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REPUBLIC OF THE MARSHALL ISLANDS

IN THE SUPREME COURT

REPUBLIC OF THE MARSHALL ISLANDS

MUDGE SAMUEL, Plaintiff-Appellant, vs. ROBSON YASIWO ALMEN, et al, Defendant-Appellee.	Supreme Court Case No. 2017-002 ORDER DENYING WRIT OF MANDAMUS

BEFORE: Cadra, C.J.; Seabright, A.J.;[1] and Kurren, A.J.[2]

PER CURIAM:

I. INTRODUCTION

Plaintiff-Appellant Mudge Samuel ("petitioner") seeks a writ of mandate ordering the High Court Chief Justice (the "High Court Chief Justice" or "trial judge") to disqualify or recuse himself from all further proceedings in this election case. Because the trial judge administered the oath of office to the declared winner of the Majuro Atoll Local Government ("MALGOV") mayoral election while a challenge to the election by petitioner was pending, petitioner contends that the trial judge "previously played a role" in the case thus disqualifying that judge from

[1] J. Michael Seabright, Chief United States District Judge, District of Hawai'i sitting by designation of the Cabinet.

[2] Barry M. Kurren, United States Magistrate Judge, District of Hawai'i (ret.), sitting by designation of the Cabinet.

further participation in the decision of this case by virtue of Article VI, Section 1(6) of the Constitution and the Judiciary Act 1983, as amended, 27 MIRC, Chapter 2, Section 267.

Petitioner further contends that because disqualification under the Constitution is mandatory or self-executing, the High Court erred by dismissing his recusal motion as untimely.

As discussed below, we DENY the requested writ of mandamus because petitioner has not clearly demonstrated that the trial judge has an actual or apparent conflict of interest, is biased or has created an appearance of bias sufficient to require mandatory disqualification under the Constitution, Article VI, Section 1(6) or the Judiciary Act 1983, as amended, 27 MIRC, Chapter 2, Section 267. We further find that the petitioner has an adequate remedy on appeal from a final judgment to address his constitutional challenge to the trial judge conducting further proceedings in this case.

II. THE PROCEEDINGS BELOW

We do not make factual findings but accept petitioner's version of the facts for purposes of deciding the instant petition. Defendant-Appellee Robson Yasiwo Almen ("respondent"), represented by the Office of the Attorney General, has filed no briefing and we are unaware of respondent's position on the issues raised by the instant writ application.

In short, this case arises out of the November 20, 2015, election for the mayor of MALGOV. On December 15, 2015, petitioner filed a petition for recount alleging violations of the Elections and Referenda Act 1980 as well as constitutional issues. On December 18, 2015, petitioner filed what might be characterized as a protective filing of two civil actions (Case Nos. 2015-233/234) in the High Court because petitioner believed the Chief Electoral Officer ("CEO") would not respond to the December 15, 2015 petition for recount before certifying the final results of the election. On December 19, 2015, the CEO certified the final results of the election for MALGOV's mayor despite having been served with the petition for recount and the two High Court civil actions.

On December 22, 2015, the High Court Chief Justice administered the oath of office to Ladie Jack as the new mayor of MALGOV.

It is unclear from the briefing what activity occurred on petitioner's cases pending in the trial court in 2016. On February 13, 2017, the High Court Chief Justice remanded one of petitioner's civil actions back to the CEO to respond in writing to petitioner's December 15, 2015 petition for a recount. On February 27, 2017, the CEO denied the recount petition. Petitioner alleges he tried to file his appeal of the CEO's denial or rejection of the petition for a recount under then existing High Court Case No. 2015-233 but was instructed to file a new civil action, which he did by filing High Court Case No. 2017-037.

A status conference was noticed and held by the trial court on April 26, 2017. Counsel for petitioner was unable to attend due to medical reasons. The High Court Chief Justice issued an order on April 27, 2017, establishing the record on appeal (from the CEO's denial of the recount petition). On that same day, April 27, 2017, before receiving the High Court's order, petitioner filed a request for rescheduling of the conference which had been held on April 26, 2017. That request was denied. The parties submitted their versions of the record on appeal on May 10, 2017.

On May 30, 2017, petitioner filed a motion to recuse the High Court Chief Justice from further participation in the case. Citing Article VI, Section 1(6) of the Constitution, petitioner argued that because the High Court Chief Justice administered the oath to Ladie Jack in December 2015, the judge previously "played a role" in the case and therefore cannot preside over the case. On June 14, 2017, the High Court Chief Justice issued an order denying the motion to recuse on two grounds: (1) the motion was untimely, and (2) the affidavit supporting the motion was legally insufficient.

On June 26, 2017, petitioner filed the instant "Application For Writ of Mandamus – Appeal From Order Denying Motion For Recusal." On July 21, 2017, the petitioner filed a supplemental memorandum in support of his

application for writ of mandamus. There has been no briefing submitted by respondent.

III. THE ISSUES PRESENTED

Petitioner frames a three-step analysis of his constitutional challenge to the trial judge's further participation in this case. First, if the administration of an oath of office is legally significant in the certification process, is the judge who administers the oath prohibited by Article VI, Section 1(6) from adjudicating a case involving a challenge to the election, qualification and certification process for having "played a role" in the case? Second, is there an inherent conflict of interest in a judge hearing an election challenge to the candidate for whom the judge administered the oath of office? Finally, does Article VI, Section 1(6) require affirmative action by one asserting the disqualification or is the prohibition self-executing, requiring the judge to disqualify himself after realizing his role in the matter which is the subject of the lawsuit (election challenge)?

Petitioner further requests the Court to review certain rulings made by the trial judge relating to the denial of referral of certain constitutional issues to this Court and to resolve certain issues relating to the record on appeal. Because these issues have not been briefed and because those issues do not pertain to the requested writ of mandate requiring the disqualification of the trial judge, we will

not decide those issues. The petitioner has a remedy on appeal from a final judgment as to those issues.

IV. <u>DISCUSSION</u>

A. The Standard for Issuance of the Writ

"A mandamus petition is the proper way to challenge the denial of a recusal motion." *In re City of Milwaukee*, 788 F.3d 717, 719 (7th Cir. 2015). Under RMI law, "[m]andamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised. *Kabua, et al v. High Court Chief Justice, et al.*, 1 MILR (Rev.) 33, 34-35 (March 20, 1986). For a writ of mandamus to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy. *Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 253 (Dec. 20, 1991)." *In the Matter of the Estate of Peter*, 2 MILR 68, 74 (1995).

United States decisional authority provides guidance in resolving the constitutional and procedural issues raised by petitioner's application for a writ of mandamus, although we are not bound by those decisions. Const., Art. I, Sec. 3(1). The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385 (1953). The treatment of mandamus

as an extraordinary remedy is not without good reason. Mandamus actions "have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants [appearing] before him" in the underlying case. *Bankers Life & Cas. Co.*, 346 U.S. at 384-85; *see also*, *Kayser-Schillegger v. Ingram*, 3 MIRL 92, 94 (2008). To justify the issuance of the extraordinary writ of mandamus, the movant must "satisfy the burden of showing that (his) right to issuance of the writ is 'clear and indisputable.'" *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976) (some quotation marks omitted); *Bankers Life & Cas. Co.*, 346 U.S. at 384; *First Fed. Sav. & Loan Ass'n*, 860 F.2d 135, 138 (4th Cir. 1998) (explaining that mandamus relief is available only when the petitioner has "a clear right to the relief sought"). A writ of mandamus compelling recusal of a judicial officer will issue only where the party seeking the writ demonstrates a clear and indisputable right to relief.

B. Petitioner Has Not Demonstrated a "Clear and Indisputable" Right to Disqualification of the Trial Judge

1. The Constitution and Judiciary Act disqualifies a judge from presiding over a case in which the judge previously "played a role"

In applying the standards for issuance of a writ of mandamus enunciated in *In the Matter of the Estate of Peter*, *supra*, we find the clear language of the Constitution, Article VI, Section 1(6) and 27 MIRC, Chapter 2, Section 267, imposes "a non-discretionary duty mandated by law" for a judge to disqualify him

or herself "if a judge played a role in a case or if he is disabled by any conflict of interest."

The Constitution, Article VI, Section 1(6) provides:

> No judge shall take part in the decision of any case in which that judge has previously played a role or with respect to which he is otherwise disabled by any conflict of interest.

Similarly, the Judiciary Act 1983, as amended, 27 MIRC, Chapter 2, Section 267, likewise, provides for disqualification of a judge who previously "played a role" in a case.

We have recognized a mandatory duty to recuse under the circumstances specified by the Constitution and Judiciary Act. In *Balos v. High Court Chief Justice Tennekone*, 1 MILR (rev.) 137 (1989), we stated that "[i]f a judge played a role in a case or if he is disabled by any conflict of interest, he *must* recuse himself." *Id.* at 145 (emphasis added). Under analogous United States federal law (28 USC 455(a)) a judge has an independent duty to disqualify or recuse which is self-executing and mandatory which the judge must observe *sua sponte*. *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980).

Thus, in answering the question posed by petitioner as to whether the prohibitions contained in the Constitution, Article VI, Section 1(6) require affirmative action by one asserting that disqualification or is the prohibition self-executing, requiring the judge to disqualify himself after realizing his role in the

matter that is subject to the lawsuit, we hold the duty to disqualify is mandatory even if not raised by a litigant. Because petitioner is raising the issue of mandatory disqualification, we need not address the timeliness of the motion to recuse. This, however, does not resolve the issue of whether the trial judge had a mandatory duty to disqualify himself in the instant election cases.

2. The disqualification mandated by the Constitution and Judiciary Act of a judge who previously "played a role" in the case is aimed at preventing actual or apparent conflicts of interest and ensuring the impartiality of the decision maker

The ultimate question posed by petitioner's application for a writ of mandamus is whether the trial judge previously "played a role" in the case by administering the oath to the declared winner of the MALGOV mayoral election. Neither the Constitution nor the Judiciary Act define what is meant by the phrase "played a role" in the case.

In construing the Constitution and interpreting statutes, our "task is to give effect to the clear, explicit, unambiguous, and ordinary meaning of language." *In the Matter of the Vacancy of the Mayoral Seat,* 3 MILR 114, 117 (2009). The meaning of "played a role" in the case is not obvious, clear or explicit. That phrase is susceptible to multiple interpretations, and in *Balos, supra,* we did not explore the contours of what it means to have "played a role" in a case. Notably, petitioner has cited no precedent or authority disqualifying a judge from hearing an election

appeal merely because that judge may have administered an oath to the challenged winner of the election. We are unaware of any authority directly on point.

When read in context, the phrase "played a role" in the case is aimed at preventing actual or apparent conflicts of interest. Article VI, Section 1(6)'s prohibition or disqualification of a judge in a case in which he "has previously played a role" is followed by the phrase "or is *otherwise* disqualified by a conflict of interest." The framer's use of the word "otherwise" suggests the purpose of the prohibition of a judge participating in a case in which he "previously played a role" is aimed at preventing actual or apparent conflicts of interest. "Otherwise" is a word of common usage that has a plain and natural meaning. *See Smoldt v. Henkels McCoy, Inc.*, 53 P.3d 443, 445 (Or. 2002). "Otherwise" is a comparative word; that is, to construe properly the meaning of the word that "otherwise" is modifying, we must examine the concept or word to which that modified word is being compared. *See, e.g., Webster's Third New Int'l Dictionary 1598* (unabridged ed. 1993) (defining "otherwise," *inter alia,* as "in a different way or manner," "in different circumstances, under other conditions," and "in other respects"). Thus construed, the concept modified by the phrase "otherwise disqualified by a conflict of interest" is "previously played a role in the case." The necessary implication is that the framer's intent by requiring disqualification of a judge who had "previously played a role in the case" was to avoid actual or apparent conflicts of

interest. This conclusion is further supported by decisional authority regarding the purpose of mandatory disqualification or recusal. "[T]he goal of the judicial disqualification statute is to foster the [a]ppearance of impartiality." *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1101 (5th Cir. 1980). So the question becomes whether the trial judge acquired a conflict of interest by administering the oath to the challenged victor in the MALGOV mayoral election.

3. *Petitioner has failed to make a "clear showing" that the trial judge acquired an actual or apparent conflict of interest by administering the oath to the declared winner of the MALGOV election*

It is undisputed that the trial judge administered the oath to Ladie Jack, the declared winner of the MALGOV mayoral election, when a petition for recount and court actions challenging the election were pending. We are not convinced, however, that the mere administration of an oath under those circumstances gives rise to an actual or implied bias, partiality or conflict of interest. Petitioner has not made a clear showing that the trial judge should be disqualified.

We note that administration of an oath from the standpoint of one administering the oath consists of little if anything more than reading from a prepared text (or reciting from one's memory if sufficient) and having the oath-taker either recite back the words or affirm he accepts the oath. While, as petitioner contends, the oath may have legal significance to the one taking the oath, the mere administration of the oath, without more, does not clearly implicate the

judge as having "played a role" in the conduct challenged in the election appeal(s) or petition for recount so as to have acquired an actual or apparent conflict of interest. By administering the oath, the trial judge does not vouch for the results of the election or that the election process comported with the law. There is no requirement that a judge or other person administering the oath make any sort of decision or predetermination that the person taking the oath is indeed the rightful winner or is otherwise qualified to hold the office. The administration of the oath by a judge does not involve any sort of adjudicatory function or decision making. Even if it did, and even if petitioner believes the administration of the oath was some sort of ruling against him (which it isn't), a judge is not ordinarily disqualified on the basis of adverse rulings against a party alone. *See, e.g.*, *Liteky v. United States*, 510 U.S. 540, 555 (1994).

A motion for recusal or disqualification, in the absence of a showing of actual bias or conflict of interest, must be governed by an objective standard. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009). Only where a reasonable person, were he to know all the circumstances, would harbor doubt about the judge's impartiality, should the judge recuse himself or be disqualified. *See, e.g.*, *Salt Lake Tribune Pub. Co. v. AT&T Corp.*, 353 F. Supp. 2d 1160, 1172

(D. Utah 2005). Petitioner has not demonstrated an actual conflict of interest or bias on the part of the trial judge. We do not believe reasonable persons could conclude the trial judge cannot act impartially in this case simply because he administered the oath of office to the declared winner of the MALGOV mayoral election.

V. CONCLUSION

In conclusion, we find the evil to be avoided by requiring the disqualification of judges for previously having "played a role in the case" is to prevent conflicts of interest and bias which might influence impartial decision making. Petitioner has not made a "clear showing" of actual bias or conflict of interest by the trial judge. Likewise, we find the mere administration of an oath by a judicial officer to the declared winner of an election under protest, without more, does not give rise to any implication of bias or conflict of interest. We, therefore,

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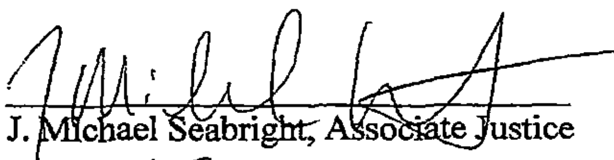
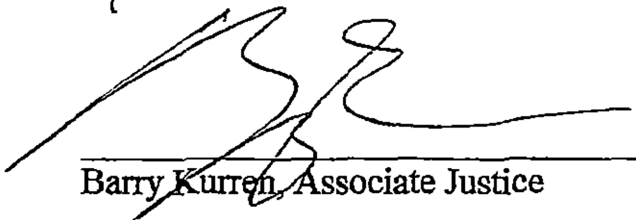
DENY petitioner's application for a writ of mandamus disqualifying the trial judge from further participation in the cases below.

DATED: September 19, 2017.

Daniel Cadra, Chief Justice



J. Michael Seabright, Associate Justice



Barry Kurren, Associate Justice