UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

In the Matter of	
Carrie Tolstedt, Former Head of the Community Bank	OCC AA-EC-2019-82
Claudia Russ Anderson, Former Community Bank Group Risk Officer	OCC AA-EC-2019-81
James Strother, Former General Counsel	OCC AA-EC-2019-70
David Julian, Former Chief Auditor	OCC AA-EC-2019-71
Paul McLinko, Former Executive Audit Director	OCC AA-EC-2019-72
Wells Fargo Bank, N.A. Sioux Falls, South Dakota	ALJ McNeil

Order Regarding Respondents' Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b)

The evidentiary hearing requested by Respondents Russ Anderson, Julian, and McLinko in this administrative enforcement action began on Monday, September 13, 2021. The hearing was held in Sioux Falls, South Dakota, with some of the participants, including Respondents Julian and McLinko, appearing through remote teleconferencing. Concerns over the spread of the coronavirus prompted the establishment of protocols permitting remote participation by the parties and witnesses. Each party had, prior to the start of the hearing, used these protocols to preserve the testimony of certain witnesses; and each party had participated in developing a schedule that would permit preserving the testimony of witnesses who would testify after September 22, 2021, which is when the hearing in South Dakota was adjourned.

The hearing currently is scheduled to resume in South Dakota on January 3, 2022. In the interim, the parties have convened remotely and preserved hearing testimony from several witnesses who have indicated they would not be able to attend the hearing in person due to coronavirus concerns.

On October 15, 2021, Respondents filed a motion seeking the disqualification of the undersigned presiding Administrative Law Judge.[1] In support, Respondents aver the ALJ's inconsistent, irregular, and one-sided rulings reflect an apparent bias against Respondents,[2] the ALJ's statements criticizing Respondents' positions and prejudging the facts reflect an apparent bias against Respondents,[3] that the ALJ's *ex parte* communications with Enforcement Counsel reflect an apparent bias against Respondents,[4] and that the ALJ has failed to effectively manage the proceedings.[5]

Authority for Respondents' Motion is found in the Administrative Procedure Act.[6] From that section of the APA detailing the powers and duties of the presiding employee in proceedings undertaken pursuant to the Act, Respondents rely on the following language to support their Motion:

> The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.[7]

In framing their argument in support of disqualification, Respondents cite to the federal judicial recusal statute, 28 U.S.C. § 455(a), for the proposition that the federal statute "likewise provides that "[a]ny … judge … of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[8] Respondents assert that "[d]isqualification is appropriate when, among other things, a

---

[1] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b), dated October 15, 2021.

[2] *Id*. at 9-27.

[3] *Id*.at 27-37.

[4] *Id*. at 37-39.

[5] *Id*. at 39-47.

[6] *Id*. at 1, citing 5 U.S.C. § 556(b).

[7] 5 U.S.C. § 556(b).

[8] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 4.

judge "has a personal bias or prejudice concerning a party."[9] Respondents further rely upon the following language found in 28 U.S.C. § 144: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."[10]

At the outset, it is not clear why Respondents have invoked language from Chapter 5 of Title 28 of the United States Code, as Title 28 applies in federal judicial proceedings presided over by district court judges.[11] The OCC has not invoked the jurisdiction of the federal district court in this administrative enforcement action.[12] Recusal and disqualification in a federal administrative enforcement proceeding are controlled not by provisions found in Title 28 but by the Administrative Procedure Act, which provides a protocol for the disqualification of a federal ALJ,[13] and – in this particular proceeding – by the OCC's Uniform Rules of Practice and Procedure, which provide a protocol for an ALJ's recusal.[14]

Respondents' erroneous reliance on rules applicable to judges in the federal district courts is significant. In their Motion, Respondents make the following legal claim: that "Section 455, and corresponding federal case law applying that statute, 'applies with equal force to the disqualification of administrative judges.'"[15] Their legal premise, drawn from these authorities, is that "[u]nder both the APA and § 455, the relevant inquiry for determining whether disqualification is appropriate is not whether the judge is proven to have actual bias or prejudice, but only [whether] the facts 'might reasonably cause an objective observer to question the judge's impartiality.'"[16]

---

[9] *Id*. at 5, quoting 28 U.S.C. § 455(b)(1).

[10] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 5.

[11] 28 U.S.C. § 144.

[12] See Notice of Charges, issued January 23, 2020 at 99, directing Respondents to file a written request for a hearing along with a written Answer in accordance with 12 U.S.C. § 1818(i) and 12 C.F.R. § 19.19(a) and (b).

[13] 5 U.S.C. § 556(b).

[14] 12 C.F.R. § 19.5(b)(9).

[15] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 6, quoting *Chianelli v. Env't Prot. Agency*, 8 F. App'x 971, 980 (Fed. Cir. 2001); see also *Marcus v. Dir., Off. of Workers' Comp. Programs, U. S. Dep't of Lab*., 548 F.2d 1044, 1051 (D.C. Cir. 1976) (noting that "[t]he general rule[s] governing disqualification" are "applicable to the federal judiciary and administrative agencies alike").

[16] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 6, quoting *United States v. Microsoft Corp*., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam) (alteration omitted).

Respondents support this premise with a correlated premise from *Chianelli*,[17] regarding the applicability of an "appearance of impartiality" standard under the APA; and from these premises submit the legal conclusion that a federal ALJ, like any federal judicial-branch judge, "must disqualify himself or be reassigned if his conduct reflects an appearance of bias, regardless of whether actual bias exists."[18]

The foregoing represents a material misstatement of the law applicable to Respondents' Motion. Case law is clear on this point: in evidentiary proceedings undertaken pursuant to the federal APA, "the appearance of impropriety standard is not applicable to administrative law judges."[19]

As the Ninth Circuit Court of Appeals held in *Bunnell v. Barnhart*:

> Administrative law judges are employed by the agency whose action they review. As the Second Circuit has specifically recognized, if the "appearance of impropriety" standard of 28 U.S.C. § 455(a) was applicable to administrative law judges, they would be forced to recuse themselves in every case.
>
> Under 28 U.S.C. § 451, the recusal based upon the appearance of impropriety applies only to Supreme Court Justices, magistrate judges, and "judges of the courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior...." *Id*. Administrative law judges do not fall within this statute.[20]

Case law supports the point argued by Enforcement Counsel, that a party seeking the disqualification or recusal of a federal ALJ must establish the ALJ acted with "actual personal bias rather than judicial bias," such that "adverse rulings alone do not constitute the requisite bias mandating disqualification."[21]

---

[17] *Chianelli v. Env't Prot. Agency*, 8 F. App'x 971, 980 (Fed. Cir. 2001)

[18] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 6, citing *Jackson v. Berryhill,* 268 F. Supp. 3d 115, 134 (D.D.C. 2017) for the proposition that "a court assessing the impartiality of an ALJ 'must focus its inquiry not on whether the judge actually harbored subjective bias, but rather on whether the record, viewed objectively, reasonably supports the appearance of prejudice or bias'").

[19] Enforcement Counsel's Opposition to Respondents' Motion for Disqualification Based on Personal Bias and Other Disqualifications dated November 1, 2021 at 2, quoting *Bunnell v. Barnhart*, 336 F.3d 1112, 1115 (9th Cir. 2003) and citing Greenberg v. Bd. of Governors of Fed. Reserve Sys., 968 F.2d 164, 166–67 (2d Cir.1992) and *Harline v. Drug Enforcement Admin.*, 148 F.3d 1199, 1204 (10th Cir.1998).

[20] *Bunnell v. Barnhart,* 336 F.3d 1112, 1114 (9th Cir. 2003), citing

[21] Enforcement Counsel's Opposition to Respondents' Motion for Disqualification Based on Personal Bias and Other Disqualifications at 3, quoting *Marcus v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of*

The Sixth Circuit Court of Appeals in *Collier v. Comm'r of Soc. Sec.* described the required analysis:

> In evaluating Collier's claim, this court must begin with the "presumption that policymakers with decisionmaking power exercise their power with honesty and integrity." *Navistar Int'l. Transportation Corp. v. United States Environmental Protection Agency*, 941 F.2d 1339, 1360 (6th Cir.1991). "The burden of overcoming the presumption of impartiality 'rests on the party making the assertion [of bias],' and the presumption can be overcome only with convincing evidence that 'a risk of actual bias or prejudgment' is present." *Id*. (citing *Schweiker v. McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982); *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)). Stated differently, "any alleged prejudice on the part of the decisionmaker must be evident from the record and cannot be based on speculation or inference." *Id*.[22]

Again, it is not clear why Respondents through their Counsel elected not to disclose this authority to the Tribunal. Both *Collier* (from the Sixth Circuit) and *Bunnell* (from the Ninth Circuit) are internally consistent reported cases of the federal Courts of Appeals and thus, in the absence of contrary authority from either the Eighth Circuit or the Supreme Court, both cases constitute controlling authority on the question.

It is not clear whether Respondents through their Counsel deliberately withheld reference to these authorities or failed to sufficiently research their claim so that through due diligence they could present an accurate statement of controlling authority on the legal claim upon which their Motion is based. Because Respondents cited neither case in their Motion, there can be no suggestion from Respondents' Motion that they presented the authorities cited in their Motion in a good faith effort to change the law.

What is clear, however, is that when applied to the facts of record in this administrative enforcement action, *Collier* and *Bunnell*, along with *Schweiker v. McClure* and *Withrow v. Larkin* support Enforcement Counsel's assertion that because Respondents' Motion does not allege or show actual bias on the ALJ's part the Motion for Disqualification must fail.

Lab., 548 F.2d 1044, 1051 (D.C. Cir. 1976)). "The mere fact that a decision was reached contrary to a particular party's interest cannot justify a claim of bias, no matter how tenaciously the loser gropes for ways to reverse his misfortune."

[22] C*ollier v. Comm'r of Soc. Sec.*, 108 F. App'x 358, 363–64 (6th Cir. 2004), citing S*chweiker v. McClure*, 456 U.S. 188, 196, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982); and *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

Independent of the foregoing basis for denying Respondents' Motion, the record reflects an insufficient factual basis to support a disqualification order even under the "appearance of bias" standard.

In accordance with the requirements imposed upon movants seeking disqualification of an ALJ under the APA, Respondent Julian through Counsel Timothy Perla of the law firm of Wilmer Cutler Pickering Hale and Dorr LLP submitted an Affidavit in Support of Respondents' Motion.[23] The Affidavit avers that "throughout the summary disposition, prehearing, and hearing stages," the ALJ's "rulings, comments, and conduct . . . have created the appearance of bias in these proceedings," and created in Respondents "concern over the Tribunal's ability to effectively manage the proceeding."[24] Mr. Perla avers the ALJ "misapplied OCC procedure and legal standards to the benefit of Enforcement Counsel during the summary disposition process" and identified the following in support of his averment.

Mr. Perla asserted that the ALJ determined Enforcement Counsel were entitled to partial summary disposition pursuant to the OCC's Uniform Rules of Practice and Procedure at 12 C.F.R. § 19.29, notwithstanding that Enforcement Counsel's Motion sought summary disposition on all issues, as is permitted under OCC Uniform Rule12 C.F.R. § 19.30.[25] Mr. Perla asserted that Respondents filed "extensive oppositions" to Enforcement Counsel's Summary Disposition Motions, and that "[n]otwithstanding the absence of any motion for partial summary disposition, and with no prior notice to Respondents, the Tribunal *sua sponte* examined each paragraph of the Statement of Material Facts (SMF) to determine whether to make findings with regard to specific 'claims,' which the Tribunal identified as specific factual assertions."[26]

In this line of averments, Mr. Perla asserted the ALJ "repeatedly disregarded the evidence that Respondents did identify to controvert Enforcement Counsel's SMFs."[27] In support as an example, Mr. Perla cited a factual claim that Enforcement Counsel presented in support of their summary disposition motions – specifically that the term "gaming" "mirrored the definition of sales integrity violations" as used within the Bank.[28] He

---

[23] Timothy Perla's Affidavit in Support of Respondents' Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b).

[24] *Id*. at ⁋ 3.

[25] *Id*. at ⁋ 5.

[26] *Id*. at ⁋ 7, citing July 20 Order at 154-747; and In re Tolstedt, Order Regarding Respondents' Motion for Clarification (Aug. 20, 2021), at 2 ("In this context, 'claims' refers to factual averments appearing in Enforcement Counsel's Statements of Material Fact.").

[27] Timothy Perla's Affidavit at ⁋ 11.

[28] *Id*., citing In re Tolstedt, Enforcement Counsel's Statement of Material Facts as to Respondent David Julian and Paul McLinko (Mar. 26, 2021), at 3-4 (SMF ¶ 13).

asserted that the claim was in fact disputed by Respondent Julian's response to the factual claim.[29]

At this point it must be noted that the determinations referred to by Mr. Perla were those rendered in the ALJ's summary disposition order, which was issued on July 20, 2021. As noted by Enforcement Counsel, under any interpretation of the disqualification protocols prescribed in the APA, Mr. Perla had the affirmative duty to present his claims in support of disqualification "at the first time after discovery of the facts tending to prove disqualification."[30] The record reflects Mr. Perla failed to timely raise the issues presented in Respondents' Motion.

As is reflected in the list of examples identified below, most of the material claims of bias raised by Mr. Perla are based on decisions of the ALJ that preceded by several weeks or months the filing of his Affidavit and Respondents' Motion. Claims of bias based on the summary disposition order (which was issued on July 20, 2021) and the Order regarding the parties' Motions *in Limine* (which was issued on September 9, 2021) form the bulk of Mr. Perla's prehearing opinions, and no grounds have been provided justifying waiting until five weeks after the start of the hearing to present these claims or this Motion. Accordingly, claims of apparent bias preceding the commencement of the hearing on September 13, 2021 cannot support Respondents' Motion.

Mr. Perla asserted that bias on the ALJ's part had been established by the ALJ's determination that the term "gaming" mirrored the definition of sales integrity violations as used with the Bank, when, according to Mr. Perla, Mr. Julian offered a response that controverted this determination, thus precluding summary disposition.

This assertion merits two responses, the first specific to this paragraph of Mr. Perla's Affidavit and the second more generally with respect to the nature and quantum of proof called for in disqualification motions under the APA using the "appearance of bias" standard.

First, an impartial reading of Enforcement Counsel's factual claim about the meaning and use of the term "gaming" and Respondent Julian's response to the claim warrants the conclusion presented in the Summary Disposition Order – despite Mr. Perla's

---

[29] Timothy Perla's Affidavit at ¶ 11, citing In re Tolstedt, Response of Respondent David Julian to Enforcement Counsel's Statement of Material Facts as to Respondent David Julian (May 21, 2021), at 11-12 (citing DJ0108 at 5, 7).

[30] Enforcement Counsel's Opposition to Respondents' Motion for Disqualification Based on Personal Bias and Other Disqualifications at 1, quoting *re Bartlett Farmers Bank*, No. FDIC-92-357j, 1994 WL 711717, at *3 (final decision) (Nov. 8, 1994) (collecting cases); *Pharaon v. Bd. of Governors of Fed. Rsrv. Sys*., 135 F.3d 148, 155 (D.C. Cir. 1998) ("Claims of bias must 'be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist.'" (quoting *Marcus v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 548 F.2d 1044, 1051 (D.C. Cir. 1976)). The timeliness of the affidavit is relevant to the movant's good faith. "[W]hen a party voices its misgivings in tardy or dilatory fashion, not only may time and effort be wasted in the event that disqualification is ultimately required, but the good faith of the claimant will quite naturally be placed in some doubt." *Marcus*, 548 F.2d at 1050.

opinion to the contrary.

Enforcement Counsel's claim in their summary disposition motion was thus:

> (13) The term "gaming" within the Bank mirrored the definition of sales integrity violations. "Sales gaming may be classified as the manipulation and/or misrepresentation of sales or sales reporting to receive or attempt to receive compensation, or to meet or attempt to meet sales goals." (MSD-2 at 1, 3). Specified types of gaming, included the following:
>
> (a) "Selling products to existing customers without their knowledge (i.e. debit cards) or booking more expensive DDA products above what an actual customer requested and without their knowledge.
>
> (b) Listing bogus sales referrals by use of current customer SSN's when they were never present.
>
> (c) Misrepresenting products by not disclosing additional fee income items like overdraft protection.
>
> (d) Signing customers up for on-line banking and bill pay without their knowledge.
>
> (e) Management supplying tellers and bankers with SSN's from the Hogan system to be used as bogus referrals.
>
> (f) Opening unfunded DDA's without customer knowledge and waiving fees (zero balance account auto-closes within 90 days but the sales goal is registered).
>
> (g) Altering or falsifying documents translating to increased sales (i.e.; phony referrals)." (MSD-557).[31]

Enforcement Counsel's factual claims in this Statement were supported by a citation to documentary evidence submitted by Enforcement Counsel – shown in our record as Enforcement Counsel's Summary Disposition Exhibit No. MSD-557. That exhibit consists of an eighteen page PowerPoint stack obtained from the Bank defining gaming generally as "the manipulation and/or misrepresentation of sales or sales reporting to receive or attempt to receive compensation, or to meet or attempt to meet sales goals."[32] The exhibit includes each of the examples presented in the above-referenced SMF. As presented by Enforcement Counsel and as supported by this documentary evidence, the ALJ determined that the factual claims found in the Statement were supported by

[31] Enforcement Counsel's Statement of Material Facts as to Respondent David Julian and Paul McLinko (Mar. 26, 2021), at 3-4 (SMF ¶ 13).

[32] EC MSD-557 at 2.

substantial evidence presented in the record.

In his Affidavit, Mr. Perla asserted that bias is shown by the ALJ's finding that the above-stated factual claims were undisputed as to Respondent Julian, and that the claims were in fact disputed by Respondent Julian.[33]

Respondents are, pursuant to the OCC's Uniform Rules, permitted to challenge the factual claims in this and any SMF. They must do so, however, by presenting documentary evidence controverting the claims in the SMF.[34]

In evaluating the merits of this averment, the OCC's Rules of Practice and Procedure direct that when disputing a claim presented by a movant seeking summary disposition, the responding party must "file a statement setting forth those material facts as to which he or she contends a genuine dispute exists."[35] Such opposition must be supported by "evidence of the same type as that submitted with the motion for summary disposition".[36]

To meet this evidentiary standard, a responding party's response must be supported by "documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position."[37] Thus, once a moving party presents substantial evidence supporting a posited statement of material fact (as was done here by Enforcement Counsel in their SMF), the burden shifts to the party opposing summary disposition to present documentary evidence controverting the claimed material facts.

Respondent Julian submitted the following in response to Enforcement Counsel's factual claims:

> Undisputed that the "Incentive Based Gaming" Report (the admissibility of which is not conceded) contains the quoted text. Disputed to the extent the "Incentive Based Gaming" Report on which Enforcement Counsel relies in Paragraph 13 for the Bank's definition of "gaming" was written by a single individual in 2004. (MSD-002 at 1). Gaming was defined by the Bank more broadly as "inappropriate sales" of any kind "to receive compensation, to meet sales goals or for any other reason." (DJ0108 at 5, 7 OCC-SP0823135).

Through this response, Mr. Julian did *not* dispute Enforcement Counsel's factual claim that the Bank's gaming report contained the language Enforcement Counsel

---

[33] Timothy Perla's Affidavit at ¶ 11.

[34] See 12 C.F.R. § 19.29(b)(2).

[35] *Id.*

[36] *Id*.

[37] *Id*.

presented in this Statement of Material Fact. That was the extent of the material import of the contents of this SMF – and nothing in Respondent Julian's response in opposition controverted the claims found therein.

His first factual claim – that the Bank's definition was "written by a single individual" does not identify a material fact in controversy, and thus would not support denial of the summary disposition motion.

His second factual claim posited that "[g]aming was defined by the Bank more broadly as 'inappropriate sales' of any kind 'to receive compensation, to meet sales goals or for any other reason."[38]

Respondent Julian supported this second factual claim by citing to a May 25, 2016 Wells Fargo PowerPoint presentation that included an overview of sales integrity with "enhancements" of the Bank's policies from 2013 to 2016.

Respondent Julian's claim that the Bank in 2016 defined gaming "more broadly" than it had in 2004 did *not* create a controverted material fact. The reference to the 2016 PowerPoint presentation did not contradict the fact that the Bank had, between 2004 and 2016, defined gaming precisely as was presented by Enforcement Counsel in the SMF. In the absence of documentary evidence controverting the factual claims in the SMF, the determination made in the summary disposition order regarding Respondent Julian with respect to this SMF was thus both defensible and legally sound.

If Respondent Julian had documentary evidence that controverted the factual claims in this SMF, he had both the opportunity and the obligation to present such documentation through his response to Enforcement Counsel's Statement. Respondent Julian failed to do so, resulting in the record reflecting that Respondent Julian failed to controvert the contents of the SMF when given the opportunity to do so. Mr. Perla's opinion that "the Tribunal repeatedly disregarded the evidence that Respondents did identify to controvert Enforcement Counsel's SMFs" is not supported by the record in this example, and will not support a motion for disqualification under the APA.

Apart from this finding, however, Respondents' Disqualification Motion must fail more broadly because there is no basis to conclude from <u>any</u> of the evidentiary rulings cited by Mr. Perla that actionable bias has been either alleged or established.

Under the Eighth Circuit's jurisprudence on the subject, a judge "is presumed to be impartial, and 'the party seeking disqualification bears the substantial burden of proving otherwise.'"[39] "'We apply an objective standard of reasonableness in determining whether recusal is required.'"[40] "'Under § 455(a), 'disqualification is required if a reasonable

---

[38] Timothy Perla's Affidavit at ⁋ 11, quoting DJ0108 at 5, 7 OCC-SP0823135.

[39] *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 790 (8th Cir. 2009), (quoting *United States v. Denton,* 434 F.3d 1104, 1111 (8th Cir.2006)).

[40] 594 F.3d at 1021 (quoting *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir.2003)).

person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown.'"[41]

In *Denton*,[42] the Eighth Circuit Court of Appeals held that "[i]n order to 'establish bias or prejudice from in-court conduct,' a party must show 'the judge had a disposition so extreme as to display a clear inability to render a fair judgment.'"[43] "'[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'"[44]

Denton, in turn, relied upon *Liteky*, where the Supreme Court construed the federal recusal statue in this way:

> For all these reasons, we think that the "extrajudicial source" doctrine, as we have described it, applies to § 455(a). As we have described it, however, there is not much doctrine to the doctrine. The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a necessary condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a sufficient condition for "bias or prejudice" recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice. Since neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias, it would be better to speak of the existence of a significant (and often determinative) "extrajudicial source" factor, than of an "extrajudicial source" doctrine, in recusal jurisprudence.
>
> The facts of the present case do not require us to describe the consequences of that factor in complete detail. It is enough for present purposes to say the following: First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See *United States v. Grinnell Corp*., 384 U.S., at 583, 86 S.Ct., at 1710. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are

---

[41] 594 F.3d at 1021, (quoting *Fletcher*, 323 F.3d at 664).

[42] *United States v. Denton,* 434 F.3d 1104 (8th Cir.2006).

[43] *Id.* at 1111 (8th Cir.2006), quoting *Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)

[44] 594 F.3d at 1021–22 (8th Cir. 2010) (quoting *Denton*, 434 F.3d at 1111).

> proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), a World War I espionage case against German–American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are reeking with disloyalty." *Id*., at 28 (internal quotation marks omitted). Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.[45]

The affidavit from Mr. Perla supporting Respondents' Motion expresses Mr. Perla's personal opinion regarding multiple rulings made by the ALJ before and during the evidentiary hearing requested by Respondents. For example, Mr. Perla expressed his opinion that "the Tribunal repeatedly disregarded the evidence that Respondents did identify to controvert Enforcement Counsel's SMFs,"[46] and "refused to consider the statements of facts offered by Respondents".[47]

---

[45] *Liteky v. United States*, 510 U.S. 540, 554–56 (1994).

[46] Timothy Perla's Affidavit at ⁋ 11.

[47] Timothy Perla's Affidavit at ⁋ 12. See also Mr. Perla's assertion that the ALJ "continued to improperly shift Enforcement Counsel's burdens to Respondents when ruling on the parties' motions in limine"," and "provisionally admitted the approximately 2,000 documents less than a week after receiving them," and "admitted the Eason exhibits into evidence," and "shifted the burden to Respondents to prove the inadmissibility of the OCC's investigative transcripts," and "put the burden on Respondents to establish that the deposition transcripts that they had sought to admit were admissible," and "sua sponte ordered Respondents to amend their prehearing statements and witness lists," because the Tribunal found a "substantial and material lack of compliance demonstrated in those responses." Mr. Perla attested that "[a]s a result of the Tribunal's unfounded and imbalanced orders, mere weeks before trial, Respondent Julian's counsel were forced to spend over 400 hours rewriting their prehearing submissions."

Respondents' Motion is based on Mr. Perla's opinion that "[t]his pattern of improper and unfair rulings continued into trial, where the Tribunal again allowed Enforcement Counsel to flout procedural rules that he strictly enforced against Respondents."[48]

---

[48] Timothy Perla's Affidavit at ⁋ 33. See, *e.g*., Mr. Perla's criticism of the ALJ's decision to prohibit a line of cross-examination of NBE Coleman about the OCC's purported coordination with the Bank's Board of Directors, "despite Enforcement Counsel opening the door by eliciting related testimony on direct examination"; that the Tribunal "has issued confusing and often times contradictory rulings" *Id*. at ⁋ 62; his opinion that the Tribunal's July 20 summary disposition order "required a subsequent email on July 27" and "a second order on July 28," and "a third order on August 2 to clarify precisely which factual claims the Tribunal had decided and which remained controverted and subject to further proof at the upcoming hearing" *Id*. at ⁋ 63; his opinion that part of that confusion rested on the fact that the July 20 Order made factual findings that, by their terms, found only that that a particular document or prior testimony contained certain text" and that "the Tribunal prevented Respondents from maintaining evidence in the record as a proffer, thus obstructing the Comptroller's eventual review of any proposed decision issued in this proceeding," on the basis that during direct examination by Enforcement Counsel, Mr. Coleman testified about the civil money penalty ("CMP") matrix that the OCC used to determine the proposed penalty amounts in this proceeding, and that during cross-examination by Respondent Julian's counsel subsequently sought to cross-examine Ms. Candy about a completed version of the CMP matrix, which Enforcement Counsel had produced to Respondents during the proceeding" *Id*. at ⁋ 70; where Mr. Perla asserted that the "Tribunal not only refused to allow Respondents to ask about the CMP matrix—*sua sponte* raising and then sustaining a foundation objection, and then preventing Respondents from asking further questions to establish that foundation—it also allowed Enforcement Counsel to claw back the document as inadvertently produced over Respondents' waiver argument; and asserted that when Respondents sought to include the exhibit in the record under seal as a proffer, the Tribunal refused; and that "when Respondents explained that the OCC's rules, specifically 12 C.F.R. § 19.36(d)(3), require that the exhibit be maintained in the record as a proffer," the Tribunal stated simply that "the comptroller has that document"; to which Mr. Perla offered the conclusion that the result is that "the record before the Comptroller (and any subsequent reviewing court) will not include a proffer of "rejected exhibits" as required by OCC rules" *Id*. at ⁋ 71; that Mr. Perla observed on October 12, 2021, that the Tribunal "similarly suggested that its review was not limited to the record in this proceeding" and supported this assertion by describing the cross-examination of Mr. Loughlin during his remote deposition, when "Respondents attempted to impeach Mr. Loughlin using his sworn statement taken during the OCC's investigation" but that "instead of allowing questioning to show that Mr. Loughlin's current testimony was inconsistent with his prior sworn statement, the Tribunal repeatedly stated that "he would look at the testimony," despite it never having been admitted into the record" and that when "Respondent Julian's counsel objected on the basis that the sworn statement was not in the record, the Tribunal exhibited a fundamental misunderstanding of agency adjudication, claiming that the document, or at least portions of it, were "now… part of the record" because counsel "showed them to" the witness" and the Tribunal "nonetheless 'rejected' that argument; [citations omitted] *Id*. at ⁋ 72; Mr. Perla asserted that the Tribunal "has failed to decide one of Respondents' motions filed before the hearing, and it similarly failed to address an application for hearing subpoenas until after repeated prompting, *Id*. at ⁋ 73; averring that when they submitted their omnibus motion in limine, Respondents also submitted a motion requesting that this Tribunal exclude exhibits that the Tribunal had determined were irrelevant, immaterial, unreliable, or unduly repetitive in its summary disposition order, Mr. Perla asserted that when Respondents noted during the hearing that the motion remained pending, the Tribunal stated only that Respondents had been given "a pretty [good] sense that that evidence is not relevant. If Enforcement Counsel seeks to present it, chances are I'm going to say the same thing" *Id*. at ⁋ 74 (citations omitted); Mr. Perla opined that "the Tribunal continued to improperly shift the burden to Respondents, noting that during the testimony of Richard Reep, Respondents objected to the admission of OCC Exhibit 2941—a spreadsheet showing compensation figures—that "had been prepared by Mr. Reep but had since been modified, causing it to contain substantial errors such that Mr. Reep would no longer "endorse any of the information" on at least one tab of the spreadsheet" and that Mr. Reep testified that there were significant errors in the exhibit, including an error with respect to Respondent Julian's

The examples identified by Mr. Perla, however, reflect the ALJ's "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings,"[49] and thus "do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."[50] None of the examples presented in Mr. Perla's Affidavit "reveal an opinion that derives from an extrajudicial source,"[51] nor do they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."[52]

By the time the hearing began in September 2021, a significant amount of judicial decision-making had occurred, all based on the motions that preceded the hearing. Determining the merits of those motions required a close examination into the factual claims presented in the Notice of Charges and Respondents answers and amended answers to those claims; along with Respondents' own motions for summary disposition, and significant motion practice regarding the quality and quantity of evidence to be considered in advance of the hearing.

Mr. Perla opined that in his view, the Tribunal's rulings and statements "demonstrate at least an appearance of bias, as well as an inability to effectively manage a case of this size and complexity." This opinion is just that – Mr. Perla's judgment about the course of the administrative enforcement action. As counsel to one of the respondents in this enforcement action, Mr. Perla is entitled to express his opinions at any stage of the proceeding. To the extent his assertions draw from prehearing litigation, nothing prevented him from raising his claims prior to the start of the hearing.

His opinion that "The Tribunal's rulings and statements suggest that its judicial decisions flowed from its animus toward Respondents and/or its prejudgment of the issues in Enforcement Counsel's favor" is, however, without a factual basis – as no such prejudgment has been shown. His claim that the examples presented through his Affidavit demonstrate a deviation from "a neutral evaluation of all evidence offered at trial (which is still ongoing) and its application of law to fact" likewise is not supported in the record, nor is there any evidence that the ALJ "determined Respondents' guilt prior to the hearing," as

---

compensation figures that he could not explain, and that when Respondents moved to strike the exhibit because it had been modified (and because metadata indicated at the time that Enforcement Counsel attorney Jason Friedman had modified the exhibit), the Tribunal "suggested that it was Respondents' burden to establish what exactly had been modified, notwithstanding the fact that the exhibit was offered by Enforcement Counsel" *Id*. at ¶ 76 (citations omitted).

[49] *Am. Prairie Const. Co.,* 594 F.3d at 1021–22 (8th Cir. 2010) (quoting *Denton*, 434 F.3d at 1111).

[50] 594 F.3d at 1021–22 (8th Cir. 2010) (quoting *Denton*, 434 F.3d at 1111).

[51] See *Liteky v. United States*, 510 U.S. 540, 554–56 (1994).

[52] *Id.*

alleged by Mr. Perla.[53]

It bears noting that as a factual matter, Mr. Perla misstated the record when making the claim that "Respondents have moved as expeditiously as possible to bring this matter to the Tribunal's attention as soon as they were appraised [*sic*] of the facts giving rise to a sufficient appearance of bias to meet the statutory standard set forth in Respondents' Motion".[54] His statement that Respondents "moved as expeditiously as possible to bring this matter to the Tribunal's attention" is patently false, suggesting bad faith on the part of Mr. Perla and Respondents' other signatory Counsel.

An examination of multiple claims Mr. Perla included in his Affidavit reveals his reliance on legal and factual findings issued by the ALJ well before the commencement of the evidentiary hearing on September 13, 2021, and thus well before the date that Respondents' filed their Motion for Disqualification on October 15, 2021. These include claims of improper actions evidenced by the issuance of the order determining the merits of Enforcement Counsel's motions seeking summary disposition – which was issued on July 20, 2021 – and the merits of the parties' motions seeking orders *in limine* – which was issued on September 9, 2021.

It is no excuse for Mr. Perla to assert he could not have acted sooner "[g]iven the demands of the September 12-22 hearing and other disputes flowing therefrom."[55] The record reflects each Respondent has consistently been served by not fewer than eight Counsel of record – with ten Counsel representing Respondent Julian. Any concerns he or his co-counsel might have had based on the Tribunal's prehearing orders could have been presented well in advance off the hearing. Inasmuch as Mr. Perla was in attendance throughout the proceedings in Sioux Falls, there is no basis in the record to conclude he could not have acted sooner than October 15, 2021 to express his opinions.

In one averment, Mr. Perla opined that "[a]s the result of the Tribunal's unfounded and imbalanced orders, mere weeks before trial, Respondent Julian's counsel were forced to spend over 400 hours rewriting their prehearing submissions."[56] Mr. Perla declined to cite a source for this averment – the averment bears no reference to the record. The record will reflect, however, that the ALJ has issued over 90 orders since the start of this enforcement proceeding twenty months ago; and that one order, issued on August 20, 2021, found Respondents had submitted prehearing statements on August 6, 2021 that "failed to provide disclosures required by the extant prehearing orders" of the Tribunal.[57]

The August 20, 2021 Order reflected that pursuant to an Order issued on March 17,

---

[53] Timothy Perla's Affidavit at ⁋ 78.

[54] *Id.* at ⁋ 79

[55] *Id.*

[56] *Id*. at ⁋ 32.

[57] Order Amending Prehearing Schedule, issued August 20, 2021.

2020, the parties' prehearing submissions were to identify the documents each witness would be presented during parties' case in chief. The record reflects Respondents' collective failure to comply with the March 17, 2020 prehearing order with the prehearing submissions they filed on August 6, 2021. Upon these findings the ALJ directed Respondents to supplement their prehearing statements by August 27, 2021.[58] The August 20, 2021 Order was neither unfounded nor imbalanced, and does not constitute evidence of bias supporting a disqualification order.

If, however, the "pattern of improper and unfair rulings" preexisted the commencement of the hearing, Respondents' first opportunity to raise the claims supporting disqualification likewise preceded the start of the hearing and could have been raised weeks or months before the start of the hearing, not five weeks after the start of the hearing.

Mr. Perla claimed that the Tribunal "repeatedly disparaged Respondents' arguments and demonstrated that it had already decided critical issues in this proceeding without having considered Respondents' evidence."[59] In support of these factual claims, Mr. Perla offered the example – drawn from the order regarding the parties' motions seeking orders *in limine* – where "the Tribunal referred to Respondent Julian's argument that he was not an institution-affiliated person [*sic*] as defined in the Federal Deposit Insurance Act as 'specious.'"[60] The pleadings of record as of the issuance of the orders *in limine*, however, established Respondent Julian's argument denying his status as an institution-affiliated party to be one with a false look of truth or genuineness – thus the argument qualified as "specious". Mr. Perla's fatuous claim will not support a disqualification order.

Similarly, Mr. Perla claimed that disparagement was evident in the Order regarding the parties' motions *in limine* where the Order including a finding that "it was the Bank's established practice (although clearly not the practice of Respondent Russ Anderson) to investigate complaints, and maintain the complaints in the ordinary course of business."[61] There was no unwarranted disparagement in this finding.

The pleadings of record as of the issuance of the Orders *in limine* included a factual determination based on Respondent Russ Anderson's own prior testimony, that while thousands of employees flooded the Wells Fargo EthicsLine warning senior leadership for years about the retail branch environment of significant pressure to meet unreasonable sales goals and resulting misconduct, Respondent Russ Anderson had already testified under oath that she "did not make a

---

[58] *Id.*

[59] Timothy Perla's Affidavit at ⁋ 40.

[60] *Id.* at ⁋ 41

[61] *Id*. at ⁋ 42.

habit of reading the EthicsLine allegations that came in. I had a pretty busy job. That would have been not a wise use of my time."[62]

When given the opportunity to respond through the summary disposition process, Respondent Russ Anderson did not dispute that she testified as presented, but clarified that she would "read the ones that [her] SSCOT felt were important for [her] to know about" because the EthicsLine complaints contain "a broad variety of information" and so she "depended on [her] team, who did get EthicsLine allegations, to point situations out to [her] that they felt were noteworthy."[63] If the evidence gathered through the summary disposition process cast Respondent Russ Anderson in a negative light, it did so based on her own testimony, not by any unwarranted disparagement by the ALJ.

Mr. Perla claimed that the Tribunal "has prematurely made factual and quasi-legal findings without the benefit of an evidentiary record before the hearing even began."[64] This assertion is without merit and without support in the record. By the time the hearing began in September 2021, substantial findings were entered into the record through summary disposition motions presented first by Respondents in June 2020 and then by Enforcement Counsel in July 2021; and through the Amended Answers submitted by each Respondent in August 2021. The record was thus particularly well-developed prior to the start of the evidentiary hearing, and provided the factual bases for each of the factual claims identified by Mr. Perla in his Affidavit.[65]

Respondents also supported their Motion by the Declaration of Diana Case.[66] Through this Declaration, Ms. Case averred that during a tour of the Washington Pavilion on the day before the hearing was to start in Sioux Falls, a group consisting of counsel and litigation support personnel for both Enforcement Counsel and Respondents toured the Pavilion, and that the ALJ was part of the group participating in the tour.[67] At the tour's conclusion, and in the presence of all participants in the tour, Ms. Case saw the ALJ ask two members of the OCC – William Jauquet and a female OCC employee to meet with him again at the ALJ's chambers, without notifying any counsel or litigation support personnel for Respondents about the meeting.[68]

As the record reflects, the female OCC employee was Susan Bowman, who was on site to provide the ALJ with directions and guidance for complying with extant protocols for COVID-

---

[62] MSD-266 (Russ Anderson Dep. Tr.) at 58:13-16.

[63] Russ Anderson's ECSFM at No. 173, quoting from MSD-266 (Russ Anderson Dep. Tr.) at 58:5-59:8.

[64] Timothy Perla's Affidavit at ⁋ 43

[65] *Id*. at ⁋ 45-52.

[66] Diana Case's Declaration in Support of Respondents'' Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b), dated October 12, 2021.

[67] *Id*. at ⁋ 3.

[68] *Id*. at ⁋ 4-5.

19 precautions.[69] The record reflects she and OCC Assistant Director Jauquet met in chambers following the group tour; and that the ALJ questioned both AD Jauquet and Ms. Bowman regarding on-site measures being taken to comply with extant Executive Orders regarding limiting the transmission of the virus.[70] Further, the record reflects the nature of the discussion included information regarding a medical issue facing the ALJ that might require the ALJ to appear through the remote platform being used by counsel and their witnesses.[71] The record further reflects that the ALJ advised all of the parties during the hearing that a medical issue facing him may require that he participate using the virtual conferencing platform used by counsel and the witnesses.

The record further establishes that nothing substantive about the administrative enforcement action was discussed or mentioned during the meeting referred to by Ms. Case.[72] Given this record, there is no basis that would support a disqualification order upon Ms. Case's Declaration.

Respondents' argument to the contrary is without merit and is rejected. Respondents' claim that the APA prohibits all *ex parte* communication is not supported by the authority presented. *Ex parte* communication as defined by the OCC's Uniform Rules of Practice and Procedure means "any material oral or written communication relevant to the merits of an adjudicatory proceeding".[73] Nothing in Respondents' Motion or their supporting Declaration establishes the exchange of communication relevant to the merits of the pending adjudicatory proceeding.

Case and statutory law relied upon by Respondents suggests the same outcome and does not support Respondents' claim.

The federal APA provides in pertinent part the following:

> (d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law--
>
> (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

---

[69] Declaration of Susan C. Bowman, Senior Counsel, Enforcement Division, The Office of the Comptroller of the Currency, dated October 26, 2021.

[70] *Id*. at ¶¶ 1-11.

[71] *Id*. at ¶¶ 21, 24.

[72] *Id*. at ¶ 25.

[73] 12 C.F.R. § 19.9(a)(1).

> (B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding[74]

Neither the facts described by Ms. Case nor the factual and legal assertions presented by Respondents in their Motion establish the exchange of any *ex parte* communication relevant to the merits of the enforcement action.

Similarly, case law relied upon by Respondents does not compel a finding that would support a disqualification order. In *United States v. Microsoft Corp.*,[75] recusal was warranted where the trial judge relied upon extra-judicial evidence and accepted written ex parte submissions by two of the parties.

The Court of Appeals found as follows:

> That a judge commits error, of course, is by itself hardly a basis for imputing bias or even the appearance of partiality. But a review of the transcripts in this case makes it patently obvious that the reason for the judge's broad-ranging inquiries was his acceptance of the accusations in the book Hard Drive. The district judge's reliance on that book contaminated the entire Tunney Act review.[76]

Nothing in the Court of Appeals' decision supports Respondents' recusal claim, as the record in this enforcement action includes no indication or suggestion of contamination based on reliance on evidence not presented in the record.

Similarly, the District Court's decision in *Board of Trustees of University of Arkansas v. Secretary of Health & Human Services*[77] will not support recusal here. In that case, the ALJ conducted an *ex parte* "pre-hearing meeting" in violation of both the Administrative Procedures Act and numerous agency regulations governing the hearing. During the pre-hearing meeting, the Compliance Officer for University Hospital of Arkansas appeared on an *ex parte* basis before the Administrative Law Judge and was asked to address certain technical aspects of Medicare billing.[78] The District Court determined that it lacked sufficient information to determine the

---

[74] 5 U.S.C. § 557(d).

[75] Respondents Motion for Disqualification Based on Personal Bias and Other Disqualification under 5 U.S.C. § 556(b) at 38, citing *United States v. Microsoft Corp.,* 56 F.3d 1448, 1464 (D.C. Cir. 1995).

[76] 56 F.3d. at 1463.

[77] *Bd. of Trustees of Univ. of Arkansas v. Sec'y of Health & Hum. Servs.*, 354 F. Supp. 2d 924 (E.D. Ark. 2005).

[78] *Id.*

merits of the underlying case and thus remanded the matter for further proceedings – but made the following observations regarding the *ex parte* communications issue:

> When evaluating *ex parte* communications, the court weighs the gravity of the *ex parte* communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contact benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.[79]

Respondents' description of the District Court's ruling is materially incomplete. Respondents asserted the District Court "decided that reassignment was necessary on remand because the ALJ had engaged in *ex parte* communications with witnesses prior to their hearing testimonies." In fact, as reflected above, the District Court weighed the gravity of the *ex parte* communication, whether there was evidence showing the improper contact benefited one party over another, whether the contents of the communications were unknown to the other party and if so did that deprive a party of the opportunity to respond, and whether it would be useful at that point to vacate the decision and remand for a new hearing. Faithfully applying the steps suggested in *Board of Trustees*, I find no support in the decision that would warrant the issuance of a disqualification order.

In sum, Respondents' Motion would have this Tribunal apply an inappropriate legal standard when determining whether circumstances create the appearance of bias rather than the proper legal standard that recognizes the distinctions that must be made between proceedings conducted by judges of the judicial branch and those conducted by administrative adjudicators of the executive branch. For that reason alone, given that no claim of actual bias was presented or shown, Respondents' Motion is DENIED.

Independent of the foregoing, Respondents' Motion shows only that Respondents disagree with the legal implications occasioned by their failure to fully and honestly answer the Notice of Charges, the consequence of which was to require the submission of amended answers that more completely discharged their duty to provide forthright, complete, and not misleading answers. They disagree with the implications occasioned by their failure to provide documentary evidence that would establish the existence of controversies that could be resolved only through the evidentiary hearing instead of through the process of summary disposition. They disagree with the nature and scope of forensic limits placed on all parties – Enforcement Counsel and Respondents alike, as set forth in the orders responding to their respective motions seeking orders *in limine*. And through Mr. Perla Respondents have expressed their opinions showing their disagreement with the myriad legal and factual determinations that are now in our record.

---

[79] *Id*. at 937-38, citing *Pro. Air Traffic Controllers Org. v. Fed. Lab. Rels. Auth*., 685 F.2d 547, 564 (D.C. Cir. 1982).

These disagreements do not, however, establish a basis that would justify the issuance of an order disqualifying the ALJ. For these reasons, Respondents' Motion is DENIED.

It is so ordered.

Date: November 3, 2021

Christopher B. McNeil
U.S. Administrative Law Judge
Office of Financial Institution Adjudication