

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BEFORE:

POLLARD, PRESIDING Judge

=====

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

CMCR 13-005

November 13, 2015

=====

Colonel Peter E. Brownback, JA, U.S. Army and Colonel Patrick J. Parrish, JA, U.S. Army, military commission judges.

Samuel T. Morison and Major Justin Swick, USAF, Office of the Chief Defense Counsel, and Dennis Edney, Law Society of Alberta, Canada, on motions for Appellant Omar Ahmed Khadr.

Brigadier General Mark S. Martins, U.S. Army; and Danielle S. Tarin, on motions for Appellee United States Government.

OPINION AND ORDER

Opinion filed by POLLARD, *Presiding Judge*.

POLLARD, *Presiding Judge*; On December 10, 2014, and March 19, 2015, Appellant Omar Ahmed Khadr filed motions to disqualify me from hearing his appeal that is pending before our Court.¹ Both motions are denied.

¹ Khadr filed two prior motions on August 5, 2014, and August 20, 2014, asking me to recuse myself. The prior motions were denied on October 17, 2014. *See* Khadr v. United States, 62 F. Supp. 3d 1314 (USCMCR 2014).

The Motions

Khadr makes two interrelated arguments in his current motions. First, he claims that the civilian judges on our Court have voluntarily abandoned their status as principal officers of the United States and subordinated themselves to the Secretary of Defense because the Department of Defense designated the civilian judges Highly Qualified Experts (HQE) pursuant to 5 U.S.C. § 9903 in order to pay them for time spent on Court matters. The essence of this argument is that the manner in which the Department chose to pay the civilian judges makes them subject to the Secretary's control and this vitiates their independence as Article I judges.

Khadr's second argument contends that I placed my financial interests over service to the Court by seeking and accepting an employment relationship with the United States that permits me to continue a private practice of law, albeit with some limitations. Khadr says that to protect the income that I earn from private practice I might favor private duties over court responsibilities. From this, he concludes that I have a financial conflict of interest that requires disqualification. He also argues that because of this, my impartiality can be questioned and this, too, requires disqualification. Khadr offers no factual record to support his arguments.

Discussion

Under the Court's rules, recusal and disqualification motions are addressed to the judge whose recusal or disqualification is sought for "a final decision." *See* Rule 24(b), USCMCR Rules of Practice. The grounds for recusal and disqualification are found in Rule 24(a), which incorporates Canon 3C, Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States, and 28 U.S.C. § 455. The disqualification grounds in Canon 3C are substantively the same as found in § 455 and include when the judge's impartiality might reasonably be questioned, bias, prior involvement as an attorney or financial interest in the matter before the court. Disqualification for impartiality or bias is required if established in fact or appearance. The other grounds are fact-based circumstances. *See Khadr v. United States*, 62 F. Supp. 3d 1314, 1317-18 (USCMCR 2014).

There is no general ground for disqualification for a conflict of interest in § 455. Rather, the criteria for disqualification based on a conflict is set forth in § 455(b)(2) – (5), and includes a financial interest in the outcome of the dispute before the court or a prior participation in the dispute. Khadr cites no authority for a broader application of the conflict of interest criteria for disqualification. However, a judge should be vigilant for circumstances when a conflict not

delineated in § 455(b) might raise recusal considerations under Rule 24(a) because there are “circumstances considered sufficient to require such action.”

While Khadr frames his motion as one for disqualification, his argument that my “impartiality might reasonably be questioned” is a conclusion that he attempts to draw from an alleged financial conflict of interest and several factors related to my employment as a civilian judge that he contends creates an appearance of impropriety. Thus, at most, the predicate arguments implicate recusal, the resolution of which is left to the Court’s sound discretion. In any event, the standard for review for disqualification and recusal is the same.

It is for “judges [to] determine [an] appearance of impropriety . . . by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.” *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988). A “judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.” *Id.*, 861 F.2d at 1312. Further, the motion must be decided based on whether the movant has established grounds for disqualification or recusal “as judged by an objective standard.” In doing so, the Court need not accept every fact that the movant alleges as true. *See United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

Finally, “[i]n its determination of the motion, the court ‘must begin its analysis of the allegations supporting such a request with a presumption against disqualification.’ *Cobell [v. Norton]*, 237 F. Supp. 2d [71, 78 (D.D.C. 2003)] (citations omitted). In order to overcome the presumption, the moving party must demonstrate by clear and convincing evidence that disqualification is required by Section 455(a). *Id.* at 78–79 . . .” *Cotton v. Washington Metro. Area Transit Auth.*, 264 F. Supp. 2d 39, 42 (D.D.C. 2003).

Special Government Employee and Highly Qualified Expert Status Does Not Require Disqualification or Recusal

Our Court in its present form was created by the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009), 10 U.S.C. § 950f. That act created “a court of record to be known as the “United States Court of Military Commission Review” . . . [f]or the purpose of reviewing decisions of military commissions under this chapter . . .” § 950f(a). The judges of the Court are comprised of appellate military judges assigned to the Court by the Secretary of Defense and civilians appointed by the President, by and with the advice and consent of the Senate. § 950f (b). However, the statute is silent

concerning issues of tenure, compensation and removal.² Compare with 10 U.S.C. §§ 941 *et seq.*, regarding the Court of Appeals for the Armed Forces.

Section 950f further says nothing regarding whether the civilian judgeships are full time or part-time positions. The historic and current caseload of the Court, however, does not require the judges to devote all of their time to the Court's work. The military judges, who are drawn from the Service Courts of Criminal Appeals, continue to serve as judges on those courts, subject to their duties on our Court.

Khadr's arguments are rooted in statutory silence regarding compensation for the Court's civilian judges.³ The civilian judges who served on the two predecessor courts, *see Khadr*, 62 F. Supp. 3d at 1316, were employees of the Department of Defense. Thus, the Department determined their employment status and compensation. Beginning in 2004 those judges "were designated [by the Department] as Special Government Employees (SGE) . . . and paid as HQEs", *see* March 19, 2015 Motion, Attachment at 1.

Our Court, an Article I Court, is housed for administrative purposes in the Department of Defense. Thus, among other things, the Department has the responsibility to fund the Court's operations. This includes paying the civilian judges who were appointed under the Military Commissions Act of 2009, 10 U.S.C. § 950f. In the absence of any statutory directive, it was left to the Department to determine the manner in which those judges, who serve on a part-time as-needed basis, would be compensated for their work. The Department then decided to continue the practice of designing the civilian judges as SGEs and to pay us as HQEs.

Khadr argues that "as a condition of [my] appointment to the court, [I] requested the Secretary of Defense to designate [me] as a 'special Government employee' in order to permit [me] to continue [my] private law practice simultaneously with [my] judicial service." December 10 Motion at 2, citing *Khadr*, 62 F. Supp. 3d at 1316, 1320. The citations do not support this assertion. Moreover, contrary to Khadr's contention, I did not request to be

² The civilian judges also do not receive any of the usual benefits provided other Federal employees, e.g., sick and vacation time, health insurance or retirement benefits.

³ Congress, of course, could cure this apparent oversight. More than a year ago, our then Chief Judge, Colonel Eric Krause, submitted a request to the Department of Defense asking it to seek legislation that would, among other things, specify the manner in which civilian judges would be paid, and the level of their compensation. The request remains pending within the Department.

designated an HQE or SGE, nor did I ever discuss this with anyone in the Executive Branch during the nomination or confirmation process.

The conversations that I did have were about the part-time nature of the position and that I could and would continue to practice law if appointed to the judgeship. I made note of this in one of the many forms that I was required to complete as part of the vetting process: “The position for which I am being considered is a part-time judicial position. It is my understanding that, subject to conflict of interest rules, I may continue to practice law at my current law firm if confirmed by the Senate.”

Further, in a March 8, 2012 email to the Department asking about the organization of the Court, I wrote: “Who is the Ethics Officer? I would like to make sure that from day one I conform to the ethical obligations for one who is a part-time judge but still a practicing attorney.” In response a few days later, I was provided with some general information regarding Special Government Employees and told that the judges on the predecessor court had been designated SGEs.

Khadr argues that the Department’s decision to pay the civilian judges as HQEs undermines their independence as judges. He contends that this makes the civilian judges subordinate employees of the Secretary of Defense, and that they are subject to discharge at his discretion. Khadr, however, misses the point between a civilian judge’s independence and authority to act as a judge and how the Department has determined to pay them. Our authority to act as judges comes from our appointment, as principal officers, to the Court by the President with the advice and consent of the Senate pursuant to 10 U.S.C. §950f(b)(3). The Secretary has no control over our judicial duties or conduct. He may not review our decisions, nor may he discharge us at his discretion. *See Khadr*, 62 F. Supp. 3d at 1319-20. Moreover, he is barred by law from attempting “to coerce or, by any unauthorized means, influence” the judges on the Court. *See* 10 U.S.C. § 949b(b)(1).

Accordingly, the manner in which the Department decided to pay the civilian judges does not erode their judicial independence, nor can it be construed as the judges, voluntarily or otherwise, subordinating themselves to the Secretary or abandoning their status as principal officers.

There Is No Financial Conflict of Interest

Khadr correctly points out that to continue as an HQE a civilian judge cannot work more than 130 days in a 365-day cycle. If a judge exceeds that limit, he or she must become a full-time Federal employee to continue their judicial work. The judge also would lose his or her SGE status, and could no

longer work in the private sector as permitted with some restrictions without violating 18 U.S.C. § 203(c). Khadr then argues that this creates a financial conflict because it is in my interest to work fewer than 130 days as a judge during the 365-day cycle so that I may continue to practice law. Khadr contends that this inures to his detriment because if there is a conflict between devoting time to my judicial duties or my practice, I will give priority to my practice in order to enhance my private remuneration. *See* December 10, 2014 Motion at 7-8 and March 19, 2015 Motion at 3-7. Khadr claims that in addition to a financial conflict of interest, this creates an appearance of impropriety, and both disqualify me from serving as a judge in this case.

There are multiple problems with Khadr's argument. The financial conflict of interest that he attempts to identify is not predicated on "a financial interest in the subject matter in controversy or . . . any other interest that could be substantially affected by the outcome of the proceeding." § 455(b)(4). Thus, the premise of his argument is meritless. Even if that were not so, the construct is hypothetical.

The premise is grounded on the allocation of time, and assumes that I would devote insufficient time to judicial duties because another endeavor is favored. Time management issues exist in all walks of life. Moreover, there could be more than one endeavor, which may or may not involve compensation, that also competes for a judge's time. Thus, the foundation of Khadr's argument – a *common potential* for neglect of duty – does not create a conflict of interest, an appearance of impropriety, or any other circumstances that might implicate disqualification or recusal.

Moreover, Khadr offers no proof that I either have been faced with choosing between public and private duties, or that I have shirked my public duties. He simply speculates that I would favor my private interest to the detriment of my public duties if ever required to choose between the two. Conjecture, hypothesis, and speculation, however, are not bases for disqualification or recusal. *See United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) (collecting cases).

Khadr's Other Arguments Have No Merit

Khadr also offers seven "facts" that he says support his argument that an objective observer might reasonably question my impartiality. *See* March 19, 2015 Motion at 5-6. Most are complaints directed at the panel before which his appeal is pending regarding procedural matters concerning his appeal. Others repeat arguments made previously. Only a few require comment.

Khadr contends, as noted, that I was aware of the financial significance of an SGE status and “took pains” to make sure that I received that designation so that I could continue to practice law. As discussed above, this is simply untrue.

Next, Khadr points out that his appeal has been held in abeyance since March 2014, and argues that this was done to minimize the number of days that I must work as a judge to keep below the 130-day limit. However, Khadr fails to acknowledge that *the panel* has held his appeal in abeyance while awaiting the final adjudication of a case that most likely “may have a material bearing on the disposition” of a significant portion of his appeal. *See* abeyance orders dated March 7, 2014, July 11, 2014, and October 27, 2015, and *Al Bahlul v. United States*, No. 11-1324, 2015 WL 3687457 (D.C. Cir. June 12, 2015), rehearing en banc granted and order vacated, September 25, 2015.

Khadr further contends that my opinion denying his prior recusal motions “justified the appropriateness of [my] SGE status by stating that USCMCR judgeships are ‘part-time, as needed position[s],’ but points to no authority for that conclusion.” He also claims that the opinion did “not explain what makes [the Court] the only such [Article I] court all of whose judges are part-time.” *See* March 19, 2015 Motion at 5. There are three responses to these related statements. Each is well known or readily knowable.

First, since 2007 this Court has published less than a dozen opinions. Second, the Military Appellate Judges assigned to our Court are drawn from the Service Courts of Criminal Appeals, and all continue to serve as judges on those courts. Civilian judges who served on the predecessor courts were part-time judges who also held full-time private employment. The same can be said for the current civilian judges. Finally, statutes that created the other Article I courts explicitly provided for the creation of full-time judgeships and addressed tenure, compensation and retirement benefits. The statute that created our Court does not, nor does it provide any other indicia that a civilian judge appointed to the Court must be a full-time government employee.⁴ *Compare* 10 U.S.C. § 950f *with, e.g.,* 28 U.S.C. §§ 171 *et seq.* (Court of Federal Claims) and 10 U.S.C. §§ 941 *et seq.* (Court of Appeals for the Armed Forces).

In sum, the factual contentions upon which Khadr relies do not, individually or collectively, suffice under any standard, let alone one requiring clear and convincing evidence, to cause an objective observer to question my impartiality and, hence, require disqualification or recusal.

⁴ This does not mean that a civilian judge could not assume full-time employment status if the circumstances warranted it. If that were to occur, there are different rules and limitations that would apply to the judge.

Conclusion

Khadr's motions present no facts that raise even a colorable argument that a financial conflict of interest exists, the civilian judges have surrendered their principal officer status, or the manner in which the Department of Defense chose to pay the civilian judges raises an appearance of impropriety that comes within the criteria for disqualification or recusal. Accordingly, Khadr has failed to establish a basis for disqualification or recusal. Therefore,

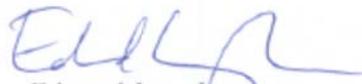
IT IS HEREBY ORDERED that

The abeyance order dated October 27, 2015, is lifted to the extent necessary to resolve the motions addressed by this Opinion and Order.

IT IS FURTHER ORDERED that

Appellant Khadr's December 10, 2014, and March 19, 2015 motions seeking to disqualify Presiding Judge Pollard from hearing Khadr's appeal pending before the Court are DENIED.

FOR THE COURT:



Edward Loughran
Assistant Clerk of Court,
U.S. Court of Military Commission Review