ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
AEI Pacific, Inc.	)	ASBCA No. 53806
	)	
Under Contract No. DACA85-98-C-0031	)	

APPEARANCES FOR THE APPELLANT: Traeger Machetanz, Esq.
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Anchorage, AK

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
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OPINION OF THE PANEL ON MOTION TO RECUSE

Appellant has moved to recuse Administrative Judge Elizabeth A. Tunks, the presiding judge assigned to this appeal. The government opposes the motion. We deny the motion. In our opinion, appellant's allegations fall far short of providing a basis for recusal.

BACKGROUND

The Board held a ten-day hearing in this appeal starting 12 November 2003 in Anchorage, Alaska with Judge Tunks presiding. The appeal concerns a claim for $1,245,393.66 under a construction contract. Appellant's right to proceed under the contract was terminated for default and its surety took over the contract. (R4, tabs 3-5, 27) The parties prefiled 21 volumes of Rule 4 and supplemental Rule 4 documents, including expert testimony. Judge Tunks received these documents in evidence at the beginning of the hearing (tr. 1/5).

On 21 November 2003, the day after appellant concluded its case-in-chief and eight days into the hearing, appellant served the presiding judge with a motion to recuse herself and also transmitted the motion to the Board, which recorded its receipt on 24 November 2003. In addition, appellant requested that the Board's decision in the

appeal be made based upon the written record by the remaining members of Judge Tunks's panel. Appellant did not request a continuance of the hearing.

On the next hearing day, Sunday 23 November 2003, Judge Tunks stated that she would like to say a few words about appellant's motion before the hearing continued:

> I have been a judge on this Board for almost 17 years. And no one has ever filed a motion to recuse in any of my cases. I take my duties as a judge very, very seriously. And I want to assure the parties if I wind up writing the draft opinion in this case, that I will do so fairly and objectively.

(Tr. 9/5) The government stated that it vigorously opposed the motion (*id*. at 5-6). The hearing then proceeded.

Appellant alleges in its motion that the judge has "created such a strong appearance of partiality, if not demonstrating actual partiality," that she should be recused (mot. at 1). Appellant cites 28 U.S.C. §§ 144, 455(a) (hereinafter sections 144, 455(a)). Appellant supports its motion with affidavits of trial attorneys Mr. Traeger Machetanz and Ms. Christine V. Williams, including an affidavit of counsel certifying the motion was brought in good faith, and of its construction expert, Mr. Thomas Presnell. Ms. Williams' affidavit essentially mirrors Mr. Machetanz's. The motion does not allege an appearance of partiality based upon an extrajudicial source or interest or relationship grounds.

On 2 January 2004, the government filed a reply to the motion. The government opposed the motion and requested, should the Board grant the motion, that the appeal be reheard. The government argues that the judge's "comments and actions do not create an appearance of partiality" and that she "conducted herself appropriately throughout the hearing, aptly performing her duties as a judicial officer" (opp'n at 1). It states that even assuming the facts as alleged in AEI's motion are true, recusal is not warranted in this matter. The government supports its opposition with an affidavit of trial attorney Mr. Gregory W. Vanagel.

On 21 January 2004, appellant filed a reply to the government's opposition. In its reply, appellant included citations to the hearing transcript (which was not previously available).

Judge Tunks has reviewed the parties' filings with respect to the motion. She has reaffirmed the statement made at the hearing that she is able to fairly and objectively draft the opinion in this appeal. She has stated that she has no comments to make on the motion and has elected not to participate in deciding it in order to remove any question concerning the impartiality of the Board's decision on the motion.

The Board reaches decisions by the "majority vote of the members of a division participating and the chairman and a vice-chairman." 48 C.F.R. ch. 2, app. A, pt. 1, ¶ 4 (2003). In practice, the full division or panel does not participate if the vote of the presiding judge, vice-chairman and chairman is unanimous. Since Judge Tunks has elected not to participate in the decision on this motion, the motion is being addressed by the remaining two members of the panel, the vice-chairman and acting chairman.

In view of Judge Tunks's decision not to participate, we accept the affidavits of the parties as to her "off the record" statements at the hearing. In addition, we have independently reviewed the transcript to satisfy ourselves as to the overall conduct of the hearing.

DECISION

Applicable Law

Appellant cites 28 U.S.C. § 455(a). That section provides:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(West supp. 2003) Appellant also cites 28 U.S.C. § 144, which provides that a party may move for disqualification of a district judge upon the basis of personal bias or prejudice. This section is "invocable only when § 455(a) can be invoked anyway" and we do not separately address it. *Liteky v. United States*, 510 U.S. 540, 548 (1994) ("*Liteky*").

Section 455 is not directly applicable to members of boards of contract appeals. In the past, however, we have looked to it and section 144 for guidance on recusal issues. *Johnson & Son Erector Co.*, ASBCA No. 23689, 86-2 BCA ¶ 18,931 at 95,590. The General Services Board of Contract Appeals has done the same. *Coyne Kalajian, Inc.*, GSBCA No. 10113-P, 89-3 BCA ¶ 22,054 at 110,956; *Kovatch Truck Center*, GSBCA No. 5864, 81-2 BCA ¶ 15,292 at 75,714. *See also Bieber v. Department of the Army*, 287 F.3d 1358, 1362 (Fed. Cir.), *cert. denied*, 537 U.S. 1020 (2002) (applying standards under section 455 to a request for a new hearing before a Merit Systems Protection Board administrative judge). We follow that procedure here.

Liteky is the leading case interpreting section 455(a). In *Liteky*, petitioners sought disqualification of a district judge based on bias or prejudice grounds. The Court reviewed the genesis of section 455, which was revised in 1974. The Court said:

> Subsection (a), the provision at issue here, was an entirely new "catch-all" recusal provision, covering both "interest or relationship" and "bias or prejudice" grounds . . . but requiring them *all* to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever "impartiality might reasonably be questioned."

510 U.S. at 548.

The question before the Court in *Liteky* was whether the recusal required under section 455(a) was "subject to the limitation that has come to be known as the 'extrajudicial source' doctrine" (*id.* at 541). As described by the Court, "extrajudicial source" refers to a judge having derived an opinion "from a source outside judicial proceedings" (*id.* at 554). The Court concluded "a significant (and often determinative) 'extrajudicial source' *factor*" exists in recusal jurisprudence (*id.* at 555). Thus, "predispositions developed during the course of a trial will sometimes (albeit rarely) suffice" as the basis for recusal (*id*. at 554). The Court then dealt with two examples. "First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion" (*id.* at 555). Judicial rulings are grounds for appeal, not recusal. Second:

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id. The Court cited as an example of the latter the instance of an alleged statement by a district judge in a World War I espionage case against German-American defendants that "'One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty'" (*id*.). The Court continued (*id.* at 555-56):

> *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger,

> that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration--even a stern and short-tempered judge's ordinary efforts at courtroom administration--remain immune.

In *Liteky*, petitioners contended that the judge had manifested bias through his conduct of a prior trial, "including the questions he put to certain witnesses, his alleged 'anti-defendant tone,' his cutting off of testimony said to be relevant," and his "refusal to allow petitioners to appeal *in forma pauperis*." Applying the principles set forth above, the Court said the case was "not difficult." All of the grounds referred to were inadequate. They consisted of:

> judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses. All occurred in the course of judicial proceedings, *and* neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.

(*Id.* at 556)

The United States Court of Appeals for the Federal Circuit has stated, "[i]n *Liteky*, the Supreme Court recognized that a showing of 'deep-seated . . . antagonism' toward a party is necessary for a successful bias or partiality motion under the federal judicial recusal statute . . . where the motion is based on the judge's conduct in the course of the proceeding." *Bieber v. Department of the Army*, *supra*, 287 F.3d at 1362, footnote omitted. In *Bieber*, the primary question was whether an administrative judge's conduct during a hearing deprived appellant of due process. The Federal Circuit noted that *Liteky* concerned judicial bias in the context of recusal, but said that "we think that the same standard, requiring a showing of 'a deep-seated favoritism or antagonism that would make fair judgment impossible,' must govern in both contexts." 287 F.3d at 1362. The Court cited *Logue v. Dore*, 103 F.3d 1040, 1046 (1st Cir. 1997), where the judge had stated that "'I totally disbelieve plaintiff in this case' and 'I think he's an absolute and incorrigible liar.'" The First Circuit found that these comments did not violate due process under *Liteky*. The Federal Circuit said that likewise, the administrative judge's comments in the case before it, while in some instances inappropriate, did not violate due process under *Liteky*. Neither did the judge's remarks require a new hearing. 287 F.3d at 1363. *See also Charron v. United States*, 200 F.3d 785 (Fed. Cir. 1999) (judge's comments regarding counsel merely reflected the judge's perception that counsel's professional performance was severely deficient and did not qualify as a ground for recusal under *Liteky*).

Analysis of Appellant's Allegations

Appellant argues that the judge has created an appearance of partiality "through (a) making it clear she has decided the matter prior to even listening to the evidence, (b) violating the restraints of settlement discussions while acting as the trial judge, and (c) otherwise making it abundantly clear that she disagrees with appellant's counsel's trial conduct, repeatedly interrupting and belittling him during the proceedings" (mot. at 1-2).

As we construe the contentions, appellant's specific allegations fall into three groups. One group relates to the judge's efforts to promote settlement of the appeal. All of these allegations concern "off the record" statements. The second group relates to rulings and surrounding comments on the record concerning the admissibility and weight of certain testimony. The third group relates to "belittling" statements to counsel. All of the allegations concern statements subsequent to commencement of the hearing. There is no allegation of an appearance of partiality based on knowledge from an extrajudicial source.

The government argues that the judge's comments and actions do not "suggest that she had decided the case prior to hearing all of the evidence," that "[h]er efforts to invoke settlement discussions among the parties did not violate any judicial restraint in participating in such discussions," and the judge's "comments do not even remotely approach the level of severity required for recusal" (opp'n at 1, 7).

In *Liteky*, the Court said that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings . . . do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." 510 U.S. at 555. We conclude, for the reasons set forth below, that none of appellant's allegations individually or in the aggregate come close to displaying the "deep-seated favoritism or antagonism that would make fair judgment impossible."

1. Efforts to Promote Settlement

We turn first to the allegations relating to the judge's efforts to promote settlement of the appeal. Appellant's lead-off witness was a former employee who testified on direct and cross-examination for two days and was scheduled for redirect examination on the morning of the third day. At the end of the second day, after the proceedings had closed for the day, the judge met with counsel for the parties in chambers. According to Mr. Machetanz, she informed counsel that "she had decided that this case 'is a bloodbath'" and that the lead-off witness "who had only partially testified, was 'one of the most dishonest witnesses I have ever seen.'" She urged counsel to settle the appeal.

(Machetanz aff., ¶ 2) According to Mr. Vanagel, the judge also pointed out the government's assessment of its own liability risk based upon its expert's report, stated with reference to the lead-off witness that appellant could still rehabilitate its case, and "emphasized the fact that she was fair, and that she would act fairly as hearing judge" (Vanagel aff., ¶ 2). Mr. Vanagel recalled:

> inquiring about the Judge's ability to continue presiding as the hearing judge if proposed settlement amounts were discussed. These limitations were acknowledged, and the possibility of the parties executing an appropriate waiver was discussed. At no time during this conference or during any other discussions in the presence of Judge Tunks were settlement amounts expressed or revealed.

(*Id.*) Mr. Machetanz places the discussion about the government's inquiry the following day and states that the parties did not sign a waiver (Machetanz aff., ¶ 4).

The next day, the third day of the hearing, according to Mr. Machetanz, the judge approached him within hearing of the government and said "You really need to settle this case . . . it's a bad case . . . it happens sometimes." The judge offered to become involved in the settlement discussions, and "made it clear that she expected the parties' agreement on that point. After the parties agreed, she informed" him, separately from government counsel, that in her opinion "[t]his case is a dog . . . that dog is barking . . . this is a bad case." At some point during that day the judge also approached Mr. Presnell, appellant's expert, who had not yet testified, and informed him that "This is a bad case . . . you guys need to move on." (Machetanz aff., ¶ 3; Presnell aff., ¶ 3)

Later that day, after the parties had met separately to discuss settlement, the judge inquired whether the case had been settled. Counsel for both parties reported that it had not. The judge inquired whether the parties were close. Mr. Vanagel advised that the parties were over half a million dollars apart. According to Mr. Machetanz, the judge then stated to him in the presence of Mr. Vanagel:

> You should take the Government's offer. The Government may offer more than I'm going to give you. You're not going to get claim costs. You're not going to get half your claim. You should take this offer. This is a business decision, your client is going to incur costs. Your client does not want me to decide this case. You very well may get less than the Government offered. You need to do a better job of convincing your client to settle this.

(Machetanz aff., ¶ 5)

That same day, the parties decided to end settlement discussions and return to the hearing. Mr. Machetanz asserts that the judge's "remarks have made it virtually impossible for appellant to settle this matter at any reasonable sum." Mr. Vanagel asserts that "It is my belief that Judge Tunks' efforts to encourage settlement of this appeal were appropriate, well meaning and fair." (Machetanz aff., ¶ 8; Vanagel aff., ¶ 1)

On Thursday, 20 November 2003, appellant concluded its case-in-chief. Immediately before it rested, the question of settlement was raised on the record in the context of the presiding judge's concerns that evidence presented at the hearing, indicating that appellant's surety might be the real party in interest, raised questions about the Board's jurisdiction (tr. 7/56-60). Appellant did not specifically complain in the motion about this in-hearing exchange, and neither party referenced it. In any event, the judge explained the jurisdictional question, citing *Fireman's Fund Insurance Co. v. England*, 313 F.3d 1344 (Fed. Cir. 2002), and urged appellant to consider settlement:

> . . . And then even if I have jurisdiction, there are certain deficiencies here. I'm just trying to say that you may want to reconsider a few things in the interest of your client, because your client is not going to be very happy if he has wasted all the money of putting on a hearing and there's no jurisdiction. The case that I'm talking about is Fireman's Fund . . . .
>
> Now, that I've vented my spleen, let's go ahead.

(Tr. 7/59)

The judge's statements attempting to promote settlement were based on hearing testimony and the evidentiary record compiled to that date. As discussed above, the issue under *Liteky* is whether those statements, urging appellant to settle, would indicate to a reasonable person, informed of all the surrounding facts and circumstances, a "deep-seated . . . antagonism" toward appellant "that would make fair judgment impossible." We have no difficulty in concluding they do not. Rather, they represent the permissible efforts of the judge, using vernacular language and an abrupt approach, to encourage settlement. And, in the case of the in-hearing comments, the remarks also reflect a sense of frustration at a possible jurisdictional impediment. Thus, "[i]n the absence of statutes or court rules to the contrary, a trial judge's attempts to encourage settlement do not constitute improper extrajudicial conduct and do not give rise to an objective appearance of bias." RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 12.4.7.3 at 363 (1996) (footnotes omitted).

Appellant argues that the judge's comments following the second day of the hearing indicate that she had decided the appeal before listening to the evidence.[1] It is normal in settlement negotiations to inform each side of the weaknesses of its position. Obviously, the judge had not heard all the evidence. She had, however, heard two days of testimony, presumably from a significant witness, as well as having the prefiled exhibits including expert reports available. Judges may properly develop preliminary opinions about a case based on the pleadings, motions, communications with counsel and so forth. *Liteky, supra*, 510 U.S. at 551. A reasonable and informed person would not infer, from the fact that the judge communicated her impressions as of a certain point in time, that she could not decide (or participate in deciding) the appeal fairly after the hearing was complete.

Appellant points out that the Board's Notice Regarding Alternative Methods of Dispute Resolution states that:

> any settlement judge or neutral advisor who has participated in a non-binding ADR procedure which has failed to resolve the underlying dispute will ordinarily not participate in the restored appeal. . . . Unless the parties explicitly request to the contrary, and such request is approved by the Chairman, the assigned ADR settlement judge or neutral advisor will be recused from consideration of the restored appeal.

These provisions are an important element of the Board's ADR program, specifically the role of the judge as a third party neutral. They are not, however, a basis for *requiring* the recusal of a hearing judge who attempts informally in the course of the hearing to facilitate settlement discussions, with the agreement of the parties and the understanding that the judge will continue in the case.

2. Rulings and Surrounding Comments

We turn next to appellant's allegations relating to rulings and surrounding comments on the admissibility and weight of testimony. Appellant's specific examples concern its second witness, Mr. John Hesser. Mr. Hesser began testifying after lunch on the third day of the hearing (tr. 3/97). According to Mr. Machetanz, the judge:

> informed appellant that she would not allow the testimony of appellant's witness John Hesser, deciding *sua sponte* that his testimony was irrelevant. Mr. Hesser worked as a foreman

[1] We interpret appellant's argument as referring to the judge's participation in the decision-making process as a member of a division.

> and superintendent on the project at issue. It was not until I made an offer of proof that Judge Tunks finally agreed to allow him to testify, but stated she would only allow that testimony for two hours. That statement was later withdrawn and Mr. Hesser was allowed to testify without time restriction.

(Machetanz aff., ¶ 7)

In its reply brief, appellant quotes the following portion of the transcript in support of this allegation:

> You know, I won't tell you that you cannot ask this witness or examine this witness, but I'm telling you that the amount of weight that I could give is probably very little because he's not a first hand witness to these issues.

(Tr. 3/113; reply br. at 4) Appellant also cites similar remarks at tr. 3/114, 3/115-19.

Appellant also alleges that after expressing the opinion in connection with settlement efforts, *supra*, that appellant's lead-off witness could not be believed, the judge then "repeatedly instructed counsel for AEI that it could not ask questions of subsequent witnesses if that material had previously been covered" by the lead-off witness. Appellant takes as an example the following discussion concerning Mr. Hesser. Mr. Machetanz had explained as an offer of proof that Mr. Hesser would testify to his present sense impressions of what was occurring at the construction site. The judge stated: "But you've already done that. You've already had [the lead-off witness] for three days." (Tr. 3/138; reply br. at 6)

Under *Liteky*, judicial rulings "almost never constitute a valid basis for a bias or partiality motion." *Supra*, 510 U.S. at 555. Insofar as the surrounding comments are concerned, Board Rule 20 provides that:

> Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the Government may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding administrative judge or examiner.

We find nothing whatsoever improper or questionable in the judge's attempting to draw counsel's attention to her perception of the need for a better foundation for a witness's testimony on direct examination. It is apparent that the judge questioned the value of

Mr. Hesser's testimony. She did not, however, preclude appellant from offering it. As appellant admits, the judge in fact permitted Mr. Hesser to testify without time restriction. Her comments gave appellant an opportunity to address her concerns about the weight of the testimony at the time.

3. "Belittling" Statements

Finally, Mr. Machetanz alleges that throughout his examination, the judge "repeatedly interrupts me, belittling me or my work (like saying, 'It doesn't matter that he admits that—I'm going to decide it on my own.'), and raising objections *sua sponte* and instructing me to move on" (Machetanz aff., ¶ 9). Mr. Machetanz provides the following example. The judge, reviewing an exhibit, interrupted his cross-examination to point out a reference to the surety, St. Paul. "I acknowledged her statement and then continued with the cross-examination. Judge Tunks then interrupted, saying, 'Hello, counsel. Hello. Are you listening? You need to address this. Hello!'" (*Id.*, ¶ 10) Mr. Vanagel provides context. According to him:

> Judge Tunks also raised sincere concerns regarding the Board's jurisdiction to hear this appeal, since it had become apparent through the presentation of evidence that the real party in interest may not be AEI but the performance and payment bond surety. I perceived her comments to AEI's counsel in this regard as intended to direct attention to a serious issue that may cause the dismissal of AEI's appeal.

(Vanagel aff., ¶ 4)

Mr. Machetanz also avers that the judge:

> takes issue with almost every admission attained from [government] witnesses, making statements in the middle of cross-examination such as: "That doesn't matter, you know, I'm going to decide it myself" . . . "It doesn't matter what they say or admit" . . . "This has no relevance" . . . "Don't go into all this stuff." A review of the record will make clear that these comments were made in response to some of the **most** relevant testimony.

(Machetanz aff., ¶ 11, emphasis in original) He continues that the judge "[t]ypically . . . does not interrupt, object to, or provide a running commentary during the Government's examinations" (*id.*, ¶ 12).

Mr. Vanagel agrees that the judge at times suggested that appellant's counsel "move on to more relevant lines of inquiry." He continues:

> I perceived this as an attempt to direct focus to pertinent evidence as well as to move the progress of the hearing along to allow its timely completion. This was a legitimate concern as evidenced by the fact that it was necessary to continue the proceedings in this appeal on the Sunday before Thanksgiving.

(Vanagel aff., ¶ 4)

Again, appellant has not begun to make the showing required under *Liteky*. The allegations concern conduct towards counsel, and not alleged bias or prejudice against appellant itself. As explained by the Federal Circuit:

> Ordinarily an allegation of judicial bias relates to bias against a party. Although it is possible that judicial bias against the lawyer may become so pervasive and clear that the client's rights are likely to be affected . . . .

Charron v. United States, *supra*, 200 F.3d at 788. In *Charron*, the trial judge accused counsel of malpractice, defrauding the court, filing a frivolous action, and doctoring the record. The Court said that the judge's comments reflected her perception that counsel's professional performance was "severely deficient." The Court concluded:

> These were factors that she derived solely from her conduct of the litigation. The judge's comments and actions, however, do not establish either personal bias and prejudice or the appearance of partiality.

200 F.3d at 789.

With reference to the surety discussion, the judge's comments, although again couched in the vernacular, addressed a possible jurisdictional issue. Ideally, participants in a hearing do not interrupt each other. That being said, frustration with counsel and/or with the realization that jurisdiction might be lacking, as in this example, does not meet the standard for recusal in *Liteky*. The other comments reflect ordinary efforts at courtroom administration. For example, they reflect efforts to avoid waste of time in a relatively long hearing. Procedurally, if counsel believes that the judge is cutting off relevant lines of inquiry or is otherwise in error, counsel's remedy is to lodge an objection and, if unsuccessful at hearing, to raise it in post-hearing briefing. As stated by the Federal Circuit in *Charron*, judicial remarks that are critical or disapproving of

counsel do not ordinarily support a bias or partiality charge. Appellant has not persuaded us that they do so here.

Appellant also argues that under *Liteky*, the judge's conduct in the aggregate can show that fair judgment is impossible. Appellant continues "[i]n this case, it is Judge Tunks' repeated comments, both on and off record, which show that she could not make a fair judgment in this matter" (reply br. at 3). We are not persuaded that the allegations addressed above, which individually do not meet the requirements for disqualification under section 455(a), somehow do meet those requirements when viewed in the aggregate. Nor are we persuaded, based on our review of the transcript, that the conduct of the hearing as a whole meets those requirements.

CONCLUSION

The motion is denied.

Dated: 18 May 2004

I concur

MARTIN J. HARTY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53806, Appeal of AEI Pacific, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals