

FOR OFFICIAL PUBLICATION

**SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED INDUSTRIAL, SERVICE,	)	CASE NO. SX-18-CV-084
TRANSPORTATION, PROFESSIONAL AND	)	
GOVERNMENT WORKERS OF NORTH	)	ACTION TO CONFIRM ARBITRATION
AMERICA, SEAFARERS INTERNATIONAL	)	AWARD
UNION, AFL-CIO, obo MARK WEBB,	)	
	)	
Plaintiff	)	
	)	
v.	)	
	)	
GOVERNMENT OF THE VIRGIN ISLANDS,	)	
DEPARTMENT OF JUSTICE, OFFICE OF	)	
COLLECTIVE BARGAINING,	)	
	)	
Defendant.	)	
	)	

Appearances:

JOHN J. MERCHANT, ESQ.

United Industrial Workers of the Seafarers Union, AFL-CIO
Christiansted, VI 00823
For Plaintiff

EARNESTA L. TAYLOR, ESQ.

Assistant Attorney General
Virgin Islands Department of Justice
St. Thomas, VI 00802
For Defendant

MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER is before the Court *sua sponte*. Upon review of the complaint, the undersigned judicial officer finds that he is disqualified from presiding over this case. *See* 4 V.I.C. § 284(3). This opinion provides the basis. *Cf. id.* § 285 (“it shall be his duty to . . . cause a memorandum thereof to be entered in the minutes.”).

I. BACKGROUND

The United Industrial, Service, Transportation, Professional and Government Workers of North America, of the Seafarers International Union, AFL-CIO ("UIW-SIU" or "Union") filed this action against the Government of the Virgin Islands ("Government") and two of its agencies, the Virgin Islands Department of Justice ("DOJ") and the Office of Collective Bargaining ("OCB") (collectively "Government") to confirm an arbitration award issued in favor of the Union and Mark Webb, Esq., a former assistant attorney general. Attorney Webb was recruited to be a prosecutor with the DOJ by former Attorney General Vincent F. Frazier, Esq. He moved to the Virgin Islands from Michigan in March 2014 and began working for the DOJ on St. Thomas. He was specially admitted to practice in the Virgin Islands in June 2014. Attorney Webb was never disciplined or counseled during his tenure or given an unsatisfactory performance review.

The Governor of the Virgin Islands terminated Attorney Webb by letter dated November 18, 2015. His last day was November 19, 2015. Once his position as a government attorney had ended, Attorney Webb's special admission also ended. The Union filed a timely grievance on Attorney Webb's behalf, and a timely demand for arbitration, pursuant to a collective bargaining agreement ("CBA") between assistant attorneys general and the Government. Attorney Webb also filed an appeal with the Public Employees Relations Board that was dismissed. Throughout the arbitration, the Government challenged the arbitrability of Attorney Webb's dismissal, relying on section 113(a) of title 3 of the Virgin Islands Code, which provides that "Assistant Attorneys General shall be appointed by the Governor, and shall hold office during the continuance in office of the Governor by whom they are appointed and until their successors are appointed and qualified, unless sooner removed by the Governor." The Government filed a declaratory judgment action in the Superior

Court of the Virgin Islands in December 2016, to enjoin the arbitration from proceeding. (*See Gov't of the V.I., V.I. Dept. of Justice v. United Indus., Serv., Transp., Prof'l & Gov't Workers of N. Am., Seafarers Int'l Union, AFL-CIO*, case no. SX-16-CV-690.) The Superior Court (Meade, J.) denied the Government's motion for a temporary restraining order and the Supreme Court of the Virgin Islands dismissed the Government's appeal from that order for lack of jurisdiction. (*See Order*, entered Dec. 14, 2016, *Gov't of the V.I., V.I. Dept. of Justice v. Justice v. United Indus., Serv., Transp., Prof'l & Gov't Workers of N. Am., Seafarers Int'l Union, AFL-CIO*, S. Ct. Civ. No. 2016-0098.)

The arbitration proceeded with the Government maintaining throughout that the CBA violated Virgin Islands law insofar as it purported to circumscribe the Governor's statutory authority to discharge assistant attorneys general. In particular, the Government relied on another case, *Government of the Virgin Islands v. United Industrial, Service, Transportation, Professional and Government Workers Of North America Seafarers International Union, on Behalf of Ernest Bason*, 57 V.I. 649 (V.I. 2012), *vacated as moot by United Industrial, Service, Transportation, Professional and Government Workers of North America Seafarers International Union, on Behalf of Ernest Bason v. Government of the Virgin Islands*, 61 V.I. 753 (3d Cir. 2014). In that case the Supreme Court of the Virgin Islands "[a]ssum[ed] without deciding that Assistant Attorneys General may unionize," 57 V.I. at 657 (footnote omitted), but concluded that "their right to do so is not unlimited." *Id.* The Court held that

[s]ection 113 of title 3 expressly provides that the Assistant Attorneys General shall be appointed by the Governor, and shall hold office during the continuance in office of the Governor unless sooner removed by the Governor. While the UIW-SIU attempts to harmonize section 113 and the collective bargaining agreement by arguing that the agreement simply "prescribes the manner and conditions by which such terminations may take place, this Court disagrees that any harmonization is possible with respect to the reinstatement provisions. We note that section 113 not only vests the Governor with the power to remove an Assistant Attorney General, but provides that an

Assistant Attorney General's appointment terminates upon the conclusion of the term of the Governor who appointed him or her. Given that section 113 actually mandates automatic discharges of Assistant Attorneys General without cause at the conclusion of a Governor's term, it is not clear to this Court how the provisions of the collective bargaining agreement which permit reinstatement by an arbitrator of an Assistant Attorney General discharged without just cause can in any way be reconciled with the statutory enactment.

Id. at 658 (quotation marks, brackets, and ellipses omitted).

The undersigned judicial officer was counsel of record for the Government in the *Bason* case before the Superior Court of the Virgin Islands, *see Gov't of the V.I. v. United Indus., Serv. Transp., Prof'l & Gov't Workers of N. Am. Seafarers Int'l Union*, 55 V.I. 440, 443 (Super. Ct. 2011) ("Robert A. Molloy, Esq., Assistant Attorney General-Labor, Office of Collective Bargaining, St. Croix, USVI."), *vacated by* 61 V.I. 735 (3d Cir. 2014), before the Supreme Court of the Virgin Islands, *see* 57 V.I. at 649 ("ROBERT A. MOLLOY, ESQ., Assistant Attorney General, St. Thomas, USVI, Attorney for Appellant."), and before the United States Court of Appeals for the Third Circuit until appointment to the bench. (*See Order, United Indus., Serv., Transp., Prof'l and Gov. Workers of N. Am. Seafarers Int'l Union, on Behalf of Ernest Bason v. Gov't of the V.I.*, No. 13-1247, (3d Cir. Oct. 22, 2013) ("granting motion by Robert A. Molloy, Esq. to withdraw as counsel for Respondent at the direction of the Court.").)

II. DISCUSSION

Section 284 of title 4 of the Virgin Islands provides that, "[n]o judge or justice shall sit or act as such in any action or proceeding . . . [w]hen in the action or proceeding or in *any prior action or proceeding involving the same issues*, he has been of counsel for any party to the action or proceeding." 4 V.I.C. § 284(3) (emphasis added). "In this jurisdiction, case law as to the disqualification of a judge under subsection 3 of the disqualification statute is lacking." *Hodge v.*

McGowan, 50 V.I. 296, 310 (V.I. 2008) (*per curiam*) (“Perhaps, the reason for this lack of case law stems from the common sense notion that a judge who has previously represented a party, or its predecessor in interest, in a matter relating to the same basic subject matter should disqualify himself from hearing the new case.”).

In *McGowan*, former Territorial Court judge Alphonso A. Christian, sitting as a senior judge, held that “[s]ection 284 does not require disqualification of a Judge who represented a party in a prior action, where that party is not involved in a subsequent action, even if the two cases involved the same issues.” *McGowan v. Hodge*, 27 V.I. 16, 22 (Terr. Ct. 1992). Rather, the focus under section 284(3) is “whether these two elements”—“representation of [the] same parties and relating to [the] same issues”—“exist[] in the two relevant cases.” *Id.* at 21. If the party is the same and the issue is the same, then “the Judge in question should promptly remove himself from the case,” Judge Christian reasoned. *Id.* However, if the judge was not of counsel in a case involving the same party and the same issue, then the judge should not “disqualify himself” because “to do so would amount to a dereliction of the duties he has sworn to perform.” *Id.* On appeal, the Supreme Court of the Virgin Islands found fault only with Judge Christian’s decision. *Cf.* 50 V.I. at 310 (“Therefore, there was a factual nexus between Judge Christian’s prior representation of Appellees’ predecessors in interest and the issues that were before him as a judge. Accordingly, he should have disqualified himself from hearing the instant action.”). The Court did not disagree with how he framed the inquiry: “privity of parties” and “sufficient sameness of the issues.” *Id.* at 309;

Based on *McGowan*, the legal standard under section 284(3) is that “a judge . . . should disqualify himself [or herself] from hearing [a] new case” when he or she “previously represented a party, or its predecessor in interest, in a matter relating to the same basic subject matter.” *Id.* at

310. Here, the undersigned judicial officer previously represented a party to this case, the Government of the Virgin Islands, in a matter, the *Bason* cases, involving the same basic subject matter, namely whether section 113 of title 3 of the Virgin Islands Code overrides any CBA entered into between the Government and the Union. The undersigned judicial officer, while of counsel for the Government, took the position on behalf of the Government that the CBA—the very same CBA at issue in this case—conflicts with Virgin Islands law. For this reason, the undersigned judicial officer is disqualified from presiding over this case.

III. CONCLUSION

For the reasons stated above, this matter will be returned to the Clerk of Court for reassignment to another judge in the Superior Court.

Date: June 12, 2018.

ATTEST:

ESTRELLA H. GEORGE

Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 6/12/18



ROBERT A. MOLLOY
Judge of the Superior Court