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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB Justice — PART 15

In the Matter of the Application of

MICHAEL J. GRECO on behalf of WASHINGTON MUTUAL, FA,

Petitioner,

- v -

PETER KALIKOW, as Chairman of the METROPOLITAN TRANSPORTATION AUTHORITY

Respondent.

INDEX NO. 118849 /2001

MOTION DATE 1/08/02

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

This application is decided in accordance with the accompanying memorandum decision.

Dated: 10/17/07

WALTER B. TOLUB, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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In the Matter of the Application of
MICHAEL J. GRECO on behalf of
WASHINGTON MUTUAL, FA.

Index No. 118849/01
Mtn Seq.

Petitioner,

-against-

PETER KALIKOW, as Chairman of the
METROPOLITAN TRANSPORTATION AUTHORITY,

Respondents.

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WALTER B. TOLUB, J.:

This petition seeks a review of the Respondent's denial of a Federal relocation allowance. The court notes that the papers in this application have been reconstructed, the original file having apparently been misplaced since its submission on or about January 8, 2002.

Petitioner Washington Mutual FA is a banking institution which is the successor in interest to claims incidental to a condemnation proceeding. Washington Mutual is the successor to Home Savings Bank, which is successor in interest to the Bowery Savings Bank ("the Bowery"), the original lessee of real property located at West 34th Street, west of Seventh Avenue, and adjacent to Pennsylvania Station ("Penn Station"). Part of the Bowery's real property was taken in order to provide escalator access to the north side of Penn Station.

Respondent MTA's interest in the Bowery's property vested on

May 21, 1991, encompassing space on three levels adjacent to Penn Station's Long Island Railroad ("LIRR") Concourse. Prior to the vesting, a substantial portion of this space was devoted to the Bowery's vault and safety deposit operations, including two conference rooms and eight "coupon booths" for the privacy of customers using the safety deposit facilities.

Petitioner contends that the space taken by respondent on the concourse level was so substantial that petitioner was no longer able to provide adequate facilities for the use of its safety deposit customers. Specifically, the large conference room was lost in its entirety, half the "coupon booths" were lost, and those "coupon booths" which were reconfigured were substantially smaller.

To compensate for the loss of the concourse level space, petitioner maintains that the safety deposit operations had to be relocated to the street level space - the only adequate space available. Petitioner claims that this move necessitated the construction of a new vault at the street level requiring: (1) an expenditure in excess of two million dollars, and (2) the appraised cost of demolition of the old, at an expense of $142,830. Moreover, the Bowery claims to have suffered the loss of valuable retail space on the street level owing to the need to relocate the vault and the safety deposit operation to that site.

Condemnation Proceeding

As a result of the taking of the Bowery's space, in May, 1991, the Bowery made a claim for compensation under the Eminent Domain Procedure Law of the State of New York. The claim was based on (1) the actual loss of real property and trade fixtures, (2)consequential damages for real property and trade fixtures not actually taken but damaged by reason of the taking of other property, and (3) the "cost to cure" claim for expenditures allegedly necessary to make the remaining space usable for bank business.

On September 22, 1997, following a trial, Justice Stanley J. Parness issued a decision in which he denied so much of the Bowery's "cost-to-cure" claim as applied to the construction of the new vault and teller area on the street level. However, Justice Parness did find that the remaining space on the concourse level was unfit for continued safe deposit operations and that the fixtures located therein had lost "their economic utility" causing the Bowery to suffer "consequential damages" which warranted compensation.

The Federal Claim

On January 27,2000, claimant served on respondent a claim for relocation expenses pursuant to the provisions of 42 U.S.C. 4601 *et seq.*, 49 CFR 24.303 and 24.404 which provide for financial assistance by the United States Government for all

those adversely affected by the acquisition of private property for the implementation of federally financed programs. Pursuant to 42 U.S.C. 4601, *et seq.*, the respondent is authorized to administer the reimbursement on behalf of the United States Government. Designated to make the determination was Anthony Semancek, respondents' Deputy General Counsel, and the very same attorney who had represented respondent in the condemnation proceeding before Justice Parness.

Three schedules of claims were submitted to respondent; Schedule "A" includes the claimant's actual costs in relocating the vault and the safety deposit boxes to the street level, Schedule "B" includes the value of the items on the concourse level "rendered useless" by the respondent's acquisition of the concourse level space, and Schedule "C" includes the estimated costs of demolition of the old vault on the course level and construction to make the space suitable for some purpose other than a safety deposit facility. By decision dated August 4, 2000, claims under all three schedules were denied.

In considering the claim under Schedule "A", the respondent relied in part on the a report submitted by a licensed architect, Nikita Zukov, who concluded that the continued use of the concourse level for the safety deposit facilities was feasible, and relocation to the ground level was not a matter of necessity. Based on the premise that the relocation was not necessary, the

claims under Schedule "C" for the costs for reconfiguring the old vault space were also denied, as were the claims under Schedule "B" for the costs of the items superannuated by the relocation of the vault.

By this application, claimant challenges the adverse decision made by Mr. Semancek, the attorney assigned by the respondent to consider the evidence and dispose of the claim. Claimant's challenge is largely predicated upon the contention that the assignment of Mr. Semancek, employed by respondent as Deputy General Counsel, and the attorney responsible for actively litigating against the claimant in the Eminent Domain proceeding, prevented claimant from obtaining an impartial review of its claims.

There is no dispute that Mr Semancek participated extensively in the litigation of this matter as a proceeding under the Eminent Domain Procedure Law, and the Court takes judicial notice of its own record in support thereof (see, In the Matter of the Metropolitan Transportation Authority (Station Improvements at Penn Station), Index No. 47062/90). For example, Mr. Semancek's name appears of counsel on a memorandum of law, dated September 9, 1996, arguing zealously against claimant's allegations of consequential damages resulting from a partial takings of its concourse level space, the very basis on which claimant sought reimbursement in the administrative proceeding,

the review of which is at issue herein.

New York law has established that "an impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceedings before administrative agencies" (Matter of 1616 Second Avenue Restaurant, Inc. v New York State Liquor Authority *et al.*, 75 NY2d 158, 161-162 [1990]), and has applied the common law rule of disqualification, embodied under Judiciary Law §14, to administrative tribunals exercising quasi-judicial functions (In the Matter of Beer Garden, Inc. v. New York State Liquor Authority, 79 NY2d 266, 278 [1992]).

There is no single standard which determines whether an administrative decision maker should disqualify themself from a proceeding for lack of impartiality (1616 Second Avenue Restaurant, 75 NY2d 158, 161-162 [1990]). However, as a "matter of propriety" (Beer Garden, 79 NY2d 266, 278 [1992]), the Court of Appeals has held that

> administrative officers should recuse themselves in situations where prior involvement creates an appearance of partiality (see, e.g., Matter of O'Reilly v Pisani, 79 AD2d 973, 974; Matter of Aiello v Tempera, 65 AD2d 791; Matter of Waters v McGinnis, 29 AD2d 969). Fundamental fairness requires "at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or briefs, take no part in the decision of that case by any tribunal on which [that person] may thereafter sit." (Trans World Airlines v Civil Aeronautics Bd., 254 F2d 90, 91 [DC Cir]; see also, Matter of Bigelow v Board of Trustees, 63 NY2d 470, 474).

(Id. See also, Matter of 1616 Second Avenue Restaurant, Inc. 75 NY2d 158, 161-162 ("Disqualification is more likely to be required where an administrator has a preconceived view of facts at issue in a specific case as opposed to prejudgment of general questions of law or policy")).

In this application, it is on record that Mr. Semancek took a very public position in numerous court appearances as an advocate of facts contradictory to those of the claimant throughout the eminent domain proceeding. He therefore should have been disqualified from making further determinations on the submitted claims on the ground of bias (see, Matter of 1616 Second Avenue Restaurant, Inc. 75 NY2d 158, 162 (disqualification of an administrative official is warranted on the ground of bias if a disinterested observer could conclude the official has in some way adjudged the facts and law prior to hearing it)).

The argument that Mr. Semancek's determination became untainted by virtue of its review by Sharon Patterson Glenn, Esq., General Attorney for the LIRR, a subsidiary of the MTA, is unavailing. As noted by the Court of Appeals:

> an applicant is constitutionally entitled to unprejudiced decision-making by an administrative agency (see Withrow v Larkin, 421 US 35, 46-47; Gibson v Berryhill, 411 US 564). It follows that a determination based not on a dispassionate review of facts but on a body's prejudgment or biased evaluation must be set aside (see Matter of Rotwein [Goodman], 291 NY 116, 123)

(Warder v. Board of Regents of the State of New York, 53 NY2d

186, 197, *cert. den.* 454 U.S. 1125 [1981]).

This court has discovered no authority, nor been directed to any, that neutralizes the bias-defective initial determination by an unbiased or less biased appellate proceeding. It appears that the taint attaches at the initial determination to be expiated only by re-submission.

Accordingly, the petition is granted and the cross-motion to dismiss the petition is denied, both to the extent that the respondent's determination of August 4, 2000, denying relocation benefits to petitioner Washington Mutual FA is annulled and vacated, and the respondent is directed to schedule a proceeding *de novo* to determine petitioner's claim, preferably before an independent determiner, not employed on a regular basis by respondent or any of its affiliates or subsidiaries (see Matter of Devane v Troy Savings Bank, 101 AD2d 634, 635).

To the extent that respondent moves to dismiss the petition on the grounds that Michael J. Greco, as attorney for Washington Mutual has no standing to bring this proceeding, CPLR 103 (c) provides that, "If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for proper prosecution."

Inasmuch as there is no dispute as to jurisdiction in the instant matter, it appears that Washington Mutual FA and the Metropolitan Transportation Authority are the parties properly joined, and the court directs that the caption in the instant matter be modified to the extent that it shall read: "In the Matter of the Application of Washington Mutual FA against Metropolitan Transportation Authority."

Settle order.

Dated: 10/15/07

HON. WALTER B. TOLUB, J.S.C.