Civil Procedure applies to the disqualification of the agency's quasi-judicial officer as well as to an elected judge. Though the statute at issue in that case was rewritten in 1984, the two-tier *Andrews* test (proof of bias, followed by proof that bias will interfere in trial) may still apply because the new statutory language is similar. However, we need not decide this because Code of Civil Procedure §§ 170-170.3 give very clear instructions on the removal of judges.

The judge has an affirmative duty to decide any proceeding unless he or she is disqualified (§ 170). The code then lists seven reasons which disqualify a judge; § 170.1(a)(5) is most relevant to the allegations here. "A judge shall be disqualified if . . . for any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Bias or prejudice towards a lawyer in the proceeding may be a ground

grounds for disqualification."

Section 170.2 specifically states that a judge cannot be disqualified if he or she "is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group", nor if the judge "has in any capacity expressed a view on a legal or factual issue presented in the proceeding," except as provided in § 170.1. Section 170.3 provides the mechanism for removal of a recalcitrant judge.

Case law shows that, as with the Andrews test, a moving party has no automatic or summary right to disqualify a judge under § 170.3; proven facts must buttress the allegations. *People v. Avol*, 338 Cal. Rptr. 45, 192 Cal. App. 3d Supp. 1, *Jack Farenbaugh and Son v. Belmont Const., Inc.*, 194 Cal. App. 3d 1023, 240 Cal. Rptr. 78.

Allied confuses conclusory allegations with offers of proof in attempting to disqualify Administrative Law Judge Jarvis. Merely listing the judge's previous decisions and then alleging that they demonstrate bias is utterly unpersuasive to a reader who is not assisted by any attempted demonstration of the ultimate facts. Nor is Allied's cause advanced by the conclusory allegation that the judge has somehow attempted to rewrite sections of the Public Utilities Code. Indeed, my reading of the indicated decisions suggests a record of interpretation sympathetic to the need for WMBEs to compete for and participate in utility contracting.

Motion denied.

DATED: July 30, 1991, at San Francisco, California. b6, b7C

/s/ DANIEL Wm. FESSLER

Daniel Wm. Fessler
Commissioner

1. The first step is to identify the problem. This involves understanding the symptoms and the context in which they are occurring.

7-10992-90-68

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Assigned Commissioner's Ruling on Allied Temporaries, Inc.'s Motion to Dismiss Administrative Law Judge on all parties of record in this proceeding or their attorneys of record.

Clarence Hunt

Allied Temporaries and Women and

Minority Business Enterprise Advocates

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US Sprint Communications Co. Ltd. Partnership

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B3-1

Burlingame, CA 94010

Dated July 31, 1991, at San Francisco, California

/s/ DOMENICA V. KO

Domenica V. Ko

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number of the service list on which your name appears.

(END OF APPENDIX A)