IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK SCHOOL DISTRICT	**PLAINTIFF**
V.	**NO. 4:82CV00866/DPM**
PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1, ET AL.	**DEFENDANTS**
MRS. LORENE JOSHUA, ET AL.	**INTERVENORS**
KATHERINE KNIGHT, ET AL.	**INTERVENORS**

MEMORANDUM IN SUPPORT OF PCSSD'S RESPONSE TO RECUSAL ISSUE

Introduction

Given the status of the law, and the apparent absence of authority directly upon point, the PCSSD suggests that, in the final analysis, this Court look to the rule of common sense as a guidepost for its decision. Because his honor, in his former capacity as a law clerk to Judge Arnold, did not work on any of the previous appeals, did not apparently offer opinions or suggestions to Judge Arnold, and because another law clerk had the assignment of those appeals, all of these factors militate against recusal. Also to be given considerable weight is the following: This was a three-judge panel. Decisions were not made by Judge Arnold alone. His vote was, in the mathematical sense, irrelevant since all of the appeals during the relevant time period were 3-0 decisions.

Further, it intuitively follows that while a law clerk might, and we presume they often do, make discrete suggestions, it is the panel members first individually and then collectively who make the decisions that matter. Law clerks do not vote or decide cases. Thus, as a practical

matter, and given no clear precedent directing or suggesting recusal, we respectfully submit that the Court should "sit".

Discussion

28 U.S.C. § 455(a) provides that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In cases where the alleged conflict arises from a judge's former governmental employment, 28 U.S.C. § 455(b)(3) governs. *Rahman v. Johanns*, 501 F.Supp.2d 8, 14 (D.C. 2007) (citing *Liteky v. U.S.*, 510 U.S. 540, 552-53 (1994)). 28 U.S.C. § 455 (b)(3) provides that a judge shall disqualify himself in cases "where he has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy."

The rules for disqualification for government service are "less stringent" than those for private practice. *Kendrick v. Carlson*, 995 F.2d 1440 (8th Cir. 1993). The rules for disqualification based on private practice provide that a judge must disqualify himself if "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." *Id*. (quoting 28 U.S.C. § 455 (b)(2)). The rules for disqualification based on prior government service provide that a judge is disqualified if he served as counsel for the matter. *Id*. (citing 28 U.S.C. § 455 (b)(3)). "Therefore, a judge is not subject to mandatory disqualification arising from prior government service based on the mere fact that another lawyer in his office served as a lawyer concerning the matter." *Id*. "The issue, rather, is whether a judge, while in government employment, himself served as counsel in the case." *Id*.

Courts have held that a judge who previously served as an Assistant United States Attorney is not disqualified simply because other attorneys in the judge's office brought a case.

U.S. v. Di Pasquale, 864 F.2d 271, 279 (3rd Cir. 1988). Rather, the judge must have been involved in the case in order to be disqualified. *Id*. Other courts have held that "under section 455(b)(3), recusal is required based on a 'personal participation' rule – that is, where the judge, in his former position, participated as counsel, adviser or material witness concerning the merits of the particular case or controversy." Rahman, *supra*. *See also Baker & Hostetler LLP v. U.S. Dept. of Commerce*, 471 F.3d 1355, 1358 (D.C. 2006) (stating that Congress established the personal participation rule because it was "aware of the deeply rooted tradition of high-level Executive Branch and Legislative Branch officials assuming the bench" and "to avoid making it all but impossible for judges with such backgrounds to perform their judicial duties").

The Eighth Circuit and the Arkansas federal courts have neither adopted nor rejected the personal participation rule. But, given the Eighth Circuit's statement that the court looks at a judge's "involvement" in a case, it is not unreasonable to assume that the Eighth Circuit might adhere to the personal participation rule.

In this case, the issue does not arise from Judge Marshall's serving as counsel in his previous governmental employment, but rather from his capacity as an "advisor" to Judge Arnold while he was a law clerk. However, there is no law on point. Because "counsel" and "advisor" are included in the same sentence of the same statute, the rules governing "counselors" can, for present purposes, be presumed as equivalent to "advisors." Thus, the court should look at whether Judge Marshall was involved in or personally participated in the case while he was a law clerk for Judge Arnold.

Because the issue is based on his government service, Judge Marshall cannot be disqualified simply because another attorney in the office, Polly Price, handled the case. Rather, the court must look at whether Judge Marshall was involved in and personally participated in the

case. Judge Marshall has stated on the record that he did not participate in the case. Furthermore, he has no memory of any discussions of the case in Judge Arnold's chambers. He merely admits that it is logical to assume that he was present when the discussions took place.

Conclusion

In both the literal and legal sense, Judge Marshall was not involved in the case and should not be disqualified under 28 U.S.C. § 455(b)(3).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

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I hereby certify that on July 12, 2011, I mailed the document by United States Postal Service to the following non CM/ECF participants.

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