

Court of Claims of Ohio

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GORDON PROCTOR, DIRECTOR OF THE OHIO DEPARTMENT OF
TRANSPORTATION

Plaintiff/Counter Defendant

v.

AMERICAN HOME ASSURANCE COMPANY

Defendant/Counter Plaintiff

and

KOKOSING CONSTRUCTION CO., INC.

Defendant/Counter
Plaintiff/Third-Party
Plaintiff/Counter Defendant

v.

ALLSTATE PAINTING AND CONTRACTING COMPANY

Third-Party Defendant

and

NGM INSURANCE COMPANY

Third-Party
Defendant/Fourth-Party
Plaintiff/Counter Plaintiff

v.

ELIAS KAFANTARIS, et al.

Fourth-Party Defendants
Case No. 2006-08046-PR

Judge Clark B. Weaver Sr.
Referee Jack R. Graf Jr.

ENTRY

{¶ 1} On November 8, 2008, Jack R. Graf, Jr., Esq., was appointed pursuant to R.C. 153.12 and 2743(C)(3) to serve as a referee in this matter. On February 24, 2009, plaintiff/counter defendant, Gordon Proctor, Director of the Ohio Department of Transportation (ODOT), filed a motion pursuant to Civ.R. 53(E)(6) seeking disqualification of the referee. On March 4, 2009, defendant/counter plaintiff/third-party plaintiff/counter defendant filed a memorandum in opposition. As a result of the filing of the motion, the oral hearing upon the cross-motions for summary judgment scheduled for February 25, 2009, was continued to a date and time to be determined after the court had ruled upon the motion to disqualify the referee.

{¶ 2} Civ.R. 53(D)(6) provides that “[d]isqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.”

{¶ 3} R.C. 2743.03(B) (3) states in relevant part: “When any dispute under division (B) of section 153.12 of the Revised Code is brought to the court of claims, upon request of either party to the dispute, the chief justice of the supreme court shall appoint a single referee or a panel of three referees. The referees need not be attorneys, but shall be persons knowledgeable about construction contract law, a member of the construction industry panel of the American arbitration association, or an individual or individuals deemed qualified by the chief justice to serve. *No person shall serve as a referee if that person has been employed by an affected state agency or a contractor or subcontractor involved in the dispute at any time in the preceding five years.*” (Emphasis added.)

{¶ 4} The stated grounds for disqualification are set forth in the motion as follows:

{¶ 5} “Mr. Graf is currently the owner and president of Graf & Sons, Inc., a company specializing in servicing, installing, and marketing garage doors, sliding door systems, windows, gate operators, loading dock equipment, dumbwaiters, and folding walls. Through his company, Mr. Graf has encountered many business opportunities within the state of Ohio, as both a vendor and a contractor. For example, Graf & Sons has been involved with many projects in central and southeastern Ohio, including the Ohio University Baseball facility, and the multi-purpose arena, the Schottenstein Center, at The Ohio State University.

{¶ 6} “At one point in time, Graf & Sons, Inc. was prequalified to bid on ODOT projects. More importantly for the purposes of this case, Graf & Sons was awarded an ODOT contract in April of 2008. According to ODOT records, the bid for this particular project was submitted by Mr. Graf. Graf & Sons was hired to perform services on this ODOT [project] which involved a facility in Scioto County. ODOT paid Graf & Sons for its work on the project. Due to this business relationship with ODOT, R.C. 2743.03(C)(3) prohibits Mr. Graf from serving as referee herein.”

{¶ 7} As evidenced by the transcript of the proceedings held before the referee on February 25, 2009, and as the Chief Justice recognized when the appointment was made, Referee Graf is eminently qualified to serve as referee in a dispute involving the construction of public improvement.¹ As is also evidenced in the transcript, the construction company that employs Referee Graf has contracted with various state contractors and various state agencies, including the state agency at issue in this case, on a number of occasions within the past five years. However, Referee Graf has never, at any time within the last five years, had a contract of employment either with the affected state agency or the contractor involved in this dispute. Rather, Referee Graf has been employed during the relevant time period by an independent contractor who has, on occasion, performed work pursuant to a contract with the state. Although

Referee Graf's employer has worked as a subcontractor for both parties involved in this dispute within the last five years, Referee Graf's employer is not a party to this action or otherwise involved in this dispute.

{¶ 8} In the view of the court, it is an employment relationship with the parties to the dispute that triggers disqualification under R.C. 2743.03(B)(3). See *Conn v. Ohio Dept. Of Transp.* (1983), 14 Ohio App.3d 90. The court does not read the language of the statute so expansively as to require disqualification where a referee has been employed by an independent contractor either of the state agency or the contractor involved in the dispute. Similarly, the statute does not require disqualification where the referee is employed by a subcontractor not involved in the dispute.

{¶ 9} Moreover, the obvious intent of the General Assembly in enacting R.C. 153.12 was to ensure that contract disputes involving the terms of a public improvement contract are resolved by a judicial officer with particularized skills, experience, and abilities in the construction industry. See *Conn, supra*. Were disqualification of a referee to be required under the circumstances that exist herein, the intent of the General Assembly would be defeated inasmuch as the pool of qualified referees would be either prohibitively shallow or non-existent.

{¶ 10} In short, the court finds that Referee Graf has not been employed either by the affected state agency, or contractor, or subcontractor involved in the dispute at any time in the preceding five years. Additionally, the court finds no evidence of bias on the part of Referee Graf. Accordingly, no cause for disqualification exists either under R.C. 153.12 or Civ.R. 53(D)(6). Their appearing no other cause for disqualification in the record, the motion is DENIED.

CLARK B. WEAVER SR.

¹The transcript of the February 25, 2009 proceedings before Referee Graf is incorporated herein and shall be filed concurrently herewith.

Judge

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Referee Jack R. Graf, Jr.

Case No. 2006-08046-PR

- 6 -

ENTRY

To S.C. reporter March 31, 2009