

IN THE UNITED STATES COAST GUARD  
COURT OF CRIMINAL APPEALS

UNITED STATES,  
Appellee

30 October 2018

APPELLANT'S MOTION FOR LEAVE  
TO FILE AND FOR RECUSAL FILED  
10 OCTOBER 2018

v.

CGCMSP 24961

Evan K. GOODELL  
Chief Machinery Technician (E-7)  
U.S. Coast Guard,  
Appellant

DOCKET NO. 1458

ORDER

The Court having referred Appellant's motion for Judge Koshulsky to recuse himself from further participation in this case to Judge Koshulsky for disposition, he has determined that grounds for recusal do not exist and thus declines to recuse himself.

A judge *shall* hear and decide matters assigned to the judge, except those in which disqualification is required. COMDTINST M5800.1, Code of Judicial Conduct for Coast Guard Trial and Appellate Judges, Encl. (6), Canon 3.B.(1) (adopting with modification the ABA Model Code of Judicial Conduct (August 1990)); *see also United States v. Witt*, 75 M.J. 380, 383 (C.A.A.F. 2016). There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle. *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). R.C.M. 902(a) requires that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." The applicable test is "whether a reasonable person who *knew all of the facts* might question [an] appellate military judge[s] impartiality." *United States v. Mitchell*, 39 M.J. 131, 143 (C.M.A. 1994) (emphasis in original).

A "continuing part-time judge" may practice law when not serving as a judge, subject to certain restrictions to mitigate the appearance of partiality or other impropriety. *See* ABA Model Rules of Judicial Conduct, Application § III (2007); COMDTINST M5800.1, Encl (6), Canon 3.B.(8) commentary.

While Appellant does not allege any actual bias, he asserts that Judge Koshulsky's primary duties as Staff Judge Advocate, First Coast Guard District create an appearance of partiality if he participates in Appellant's case as a collateral-duty appellate judge. He avers two specific grounds: (1) Because the original assignments of error relate to military protective orders, and "a staff judge advocate's duties include advising convening authorities on the issuance of military protective orders," there is "a potential conflict of interest between Judge

Koshulsky's two roles: impartially considering the assigned error and advocating for a commander's authority to issue military protective orders." (Appellant's Motion at 3); and (2) "Evaluating the propriety of a collateral duty trial judge's primary duties in the military justice system has necessary implications for a collateral duty appellate military judge with military justice primary duties." *Id.*

First, the Court and Judge Koshulsky take precautions to ensure that Judge Koshulsky does not participate in any case related to the First Coast Guard District and that there are no actual or potential conflicts between his full-time and part-time duties. Indeed, there are no actual or potential conflicts in this case.

Second, nothing about Judge Koshulsky's duties as a staff judge advocate is incompatible with participating as a collateral-duty judge in a case arising out of a different district and over which he has no other role or knowledge. As a staff judge advocate, Judge Koshulsky advises and assists with a wide range of matters, including operational matters, ethics, administrative personnel matters (military and civilian), administrative investigations, real property law, and a host of other legal as well as non-legal issues. Military justice matters comprise only a small fraction of issues on which he advises. Thus, it cannot be said that military justice is his "primary" duty. Judge Koshulsky in his primary-duty role instead provides impartial advice on a range of issues. Although from time to time that includes advising on military justice, he neither represents nor advocates for any party before a court-martial.

Third, the fact that the original assignments of error pertain to military protective orders does not differentiate this case from any other. Just as he would for any military justice issue, Judge Koshulsky provides objective advice; he does not "advocate" for a commander's authority to issue military protective orders or for any other military-justice-related command authority.

Finally, the fact that Judge Koshulsky is a collateral duty judge himself does not disqualify him from assessing a case questioning whether the nature of the trial judge's primary duties created an actual or apparent conflict with her collateral judicial duties.\* There is no basis for the notion that a judge is partial merely because he too is a collateral-duty judge, particularly where the primary duties involved are vastly different from those being assessed in the case.

A reasonable person aware of all the facts would not question Judge Koshulsky's impartiality. Accordingly, upon consideration of Appellant's Motion for Leave to File and for Recusal, filed under the Court's Rules of Practice and Procedure, it is, by the Court, this 30th day of October, 2018,

ORDERED:

1. Appellant's motion for leave to file his motion for recusal is GRANTED.
2. Appellant's motion for Judge Koshulsky to recuse himself is DENIED.

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\* There are only two full-time judges on the Court and it is impracticable to have more. Thus, if the third judge were not Judge Koshulsky, it would be another collateral-duty judge.



For the Court,

Sarah P. Valdes  
Clerk of the Court

Copy: Office of Military Justice  
Appellate Government Counsel  
Appellate Defense Counsel