

FILED
07-18-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV003007

BY THE COURT:

DATE SIGNED: July 18, 2022

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN

DANE COUNTY
BRANCH 8

CIRCUIT COURT

AMERICAN OVERSIGHT,

Petitioner,

vs.

Case No. 21-CV-3007

ASSEMBLY OFFICE OF
SPECIAL COUNSEL, et al.

Respondents.

DECISION AND ORDER

INTRODUCTION

The Assembly Office of Special Counsel (“OSC”) seeks an order recusing myself as judge under provisions of the federal and state constitutions, Wisconsin statute, and the Code of Judicial Conduct. “The right to an impartial judge is fundamental to our notion of due process.” *In re Paternity of B.J.M.*, 2020 WI 56, ¶15, 392 Wis. 2d 49, 944 N.W.2d 542 (quoted source omitted). OSC claims it was denied this right when it alleges that I “threatened” witnesses and have “throughout the entire case ... displayed apparent or actual bias ...” OSC Br., dkt. 377:1-2.

OSC does not meet its burden to prove bias, or the appearance of bias, or any of the

statutory factors for disqualification. I have reviewed OSC's brief and the parts of the record cited therein. I have determined that I can and have been acting in an impartial manner in this case. I will continue to do so in the future. Neither Wis. Stat. § 757.19 nor SCR ch. 60 require my recusal, and accordingly, OSC's motion for recusal is denied.

LEGAL STANDARD

The burden for proving the need for recusal is squarely on the OSC:

We presume that a judge has acted fairly, impartially, and without bias. To overcome that presumption, the burden is on the party asserting judicial bias to show bias by a preponderance of the evidence.

B.J.M., 2020 WI 56, ¶15 (internal citations omitted). The bar for meeting this burden is high: "it is the exceptional case with 'extreme facts' which rises to the level of a 'serious risk of actual bias.'" *Id.* ¶24 (citing *Capterton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009)). With OSC's burden in hand, I next turn to both Wis. Stat. § 757.19 and SCR ch. 60 to determine whether OSC shows "extreme facts" warranting recusal.

Wis. Stat. § 759.19(2) provides that a judge must disqualify himself when one of the following situations occurs:

1. When a judge is related to any party or counsel thereto or their spouses within the third degree of kinship.
2. In general, when a judge is a party or a material witness.
3. When a judge previously acted as counsel to any party in the same action or proceeding.
4. When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.
5. When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.

6. When a judge has a significant financial or personal interest in the outcome of the matter.
7. When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

The Wisconsin Supreme Court has held that the conditions in Wis. Stat. §§ 757.19(2)(a)-(f), (items 1 to 6, above), are objective standards that, if proven, require a judge to recuse himself or herself from an action or a proceeding. *State v. American TV and Appliance of Madison, Inc.*, 157 Wis. 2d, 175, 181-82, 443 N.W.2d 662 (1989). In comparison, Wis. Stat. § 757.19(2)(g), which requires recusal when a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner, is entirely a subjective determination made by the judge. *American TV*, 157 Wis. 2d at 183. When a judge's refusal to disqualify himself under this standard is made, the only question before a reviewing court is whether the record shows that the judge made this determination; there is no further investigation of the judge's thought process and no consideration of what a reasonable person might believe. *Id.*; *See State v. Walberg*, 109 Wis. 2d 96, 325 N.W.2d 687 (1983), *cert. denied*, 106 U.S. 546; *Ozanne v. Fitzgerald*, 2012 WI 82, ¶1, 822 N.W.2d 67 (Mem.).

SCR 60.03(1) provides, in part, that a judge must act at all times in a manner that promotes confidence in the integrity and impartiality of the judiciary. The test for "appearance of impropriety" is an objective test which asks "whether the conduct of the judge would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." SCR 60.03 cmt. 2. In contrast to the subjective test for disqualification under Wis. Stat. § 757.19(2)(g), the test for disqualification under SCR 60.04 combines both subjective and objective components. Generally, the rule requires a judge to recuse himself or herself in a proceeding when: (1) the facts and circumstances the judge

knows or reasonably should know establish a specified conflict; or (2) when reasonable, well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial. However, unlike Wis. Stat. § 757.19, a violation of the Judicial Code does not require recusal. *State v. Carviou*, 154 Wis. 2d 641, 643, 454 N.W.2d 562 (Ct. App. 1990) ("violation of the Code of Judicial Ethics is not grounds for recusal under sec. 757.19(2), Stats.").

DECISION

OSC's motion fails to demonstrate any objective or subjective reasons for my recusal. OSC does nothing more than summarize the hearings and decisions which have resulted, for the most part, in adverse rulings. Its brief contains inaccuracies, but even assuming the truth of each and every matter asserted therein, nothing in OSC's summary of the history of this case comes close to rebutting the presumption of fairness to show impropriety. The cases on which OSC relies illustrate this point well. *See e.g. Caperton*, 556 U.S. at 872 (a judge should have recused after he "received campaign contributions in an extraordinary amount from" a litigant.); *In re Paternity of B.J.M.*, 2020 WI 56, ¶8 (a judge should have recused after he "friended" a litigant and then allowed ex parte communication through social media during the pendency of an action.).¹ I have

¹ The remaining cases OSC cites did not require recusal:

In *State v. Herrmann*, 2015 WI 84, ¶¶48-49, 364 Wis. 2d 336, 867 N.W.2d 772, a judge properly heard a drunk driving case even though she had personally been a victim of a similar crime and had discussed her own experience at the sentencing hearing.

In *American TV*, 151 Wis. 2d at 177-178, a judge properly heard a case even though he had received a discount from a family friend who worked as a salesman for a litigant.

In *State v. Harrell*, 199 Wis. 2d 654, 656, 546 N.W.2d 115 (1996), a judge properly heard a case even though his wife worked as a prosecutor in the same office, but had no involvement, with the prosecutor who tried the case.

determined that I can and have been acting in an impartial manner in this case. I will continue to do so in the future. Neither Wis. Stat. § 757.19 nor SCR ch. 60 require my recusal.

ORDER

For the reasons stated, I conclude that OSC fails to meet its burden to show recusal is warranted, and also that I may continue to impartially preside over this matter, and accordingly, OSC's motion for recusal is denied.

This is not a final order for purpose of appeal. Wis. Stat. § 808.03(1).