



Issue Date: 15 June 2012

In the Matter of

MAKARAND BIDWAI,
Prosecuting Party,

Case No.: 2011-LCA-00029

v.

BOARD OF EDUCATION OF
PRINCE GEORGE'S COUNTY,
Respondent.

**ORDER DENYING MOTION FOR RECUSAL, DENYING MOTION FOR
RECONSIDERATION, AND DENYING MOTION TO AUGMENT COMPLAINT**

This matter arises under the H-1B provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1101, as amended by the American Competitiveness and Workforce Improvement Act of 1998, 8 U.S.C. §§1101(a)(15)(H)(i)(b), 1154, 1182(n), and 1184(c), and the implementing regulations found at 20 C.F.R. Part 655, subparts H and I ("H-1B program"). The INA and the regulations establish an H-1B Labor Condition Application ("LCA") program for aliens who come to the United States temporarily to perform services in a "specialty occupation," as defined in section 214(I)(1) of the INA. *See* 8 U.S.C. §1101(a)(15)(H)(i)(b).

By Order dated April 26, 2012, I granted Respondent Board of Education's motion for summary decision and dismissed the complaint. Since that date, Prosecuting Party Makarand Bidwai has filed three motions for reconsideration of that order, a motion for leave to augment his complaint, and a motion for recusal of the presiding administrative law judge. I will first address the motion for recusal, because if it is granted, the other motions will be held in abeyance.

Recusal

Although Mr. Bidwai's motion is somewhat difficult to understand, it appears that he bases his request for recusal on the following grounds: (1) that I am biased against him in light of my order of December 8, 2011, stating that no further requests for certification or issuance of a U-visa will be entertained; (2) that I was improperly influenced by either counsel for Respondent or the settlement judge; and (3) that I am otherwise biased against Mr. Bidwai, as evidenced by unfavorable rulings.

Order of December 8, 2011

By letter dated November 8, 2011, counsel for Respondent advised me that the parties wished to engage in settlement negotiations and requested appointment of a settlement judge under 29 C.F.R. § 18.9(e). On November 18, 2011, Chief Judge Stephen L. Purcell appointed Associate Chief Judge William S. Colwell as settlement judge. By Order dated December 5, 2011, I granted Respondent's motion for a stay and stayed all proceedings pending the outcome of settlement proceedings. On December 7, 2011, the appointed settlement judge informed me that a settlement conference had been held, but was unsuccessful. Accordingly, the stay was ended. On December 8, 2011, I issued an order addressing several motions that were outstanding at the time. Among the motions were two by Prosecuting Party requesting that I certify his request for a U-visa. My order of December 8 denied his motions and advised him that all further requests for certification or issuance of a U-visa would be summarily denied.

Rather than showing bias against Mr. Bidwai, my December 8 order reflected my opinion, which I still hold, that I do not have the authority to issue or to certify a request for issuance of a U-visa. As I said at the time:

[A] judge may certify a U-visa petition only if the judge "has responsibility for the investigation or prosecution of a qualifying crime or criminal activity." As I do not have such responsibility, I do not have the authority to certify a U-visa petition.

Thus, as I lack the legal authority to do what Mr. Bidwai requested, I placed him on notice that future requests would be denied, as it would be fruitless for him to file them. Although it is possible that my interpretation of 8 C.F.R. § 214.14(a)(2) was incorrect, the proper method of challenging it is by appealing my order. The order was based on a legal interpretation of a binding regulation, and does not reflect bias on my part.

Settlement Judge Proceedings

As mentioned above, Judge Colwell informed me on December 7, 2011 that he had conducted settlement proceedings, but they had proved unsuccessful. Under 29 C.F.R. § 18.9 (e)(8), "The settlement judge shall not discuss any aspect of the case with any administrative law judge or other person." Judge Colwell scrupulously followed this requirement and did not disclose to me any of the discussion that occurred during the settlement proceedings. Until Mr. Bidwai referred to some of the discussions in his current motions, I was unaware of them. Further, I have never spoken with counsel for Respondent outside of Mr. Bidwai's presence. His suggestion that I was influenced either by Judge Colwell or Respondent's counsel, whether immediately after the settlement proceedings or at any later date, is without merit.

Other Bias

Mr. Bidwai believes that entertaining Respondent's motion for summary decision, after having denied an earlier motion to dismiss, shows bias on my part. This reflects Mr. Bidwai's misunderstanding of the differences between the two types of motion. The earlier motion, filed

in July of 2011, related to the claims of six individual teachers against Respondent. It was based on the fact that I had approved a settlement agreement between Respondent and the Administrator of the Wage and Hour Division that completely disposed of the claims of the individual teachers. Although I granted the motion with respect five of the six individual teachers, I only partially granted it with respect to Mr. Bidwai. I acknowledged that he had claims that were different from those of the other teachers – that he had a claim based on alleged retaliation, while the other teachers did not. Accordingly, I granted the July 2011 motion as to Mr. Bidwai's claims of back pay and reimbursement of fees, but denied it as to his retaliation claim. Thereafter, in January of 2012, Respondent filed a separate motion for summary decision specifically addressing Mr. Bidwai's retaliation claim. On April 26, 2012, I granted the motion. Mr. Bidwai apparently believes that the issues in Respondent's January 2012 motion should have been raised in July of 2011, when it filed its earlier motion for summary decision. Although in theory Respondent could have done so, it was under no legal obligation to do so; the applicable regulations require only that a motion for summary decision be filed no later than 20 days before a scheduled hearing date. As no hearing date was ever scheduled, Respondent's January 2012 motion was timely, and my entertaining it does not reflect bias against Prosecuting Party.

Mr. Bidwai further argues that he was forced into a telephonic conference call with me and Respondent's counsel in December of 2011, and that forcing him to participate reflects bias against him. To the contrary, holding the conference call was an attempt on my part to be solicitous of Mr. Bidwai's pro se status – to establish a schedule for the pending motions and to make sure that he knew of his rights and responsibilities with respect to them. The discussion encompassed only administrative matters, including (1) a request that Mr. Bidwai refrain from using electronic mail unless unusual circumstances required it, to which he agreed; (2) the fact that Respondent intended to file a motion for summary decision, (3) the fact that Mr. Bidwai wished to withdraw his previously-filed motion for summary decision, and (4) an agreement to set a date for hearing after resolution of Respondent's motion for summary decision. During the telephone conference, I also assured Mr. Bidwai that he would receive sufficient time to conduct discovery on, and respond to, Respondent's motion for summary decision. It is true that I required Mr. Bidwai to participate in the telephone conference; however, I did so out of a concern that he understand the proceedings and to avoid the delays that would be caused by issuing orders and receiving written responses. There was no bias in requiring Mr. Bidwai to participate in the conference call.

Mr. Bidwai finally argues that my failure to honor his request for a telephone conference shortly before issuing the Order of April 26, 2012 granting summary decision further reflects bias. He appears to argue that if I had held such a telephone conference, he would have informed me of the difficult time he was undergoing with regard to his landlord's attempts to evict him and his family from their apartment. He did not lack the opportunity to do so, however. Mr. Bidwai filed a written motion to extend the time to submit his opposition to Respondent's motion for summary decision; it was dated March 30, 2012 and received in this Office on April 3, 2012. He made no argument relating to eviction proceedings, but only referred obliquely to a "change of apartment." Requesting a telephonic hearing on April 24 and 25, long after the extended due date for submission of his opposition, is waiting far too long. Any failure to honor his request

for a telephonic hearing was due to a wish for efficient administration of the case, and not to any bias against Mr. Bidwai.¹

Recusal of an administrative law judge is premised upon the Administrative Procedure Act. Section 556(b) of title 5, United States Code, requires that administrative law judges conduct hearings in an impartial manner and provides that “on filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.” *See also* 29 C.F.R. § 18.31 [the presiding judge has initial responsibility to rule on recusal motions]. To be disqualifying, the bias must be personal, not judicial, and must arise from the judge’s background and association, not from the judge’s view of the case. *First National Monetary Corp. v. Weinberger*, 819 F.2d 1334, 1337 (6th Cir. 1987). “Bias cannot be inferred from a mere pattern of rulings by a judicial officer, but requires evidence that the officer ‘had it in’ for the party for reasons unrelated to the officer’s views of the law, erroneous as that view might be.” *McLaughlin v. Union Oil Co. of Calif.*, 869 F.2d 1039, 1047 (7th Cir. 1989) (finding no basis for recusal of administrative law judge). “The mere fact that a decision was reached contrary to a particular party’s interest cannot justify a claim of bias, no matter how tenaciously the loser gropes for ways to reverse his misfortune.” *Marcus v. Director, OWCP*, 548 F.2d 1044, 1049, 1050 (D.C. Cir. 1976). *See also Garver v. United States*, 846 F.2d 1029, 1031 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988). In this case, Mr. Bidwai has made no allegation, let alone a claim supported by a “timely and sufficient affidavit,” that I harbor any personal animosity or bias toward him.² Instead, his motion is based on the adverse rulings I have made against him. Those rulings cannot support a recusal motion, and his motion will be denied.

Reconsideration

The Federal Rules of Civil Procedure govern motions for reconsideration. *See* 29 C.F.R. § 18.1. Pursuant to Fed. R. Civ. P. 59(e), motions for reconsideration can be granted only on the following grounds: (1) to correct manifest errors of law; (2) to introduce newly discovered or previously unavailable evidence; (3) to prevent manifest injustice; or (4) to reflect an intervening change in controlling law. *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999), *cert. denied*, 529 U.S. 1082 (2000). Here, Prosecuting Party has not specified the bases for his motion. Upon close review, it appears that he claims reconsideration is necessary to introduce newly-discovered or previously unavailable evidence, and to prevent manifest injustice.

Prosecuting Party has raised a number of issues in his request for reconsideration. One issue – the timeliness of Respondent’s opposition to his “fait accompli” motion – was fully addressed in my April 26, 2012 order granting summary decision, and Mr. Bidwai has simply re-

¹ In any event, I was never advised that Mr. Bidwai wished to have a telephone conference, and did not deny any such request. Failure to hold one without knowledge that it had been requested cannot demonstrate bias.

² I acknowledge that Mr. Bidwai attached an affidavit to his recusal motion; however, that affidavit fails to set forth any facts tending to show a personal bias, or indeed any facts at all related to the motion. The affidavit attempts to incorporate allegations made “here, elsewhere, now and elsewhere” without specifying what those allegations are. It is, therefore, not a “sufficient” affidavit under 29 C.F.R. § 18.31.

argued his previous position with regard to that issue. That is insufficient to warrant reconsideration.

Other issues raised by Mr. Bidwai relate to my denial of his request for extension of time to file his opposition to Respondent's motion for summary decision, and discovery issues related to his opposition. With respect to his request for extension of time, Mr. Bidwai has now set forth a detailed description of the time and effort he was required to devote to defending himself and his family from eviction from their apartment. His opposition was due on March 30, 2012; thus, only matters occurring before that time are relevant to whether he could have timely completed it. Those matters include a motion to strike his jury demand, and time needed to research the Virginia law of eviction. The motion to strike jury demand was apparently filed on March 13, 2012 and granted on March 23, 2012; the time spent researching eviction law encompassed March 13-23 as well. Mr. Bidwai filed his request for extension of time on March 30, 2012 but, as discussed above, failed to present evidence or argument related to the eviction proceedings. That evidence was not newly discovered or previously unavailable, and therefore cannot form the basis of a motion for reconsideration. In any event, his preoccupation with the eviction action did not prevent him from preparing and filing his "fait accompli" motion on March 19 or a revised version of it on March 27.

Mr. Bidwai further argues that had he been granted additional time, he would have engaged in discovery and obtained evidence to oppose Respondent's motion for summary decision. The only specific discovery he claims he would have performed, however, relates to the qualifications of the science teacher who returned to Croom High School, resulting in Mr. Bidwai's transfer to Frederick Douglass High School. Summary decision was sought and granted, however, on the grounds that Mr. Bidwai's complaints about Respondent's H-1B program played no part in any adverse employment action. Further, I specifically found that Mr. Bidwai's transfer to Frederick Douglass High School was not an adverse employment action. Thus, any evidence relating to the other teacher's qualifications is irrelevant to the issues involved in the motion for summary decision. Mr. Bidwai has specified no other discovery that he seeks to obtain, and has not explained how the information he seeks will affect the previous decision. He has made only broad assertions that he would be able to refute each and every fact alleged by Respondent – this is clearly untrue, as many of the facts are undisputed.

Mr. Bidwai additionally contends that I "backtracked" on assurances made in the telephone conference of December 21, 2011 that he would be given sufficient time to engage in discovery and file his opposition. He appears to believe that he was promised unlimited time; that is not the case. He was assured that he would have sufficient time, but not that his time would never expire. His opposition was initially due on February 6, 2012, which I unilaterally extended to February 17, 2012. Mr. Bidwai filed a motion to extend that time further, and on March 1, 2012 I granted it until March 30, 2012. Mr. Bidwai represented that he would be able to complete discovery and file his opposition by that date; he did not timely request another extension or give an adequate basis for doing so. Instead, he chose to prepare and file his "fait accompli" motion and a revised version thereof, even in advance of the date established for filing his opposition to summary decision. In short, Mr. Bidwai had a year to conduct discovery, and received two extensions of time allowing him 70 days, or seven times the time allowed under 29 C.F.R. § 18.40(a), to respond. He was fully advised by separate order of what he was required to

do to respond to Respondent's motion. Instead of doing so, he chose to file his own "fait accompli" motion. Although Mr. Bidwai is representing himself, he is not excused from following the applicable regulations and orders in this case. He received generous extensions of time and instructions, and chose not to follow them.

Consequently, Mr. Bidwai has failed to establish a basis for reconsideration of my grant of summary decision in Respondent's favor. The motion for reconsideration will be denied.

Motion to Augment Complaint

Because I have dismissed Mr. Bidwai's complaint, and because it remains dismissed upon consideration of his post-dismissal motions, there is no basis to grant his motion to augment it. That motion will be denied.

Additional Issues

Mr. Bidwai asks that I issue 10 subpoenas that he previously submitted, and points out that I did not specifically rule on his prayer that they be issued. Because this matter was and remains dismissed, there is no basis for his pursuit of additional information through the discovery process. Accordingly, his request for issuance of the subpoenas will be denied.

Finally, Mr. Bidwai argues that Respondent's letter of April 30, 2007 informing him that his contract was being renewed was untimely. That claim is beyond the scope of these proceedings, which is limited to his claim of retaliation.

ORDER

Based on the foregoing, IT IS ORDERED:

1. Mr. Bidwai's motion for recusal of the presiding administrative law judge is DENIED;
2. Mr. Bidwai's motion for reconsideration of my order granting summary decision is DENIED; and
3. Mr. Bidwai's motion to augment his complaint is DENIED.

SO ORDERED.

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PAUL C. JOHNSON, JR.

Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within thirty (30) calendar days of the date of issuance of the administrative law judge's decision. *See* 20 C.F.R. § 655.845(a).

The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the Petition with the Board, you must serve it on all parties as well as the administrative law judge. *See* 20 C.F.R. § 655.845(a).

If no Petition is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. § 655.840(a).