DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-11-30,151

In re: 2300 Good Hope Rd., S.E., #901

Ward Eight (8)

TONICA WASHINGTON
Tenant/Appellant

v.

A&A MARBURY, LLC/UIP PROPERTY MANAGEMENT
Housing Provider/Appellee

DISCLOSURE REGARDING DISQUALIFICATION
AND
NOTICE OF OPPORTUNITY TO PROCEED WITH WAIVER

March 31, 2016

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission ("Commission") from a final order issued by the Office of Administrative Hearings ("OAH"), based on a petition filed in the Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD"). The applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 - 3509.07 (2001), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501 - 510 (2001), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

I. PROCEDURAL HISTORY

This matter first came before the Commission pursuant to a notice of appeal filed by tenant/appellant Tonica Washington ("Tenant") on August 13, 2012 ("First Notice of Appeal"), from which the Commission issued a decision and order on December 27, 2012 ("First Decision

and Order"), remanding the case to OAH for further proceedings. Throughout the Commission's hearing and consideration of the First Notice of Appeal, the Tenant was not represented by counsel.

On August 18, 2015, the Tenant filed a notice of appeal from the final order after remand ("Second Notice of Appeal"). The Second Notice of Appeal was signed by Marc Borbely, Esq., as counsel for the Tenant.

Mr. Borbely is a relative (specifically, second cousin) of the Chairman of the Commission, Peter Szegedy-Maszak ("Chairman"). Out of an abundance of caution, consistent with the Code of Judicial Conduct for the District of Columbia ("Code of Conduct"), the Chairman has previously recused himself from participation in other cases in which Mr. Borbely represents a party, in order to avoid any question about his impartiality based upon his family relationship. *See* Sheikh v. Smith Prop. Holdings Three (DC), L.P., RH-TP-12-30,279 (RHC Sept. 23, 2014) (Notice of Recusal).

II. DISCUSSION

The Act provides that the Commission shall be composed of three members. D.C. OFFICIAL CODE § 42-3502.01(a)(1). A quorum of two Commissioners is required for the Commission to do business. D.C. OFFICIAL CODE § 42-3502.02(b)(2). However, the Commission currently has only two appointed and confirmed members, and the recusal of the Chairman would therefore prevent or substantially delay the Commission's hearing and decision of this second appeal.

The Code of Conduct requires a judge (or in this case, a Commissioner) to "disqualify himself or herself in any proceeding which the judge's impartiality might reasonably be questioned." Code of Conduct Rule 2.11(A) (2012). The critical inquiry is "whether the

circumstances could lead 'an objective observer' reasonably to question the judge's impartiality." Plummer v. U.S., 43 A.2d 260, 265-66 & n.8 (D.C. 2012). *See* Belton v. U.S., 581 A.2d 1205, 1214 (D.C. 1990); In re: M.C., 8 A.3d 1215, 1222 (D.C. 2010). Decisions to recuse are within the discretion of a judge. Reese v. Newman, No. 14-CV-283, slip op. at 6-7 n.6 (D.C. Feb. 11, 2016); Bansda v. Wheeler, 995 A.2d 189, 203 (D.C. 2010); Mayers v. Mayers, 908 A.2d 1182, 1190 (D.C. 2006).[1]

The Code of Conduct provides several circumstances that, *per se*, present reasonable questions of impartiality, including where "a person within the third degree of relationship to [the judge] is . . . acting as a lawyer in the proceeding[.]" Code of Conduct Rule 2.11(A)(2)(b). The "third degree of relationship," as used in the Code of Conduct, does not include a second cousin.[2] Therefore, the Chairman is not *per se* disqualified from participating on the basis of his family relationship to Mr. Borbely.

The Code of Conduct further provides that:

> A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

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[1] As the D.C. Court of Appeals has noted, strict rules of recusal, and limited bases for waivers of disqualification, are appropriate when the caseload of a court can be, and frequently is, easily reassigned among numerous judges. Scott v. United States, 559 A.2d 745, 756 n.22 (D.C. 1989). Because recusal in this case may result in substantial delay in adjudication, the Chairman is satisfied that the bases for disqualification under the Code of Conduct may be viewed narrowly. *See also* Code of Conduct Rule 2.11 comment [3] ("The rule of necessity may override the rule of disqualification.")

[2] The "Terminology" section of the Code of Conduct provides:

> **"Third degree of relationship"** includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

Code of Conduct Rule 2.11(C).[3] Although the Chairman is not *per se* disqualified by the Code of Conduct due to his family relationship to Mr. Borbely and is satisfied that he can remain impartial, the Chairman, in his discretion, choses to "ask the parties . . . to consider . . . whether to waive disqualification." Code of Conduct Rule 2.11(C).

Comment [5] to Code of Conduct Rule 2.11 provides that a judge "should disclose on the ecord information that the judge believes the parties or their lawyers might reasonably consider relevant to . . . disqualification[.]" Accordingly, the Chairman avers as follows with respect to his interactions with Mr. Borbely:

1. As noted, the Chairman and Mr. Borbely are second cousins;

2. To the best of his knowledge and recollection, the Chairman met Mr. Borbely for the first time at a family reunion over a three-day period in Budapest, Hungary in June 2011;

3. The Chairman has only had any extended contact or communication with Mr. Borbely at the family reunion in Budapest, Hungary in June 2011, where none of the Chairman's interactions or communications with Mr. Borbely related in any way to any cases on appeal to the Commission at the time or in the future; and

4. Since June 2011, he has had little, if any, contact or communications with Mr. Borbely generally, and no contact or communications of any type with Mr. Borbely regarding any cases on appeal to the Commission.

The Chairman ratifies and affirms that he has fully and completely disclosed the nature and scope of his interactions and communications with Mr. Borbely as they relate to any cases before the Commission, and that he will be able to render a fair, independent and unbiased decision in this appeal.

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[3] Paragraph (A)(1) of Rule 2.11, which is unwaivable under paragraph (D), provides, in relevant part, that a judge shall be disqualified where he or she "has a personal bias or prejudice concerning . . . a party's attorney." The Chairman, in his discretion, is satisfied that there are no reasonable grounds to assert that he has a personal bias or prejudice regarding Mr. Borbely and that questions of impartiality due to the familial relationship are properly addressed under paragraph (A)(2) of the Rule.

III. CONCLUSION

Consistent with Code of Conduct Rule 2.11(C) and comment [7] thereto, the Commission hereby requests the housing provider/appellee A&A Marbury, LLC/UIP Property Management, the Tenant, and their respective counsel, to consider whether the Chairman should be disqualified from participating in this proceeding or if disqualification of the Chairman should be waived. If the parties and their counsel agree that the Chairman should not be disqualified, the parties should file a joint response to this notice. A joint response waiving disqualification shall contain either the signature of each party or a representation by counsel for the party that the party has been consulted and consents to the waiver.

The parties are requested to file a joint response by April 15, 2016.

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DISCLOSURE REGARDING DISQUALIFICATION AND NOTICE OF OPPORTUNITY TO PROCEED WITH WAIVER** in RH-TP-11-30,151 was mailed, postage prepaid, by first class U.S. mail on this **31st day of March, 2016,** to:

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