

# LEITNER TORT DEFAZIO & BRAUSE

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June 7, 2024

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*LETTER-BRIEF AND APPENDIX ON BEHALF OF RESPONDENT-  
APPELLANT, TOWNSHIP OF OCEAN SCHOOL DISTRICT*

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Honorable Judges of the Superior Court of New Jersey  
Appellate Division  
Richard J. Hughes Justice Complex  
Trenton, NJ 08625-0006

Re: Giuseppe Amato (Petitioner-Respondent) v. Township of  
Ocean School District (Respondent-Appellant)  
Appellate Docket No.: A-2542-23  
Claim Petition No.: 2021-19450

Civil Action: On Appeal from an Order Denying Recusal  
of Judge, from the State of New Jersey  
Department of Labor and Workforce  
Development, Division of Workers  
Compensation, Freehold Vicinage

Sat Below: Honorable Joann Downey, J.W.C.

Dear Judges:

Kindly accept this Letter-Brief on behalf of respondent-appellant,  
Township of Ocean School District, pursuant to R. 2:6-2(b).

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PRELIMINARY STATEMENT

This is an appeal from an Order from the Division of Workers Compensation, in which the Judge of Compensation denied a motion for recusal.

The petitioner filed a dependency claim petition against respondent, alleging that his wife suffered COVID-19 in the course of her employment as a teacher employed by respondent, which caused her death. A fundamental issue in this claim is whether the decedent was an essential employee as defined by N.J.S.A. 34:15-31.11. This statute is often referred to as the "Presumption Bill" because it entitles an essential employee to a rebuttable presumption that her COVID-19 disease was related to her employment. Petitioner filed a motion to declare the decedent to be an essential employee and entitled to that presumption, which the Judge of Compensation granted over respondent's opposition.

The Judge of Compensation assigned to this claim previously served with distinction in the New Jersey State Assembly. While serving in that capacity as an Assemblywoman, she was a primary sponsor of the Presumption Bill that lead to the enactment of that statute. The statute does not include teachers as employees who are specifically identified as essential employees. Nevertheless, before the Judge of Compensation heard petitioner's motion to

declare that the decedent was an essential employee, the Judge of Compensation expressed her opinion that she believed that teachers fell within the definition of essential employees and that this decedent would be entitled to that presumption.

By expressing this opinion and by prejudging this issue, the Judge of Compensation demonstrated that there was reason to believe that she would not provide a fair and unbiased hearing and judgment on the issue. Respondent's motion to recuse the Judge of Compensation from hearing this case should therefore have been granted.

The Order denying respondent's motion to recuse the Judge of Compensation should therefore be reversed, and this matter should be remanded for hearing by another Judge of Compensation.

PROCEDURAL HISTORY

On August 6, 2021, petitioner, Giuseppe Amato, filed a Dependency Claim Petition against respondent, Township of Ocean School District, alleging that his wife, Denise Amato, suffered an occupational disease when she was exposed to COVID-19 in the course of her employment with respondent that resulted in her death. (Ra1-2).<sup>1</sup> On September 8, 2021, respondent filed a Respondent's Answer to Dependency Claim Petition, admitting that the decedent was employed by respondent, but denying that her exposure occurred in the course of her employment. (Ra3).

Petitioner filed a Notice of Motion for Essential Worker Presumption seeking to declare the decedent to be an essential employee and entitled to the presumption set forth in N.J.S.A. 34:15-31.11 on November 4, 2021. (Ra4-40). Respondent filed an Answer to Motion for Essential Worker Presumption in opposition to petitioner's motion on December 13, 2021. (Ra41-43). On May 4, 2022, respondent filed an Answer to Motion Supplemental Pleading also in opposition to that motion. (Ra44-47).

Respondent filed a Notice of Motion to Recuse Judge Joann Downey on January 24, 2024. (Ra48-61). Petitioner filed an Answer to Motion to Oppose

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<sup>1</sup> "Ra" refers to respondent's appendix to this letter-brief.

"1T" refers to February 21, 2024 motion transcript.

"2t" refers to March 14, 2024 motion transcript.

Respondent's Recusal on January 25, 2024. (Ra62-65). After oral argument on February 21, 2024, the Honorable Joann Downey, J.W.C., of the State of New Jersey Department of Workforce Development, Division of Workers Compensation, Freehold Vicinage, denied respondent's motion. (1T12-22 to 1T22-17, Ra66). Respondent moved to stay that Order. (1T33-20-25, 1T36-1 to 1T37-7). Judge Downey reserved on respondent's motion for a stay. (1T37-24 to 1T38-13). On March 14, 2024, Judge Downey denied respondent's motion to stay the Order denying recusal. (2T1-15 to 2T6-12, Ra67).

On March 14, 2024, after oral argument, Judge Downey granted petitioner's motion to declare the decedent to be an essential employee, and entered an Order on that date. (2T71-2 to 2T94-25, Ra68). Respondent moved to stay that Order. (2T94-3 to 2T96-9). Judge Downey denied respondent's motion for a stay. (2T96-10 to 2T97-21, Ra69).

Respondent filed a Notice of Motion for Leave to Appeal from the February 21, 2024 Order denying respondent's motion to recuse the Judge of Compensation on April 2, 2024. (Ra70). Leave to appeal was granted in an Order that was filed on April 23, 2024. (Ra71).

Respondent filed a Notice of Motion for Leave to Appeal from the March 14, 2024 Order declaring the decedent to be an essential worker on

April 3, 2024. (Ra72). Leave to appeal was granted in an Order that was filed on April 23, 2024. (Ra73).

Petitioner filed a Notice of Motion for Judgment on Liability on April 4, 2024, which remains pending as of this filing. (Ra74-75).

STATEMENT OF FACTS

Petitioner's wife was employed by respondent as a teacher during the time period of January 2021 to May 18, 2021. (Ra1). Respondent disputes that petitioner contracted COVID-19 in the course of her employment with respondent. (Ra3).

Respondent moved to recuse the Judge of Compensation from hearing this worker's compensation claim due to the appearance of bias. (1T3-2 to 1T8-1, Ra48-61). Prior to the Judge of Compensation's appointment to the bench of the Division of Workers Compensation, she served with distinction in the New Jersey State Assembly. (1T3-6-14). In her capacity as an Assemblywoman, she was a primary sponsor of N.J.S.A. 34:15-31.11, which is often referred to as the "Presumption Bill" because it entitles essential employees who contracted COVID-19 to a presumption of compensability. (1T3-6-14, 1T4-3 to 1T8-1).

The Judge of Compensation expressed an intention to draw upon her extrajudicial knowledge that she gained in her capacity as an Assemblywoman and as a primary sponsor of the Presumption Bill to decide whether the decedent in the present case would be declared to be an essential employee. ((1T12-22 to 1T22-17, Ra48-61).



LEGAL ARGUMENT

POINT I

THE JUDGE OF COMPENSATION SHOULD HAVE GRANTED RESPONDENT'S MOTION FOR RECUSAL TO AVOID THE APPEARANCE OF BIAS.  
(1T12-22 to 1T22-17, Ra66)

The Judge of Compensation should have recused herself from hearing this workers compensation case where she expressed an opinion on a fundamental issue in this case, whether the decedent was an essential employee. The Judge of Compensation's opinion stemmed from her extrajudicial experience that she gained as an Assemblywoman and a primary sponsor of the "Presumption Bill," and not on any evidence in the record.

A fundamental issue in this claim is whether the decedent was an essential employee as defined by N.J.S.A. 34:15-31.11. This statute is often referred to as the "Presumption Bill" because it entitles an essential employee to a rebuttable presumption that her COVID-19 disease was related to her employment.

Petitioner filed a motion to declare the decedent to be an essential employee and entitled to that presumption, which the Judge of Compensation granted over respondent's opposition. That decision is now the subject of the companion appeal, Giuseppe Amato v. Township of Ocean School District, Docket Number A-2543-23.

Before petitioner's motion was heard, the Judge of Compensation revealed that she was of the opinion that teachers were essential employees, and that this teacher would be entitled to this presumption. The Judge of Compensation also revealed that she based this opinion on her beliefs that she formed and advocated as an Assemblywoman and primary sponsor of the bill. The Judge of Compensation did not reach this conclusion based on any testimony or evidence in this case, as the motion had not even been heard. The Judge of Compensation reached this conclusion despite the absence of any supporting evidence, and despite the clear language of N.J.S.A. 34:15-31.11, which does not identify teachers in the class of employees to be considered essential employees and would not seem to apply because after the initial shutdown during the pandemic, schools were closed and learning occurred virtually.

Despite the clear language of the statute, and perhaps due to the clear language of the statute, there does not appear to be a precedent that addresses this issue. The decision in this case may therefore result in a potentially precedential decision. The importance of this issue to the parties to this claim and to the general administration of justice requires that it be decided by an impartial judge. Moreover, this Judge of Compensation's history with this bill

essentially makes her not only the trier of facts in this case but a potential witness.

The appellate standard of review in this matter is stated in Panitch, supra, 339 N.J. Super. at 66–67:

R. 1:12–2 provides "[a]ny party, on motion made to the judge before trial or argument and stating the reasons therefor, may seek that judge's disqualification." A motion for recusal may be granted for any "reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12–1(f). Such a motion must "be made before trial or argument." N.J.S.A. 2A:15–50; Bonnet v. Stewart, 155 N.J. Super. 326, 330 (App. Div.), certif. denied, 77 N.J. 468 (1978). The disposition of the motion is, at least in the first instance, entrusted to the "sound discretion" of the trial judge whose recusal is sought. Magill v. Casel, 238 N.J. Super. 57, 63 (App. Div. 1990); Bonnet, supra (155 N.J. Super. at 330).

It is improper for a judge to withdraw from a case upon a mere suggestion that he is disqualified "unless the alleged cause of recusal is known by him to exist or is shown to be true in fact." Hundred East Credit Corp. v. Eric Schuster, 212 N.J. Super. 350, 358, (App. Div.), certif. denied, 107 N.J. 60 (1986). The challenged judge who hears the motion should clearly set forth the "objective and subjective bases for the ultimate decision." Magill, supra (238 N.J. Super. at 65). In construing the analogous federal statute on judicial disqualification, Justice Kennedy stated in a concurring opinion that "[i]f through obduracy, honest mistake, or simple inability to attain self knowledge the judge fails to acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source." Liteky v. U.S., 510 U.S. 540, 563 (1994) (Kennedy, J., concurring). "Litigants ought not have to face a judge where there is reasonable question of impartiality ..." Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 162 (3d Cir. 1993).

It is unnecessary to prove actual prejudice on the part of the court, but rather "the mere appearance of bias may require disqualification.... However, before the court may be disqualified on the ground of an

appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." State v. Marshall, 148 N.J. 89, 279, cert. denied, 522 U.S. 850 (1997).

In DeNike v. Cupo, 196 N.J. 502, 514–15 (2008), our Supreme Court emphasized that judges must not only avoid acting in an impartial manner, but must also avoid acting in a manner that may be perceived as impartial:

Certain core, ethical precepts provide the proper backdrop to this case. They include the bedrock principle articulated in Canon 1 of the Code of Judicial Conduct that "[a]n independent and honorable judiciary is indispensable to justice in our society." To that end, judges are required to maintain, enforce, and observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." Ibid.

Judges are to "act at all times in a manner that promotes public confidence," id. Canon 2(A), and "must avoid all impropriety *and* appearance of impropriety," id. commentary on Canon 2 (emphasis added). Indeed, as this Court recognized nearly a half century ago, "'justice must satisfy the appearance of justice.'" State v. Deutsch, 34 N.J. 190, 206 (1961) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). That standard requires judges to "refrain ... from sitting in any causes where their objectivity and impartiality may fairly be brought into question." Ibid. In other words, judges must avoid acting in a biased way or in a manner that may be *perceived* as partial. To demand any less would invite questions about the impartiality of the justice system and thereby "threaten[ ] the integrity of our judicial process." State v. Tucker, 264 N.J. Super. 549, 554 (App. Div. 1993), certif. denied, 135 N.J. 468 (1994).

Here, the Judge of Compensation denied respondent's motion for recusal because she found that she had no personal bias towards either attorney, that she had no personal bias towards either litigant, and that she had no personal knowledge of any of the disputed facts. (1T13-24 to 1T14-14). The Judge of

Compensation acknowledged that during conferences, which occurred before hearing any testimony or evidence, she revealed that she believed that the decedent would qualify as an essential employee, but that she had not made a decision at that point. (1T15-2-21). The Judge of Compensation also found that her experience in the State Assembly as a primary sponsor of the bill did not unduly prejudice her in this matter. (1T17-1-25). The Judge of Compensation concluded that she would not recuse herself because she could "make the decision fairly and impartially and look at the law and apply the law as the law is presented and as I know it." (1T22-11-15).

However, the Judge of Compensation expressed her bias about declaring the decedent to be an essential employee before she even heard the motion. This was based on the Judge of Compensation's participation in the enactment of the law and her apparent strong feelings on the legislative intent of the law as opposed to her judicial review and statutory construction of the law and how it applies or does not apply to this case.

This is evidenced by the Judge of Compensation's finding that "The only thing that I have knowledge of is the law and the law making – I don't think that's extrajudicial knowledge. I think that's judicial knowledge." (Emphasis added). (1T18-9-12). It is the Judge of Compensation's involvement in the "law making" that, at a minimum, raises a question of impartiality. A Judge of

Compensation may only rely upon evidence in the record. Here, the Judge of Compensation expressed an intention to rely upon not only information that she acquired that was outside the record, but was information that she acquired in her former career in the State Assembly. The respondent does have the ability determine what information was acquired outside the record.

The record below of the recusal motion and the essential worker motion demonstrate substantive and procedural bias. R. 1:12-2 requires recusal not only when there is bias, but when the circumstances would lead the parties to believe that they cannot receive a fair and unbiased hearing.

A Judge of Compensation is not only the trier of the fact and the judge of the law, but is considered a medical expert, whose findings are given great deference. See Close v. Kordulak Brothers, 44 N.J. 589, 599 (1965). It is important that all parties, not just the petitioner, can reasonably believe that the matter will be decided in an objective and impartial manner. Now that this Judge of Compensation already ruled that the petitioner decedent was an essential employee, the matter should be remanded to a different Judge of Compensation.

As the court cautioned in Panitch, supra, 339 N.J. Super. at 71, a judge should consider recusal where she became too involved in a case to the point of appearing that she is not impartial. The Judge of Compensation's

involvement in the enactment of this statute and her strong feelings on treating teachers as essential employees reached "a point where it may well appear to the clients that one side is being favored over another" and "that it may well be appropriate before this case reaches trial for the judge to consider whether [s]he should step down from hearing the actual trial of the case because of the degree of involvement." Id.

The Judge of Compensation therefore should have granted respondent's motion for recusal.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Order denying respondent's motion to recuse the Judge of Compensation should be reversed, and this matter should be remanded for hearing by another Judge of Compensation.

Respectfully submitted,  
LEITNER TORT DeFAZIO & BRAUSE, P.C.  
Attorneys for Respondent-Appellant

By: s/Randolph Brause  
RANDOLPH BRAUSE



NEW JERSEY SUPERIOR COURT

APPELLATE DIVISION

DOCKET NO.: A-002542-23

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Giuseppe Amato, :  
Petitioner – Appellee, :  
v. : Dept. of Labor & Workforce Dev.,  
Division of Workers’ Compensation,  
: Freehold Vicinage.  
Township of Ocean School District, : Sat Below: Hon. Joann Downey, J.W.C.  
Respondent-Appellant. :

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PETITIONER-APPELLEE’S BRIEF SUBMITTED IN  
OPPOSITION TO RESPONDENT-APPELLANT’S APPEAL  
FROM ORDER DENYING RECUSAL OF JUDGE

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PRELIMINARY STATEMENT

This is an interlocutory appeal from an Order of the Workers' Compensation Court denying Respondent-Appellant's Motion for Recusal of the Honorable Joann Downey, J.W.C.

Respondent asserts that that Judge Downey should recuse herself because before her appointment to the Workers' Compensation Bench in March 2022, she was a member of the New Jersey legislature and served during the legislative session at the time the Bill involving essential workers, commonly referred to as the "Presumption Statute," was passed. It is curious that despite Counsel's argument (without substantive proof of any kind) that Judge Downey had somehow pre-judged this case, Counsel waited until after the Judge made substantive rulings on Petitioner-Decedent's essential worker status to appeal on this recusal issue.

Respondent's argument regarding recusal is completely without basis in the rules of judicial conduct or in the case law regarding recusal. It seems obvious that Respondent was not happy with the Judge's decision regarding Decedent's status as an essential employee and decided to file the Appeal on the Recusal. As pointed out by Judge Downey at the Oral Argument on the Motions, her concern was that "this is like where we talk about doctor shopping (in workers' compensation cases) or forum shopping . . . in terms of finding a new judge because you believe I might

decide one way because I was involved in the bill . . .” (1T25-4 to 10). Quite simply, judge-shopping does not have any place in determining a recusal motion.

There are several material misrepresentations in Respondent’s brief. Respondent’s counsel continues to assert that the Judge was the “primary sponsor” of the Presumption Bill that led to the enactment of the statute. (Rb1 and Rb6) This statement is not true and Respondent offers nothing to support it. As stated by Judge Downey in her decision on the Motion, “the sponsors by the State Senate are on top because they are the main sponsors. That’s Senator Sweeney . . . Senator Scutari, Senator Singer, Senator Greenstein and then the assembly people who are sponsors, Assemblyman Thomas Giblin, Assemblyman John Burzichelli, Assemblywoman Carol Murphy and Assemblywoman Joann Downey.” (1T17-7 to 14).

Respondent also incorrectly argues that before Judge Downey heard Petitioner’s Motion on the essential worker issue, she “ expressed her opinion that she believed that teachers fell within the definition of essential employees and that this decedent would be entitled to that presumption.” (Rb2 and Rb8). Respondent further argues that “by expressing this opinion and by prejudging this issue, the Judge of Compensation demonstrated that there was reason to believe that she would not provide a fair and unbiased hearing and judgment on the issue.” (Rb2 and Rb11). Respondent’s statements are a complete mischaracterization of the facts.

Judge Downey never expressed her opinion as to whether Decedent was an essential worker prior to deciding the merits of the Petitioner's Motion in the Workers' Compensation Court. In "off the record" conferences, the Judge and both counsel discussed the consequences of Judge Downey ruling one way or the other on the essential worker issue, but no decision was proffered. These type of forthright conferences are typically part of all workers' compensation proceedings. In fact, the Code of Judicial Conduct provides that comments made by a judge in the course of court proceedings, *i.e.* settlement conferences, should not be used as a basis for disqualification. N.J.A.C. 12:235-10, Rule 3.16.

Judge Downey sponsored Assembly Bills Nos. 782 and 4134, which involved an increase and clarification of the effective dates for awards for hand and feet claims in workers' compensation cases. If Respondent's argument in the present case were to be accepted by the Appellate Division, that would mean Judge Downey would need to recuse herself from every case involving a hand or foot.

The Rules of the Court, the Code on Judicial Conduct, and the applicable case law do not support a recusal in this matter. Respondent's efforts for recusal of Judge Downey are an attempt to manipulate the system and it should not be allowed. The Appellate Division should affirm the decision of Judge Downey, when she denied Respondent's Motion for Recusal.

## PROCEDURAL HISTORY

The Petitioner, Guiseppe Amato (hereinafter “Petitioner”)<sup>1</sup>, filed this Dependency Claim Petition on behalf of himself as surviving spouse and on behalf of their two young sons, Christian (then age 14) and Luca (then age 11). (See Claim Petition at Ra, Vol. I, page 1-2). After Petitioner filed a claim petition on August 6, 2021, in the workers’ compensation court on behalf of himself and their two minor children, the claim was initially assigned to the Hon. Leslie Berich. (See Listing of Court Proceedings from Courts-On-Line at Pa1-2). There were numerous telephonic conferences held with Judge Berich and both counsel throughout a fourteen month period, while the case was with Judge Berich. (Ibid.). Then, due to her retirement, Supervising Judge Berich transferred the case to he Hon. Joann Downey on January 26, 2023. (Pa1-2).

Pre-trial discovery took place, expert reports were exchanged, and settlement negotiations were conducted, in which the Court was actively involved. (Pa1-2). After the matter was transferred to Judge Downey on January 26, 2023, several telephone settlement conferences took place throughout the year between January 26, 2023, through January 4, 2024. (Pa1-2).

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<sup>1</sup>In order to stay consistent throughout the briefing, Respondent-Appellant will be referred to as “Respondent” and Petitioner-Appellee will be referred to as “Petitioner.”

Petitioner filed a Motion to declare Decedent as an Essential Employee under the presumption statute, N.J.S.A. 34:15-1, as her status as a school teacher during the relevant time was not in dispute. (Ra, Vol. I, page 3).

By letter dated 1/4/2024, Respondent's counsel requested that Judge Downey recuse herself. (Ra, Vol. III, pages 55 - 57). Petitioner sent a letter, dated 1/8/2024, in opposition to Respondent's request for Judge Downey's recusal. (Pa3-5). Judge Downey responded to Respondent's letter via email and stated that " I will not be recusing myself as there is no need to do so." (Pa6).

On January 24, 2024, Respondent filed a formal Motion for Recusal of Judge Downey. (Ra, Vol. II, pages 48 to 50 and Ra, Vol. III, page 53). Petitioner opposed the Motion (Ra, Vol. III, pages 62-63) and it was argued on February 21, 2024. Judge Downey denied the Motion on the record and posted the Order on Courts On-Line on that same date of February 21, 2024. (Ra, Vol. III, page 66).

Respondent pursued a Motion for Leave to File an Interlocutory Appeal, which Petitioner opposed, and the Motion was granted on April 23, 2024. (Ra, Vol. III, page 73). Respondent has submitted a brief in support of the appeal and Petitioner is submitting this timely opposition.



**UNDISPUTED FACTS**

The Spouse of Petitioner and Mother to their two sons, Decedent, Denise Amato, was age 43 and a full-time schoolteacher at Respondent’s middle school when she passed away on May 18, 2021. (Ra1-2). It is not disputed by Respondent that Decedent was employed as a full-time teacher during the January 2021 through May 2021 period of occupational exposure set forth in the Claim Petition, as admitted in Respondent’s Answer. (Ra3). It is also undisputed that that the New Jersey Covid State of Emergency (which triggers the applicability of the Covid presumption) was in effect during the claimed period of occupational exposure. (See Executive Order #103, Ra8-15).

Decedent was required by Respondent to return to in school instruction as part of the Executive Order #175 known as the “school reopening plan” which went into effect in September 2020 for the 2020-2021 school year. (Pa7 to 17).

**FACTS TO BE PROVED AT TRIAL**

Decedent’s status as an “essential worker” was the only decision regarding the substantive part of this case that was made by Judge Downey. Even after the “essential worker” finding by Judge Downey, the Petitioner still needs to prove that Decedent: 1) contracted the virus during the claimed occupational exposure period (January 2021 through her passing on May 18, 2021); and 2) that the Covid 19 virus was a material cause of her death. In addition, the statutory presumption is

rebuttable. At trial, Respondent will have an opportunity to prove by a preponderance of the evidence that Decedent contracted Covid 19 outside the workplace.

### **FACTS RELATING TO THE RECUSAL ISSUE**

Judge Downey served in the N.J. Legislature in 2015, and sat as an Assembly person for the 2016, 2018, and 2020 legislative sessions. (1T17-4 to 7). While Judge Downey served in the Legislature, Senate Bill 2380, referred to as the “Presumption Bill” was presented and then passed. (1T17-1 to 4). There were numerous sponsors of the Bill and State Senators are listed on the top of the Bill because they were the main sponsors. (1T17-7 to 14). Senator Sweeney, Senator Scutari, Senator Singer, and Senator Greenstein were the main sponsors of the Bill. (Ibid.). Then the assembly people who were sponsors included Assemblyman Thomas Giblin, Assemblyman John Burzichelli, Assemblywoman Carol Murphy and Assemblywoman Joann Downey.” (Ibid.).

While in the Legislature, Judge Downey was also a sponsor of the Assembly Bills involving an increase, and a clarification to hand and feet claims in workers’ compensation cases. (See copy of Bills Nos. 782 and 4134 at Pa18-21).

Judge Downey was appointed to the Workers’ Compensation Court in or about March 2022. After Judge Berich retired, Judge Downey was assigned to this case on January 26, 2023. (Pa2). Almost one year later, and after several court

conferences, including settlement discussions regarding the case, Respondent filed a formal motion for Judge Downey to recuse herself. (Pa1 – 2 and Ra, Vol. II, page 48 to Ra, Vol. III to 61).

In sum, Respondent did not present any factual basis for the recusal of Judge Downey, other than stating that she served on the Legislature when the Presumption Bill was presented and passed and was listed on the Bill, along with others, as a sponsor. As Judge Downey stated in her decision: “A Judge should not step aside from a case . . . ‘unless the alleged cause of recusal is known by him to exist or is shown to be true in fact.’” (1T20-15 to 18, quoting Hundred E. Credit Corr. V. Eric Schuster Corp. 212 N.J. Super. 350, 358 (App. Div. 1986).

## **LEGAL ARGUMENT**

### **POINT ONE**

#### **THERE IS NO BASIS FOR THE RECUSAL OF JUDGE DOWNEY**

A recusal of Judge Downey would set precedence and open the floodgates to recuse every judge who ever served in the legislature on matters in which they sponsored or were involved in the passing or rejecting of bills. The Rules of the Court, the Code on Judicial Conduct, and the applicable case law do not support a recusal in this matter.

In deciding the Motion for Recusal, Judge Downey correctly found that her time in the N.J. Legislature, when she was there for the 2016, 2018, and 2020 legislative sessions, and was one of many sponsors of the “Presumption Bill,” did not preclude her from sitting on this case. (1T17-3 to 25). Judge Downey stated that there was nothing that Respondent had pointed to, nor was there an affidavit submitted showing any appearance of impropriety to the Movant’s client. (1T19-7 to 9). Judge Downey cited many published and unpublished decisions in which recusal was disfavored and the Courts made it clear that a judge should not step aside “unless the alleged cause of recusal is known by him to exist or shown to be true in fact.” (1T20-15 to 18, where Judge Downey quoted Panitch v. Panitch, 339 N.J. Super. 63, 66-67 (App. Div. 2001).

Judge Downey also quoted State v. Marshall, 148 N.J. 89 (1997), and the holding in that case is applicable to the present matter: “Judges are not free to err on the side of caution; it is improper for a court to recuse itself unless the factual bases for its disqualification are shown by the movant to be true or are already known by the court.” (1T20-23 to 21-4).

N.J. Court Rule 1:12 sets forth the standard for “Disqualification and Disability of Judges.” The disposition of disqualification by a party’s motion rests in the sound discretion of the judge whose recusal is sought. *See, e.g. Chandok v. Chandok*, 406 N.J. Super. 595, 603 (App. Div., *certif. den.* 200 N.J. 207 (2009).

The comment section to Court Rule 1:12-2, which is the rule based on a party's motion for recusal, states that for further information on the standard for recusal, one should look at the Comment Section to Rule 1:12-1 (Rule regarding cause for disqualification on the Court's Motion). This comment section shows that there is an abundance of case law to support that the Motion for Recusal was properly denied.

In Johnson v. Salem Corp., it was determined by our Appellate Division that a judge need not recuse himself because of his general life experiences which might give him a particular insight into a controversy provided he is not rendered biased. 189 N.J. Super. 50 (App. Div. 1983), *aff'd as modified on other courts*, 97 N.J. 78 (1984). In Zucker v. Silverstein, there was no need for recusal based on the fact that a judge represented non-party grantors in a sale of lands to assignors for the benefit of creditors where the asset status of those lands was in controversy. 134 N.J. Super. 39 (App. Div. 1975). In Ferren v. Sea Isle City, a judge was not disqualified from sitting on matters in which a party-municipality was represented by the judge's former law partner. 243 N.J. Super. 522 (App. Div. 1990).

In the present matter, Respondent has failed to set forth any facts regarding Judge Downey's actions as a N.J. legislator as it relates to N.J.S.A. 34:15.11. No legislative history was produced nor were any other facts or documentation produced in in the proceedings below or in support of this Appeal. Respondent

never presented any proof of what “extra-judicial knowledge” that Judge Downey would have to render her biased in this matter. In addressing whether there was any appearance of impropriety, Judge Downey noted that Respondent did not provide any affidavit from the client or anything factually before her to indicate any reason as to why she shouldn’t sit on this case. (1T19-8 to 15).

Pursuant to the Disqualification Rule in the *Code of Conduct for Judges of Compensation*, “Judges shall hear and decide all assigned matters unless disqualification is required by this rule or other law.” N.J.A.C. 12:235-10, Rule 3.16. Section (B) of this Rule provides that judges shall disqualify themselves in proceedings “in which their impartiality or the appearance of their impartiality might reasonably be questioned.” Examples in this section refer to personal bias, prejudice or knowledge or if they have a financial interest in an enterprise related to the litigation. N.J.A.C. 12:235-10, Rule 3.16, (B)(1) and (2). The fact that Judge Downey served on the Assembly is not a basis for recusal.

Our New Jersey Supreme Court in State v. Dalal warned that defendants “not be allowed to manipulate the judicial system and engage in forum shopping.” 221 N.J. 601, 607 (N.J. 2015). In the case at bar, as he did in his initial letter to the Judge regarding recusal, Respondent’s counsel appears to be attempting to do just that, and it should not be allowed.

The Code of Judicial Conduct also provides that comments made by a judge in the course of court proceedings, *i.e.* settlement conferences, should not be used as a basis for disqualification. N.J.A.C. 12:235-10, Rule 3.16. In the comment section to Rule 3.16 of the Code of Conduct, it states that “Judges must be available to decide the matters that come before the court.” The Rule further provides that “[a]lthough there are times when disqualification is necessary to protect the rights of the litigants and preserve public confidence in the independence, integrity and impartiality of the judiciary, **unwarranted disqualification may bring public disfavor to the court and to the judge personally.**”

Respondent’s Counsel misrepresented in his brief and stated that the “Judge of Compensation revealed that she was of the opinion that teachers were essential employees and that this teacher was entitled to the presumption.” (Rb8). Respondent further states that the Judge “revealed that she based this opinion on her beliefs that she formed and advocated as an Assemblywoman and primary sponsor of the bill.” (Rb8). **This is not true.** Of course, Respondent does not put any citations to these statements because there are none.

Judge Downey actually stated that she “did not make any decisions regarding the matter at any point.” (1T15-20 to 21), She added that she “still needed to be able to have all the information” and to be able to have “any additional

documentation or opposition to the motion that was filed by petitioner.” (1T15-21 to 24).

In Respondent Counsel’s own words at the Motion hearing on February 21, 2024, he stated that, “first of all, I don’t know how you’re going to rule on the essential worker statute. It’s very difficult for me to suggest that there’s any bias. It’s about knowledge that is outside the realm of this proceeding and which I can never find out if your decision is based on what the litigants and what the public perceives in terms of a jurist who happened to be involved in a statute that does not specifically mention teachers.” (1T10-21 to 11-4). Thus, it is difficult to fathom how Respondent’s Counsel can now argue that Judge Downey expressed her decision on the essential worker issue when he states he didn’t know how she was going to rule and it was difficult for him to suggest bias.

As Petitioner’s counsel pointed out at the Motion Hearing on February 21, 2024, Respondent’s counsel appeared to be going on a fishing expedition when he stated he didn’t know what Your Honor knows. (1T12-11 to 14). Petitioner’s counsel further stated the obvious: “If you have a criminal case, are you going to ask the judge have you ever been a victim of a crime? If you’re going to have a sexual assault case are you going to ask the judge have you ever been harassed?” (1T14 to 18).



The Appellate Division case of State v. Medina, 349 N.J. Super. 108 (App. Div. 2002), provides guidance on this issue in the present matter. In a criminal matter, the Defendant in Medina argued that the law division judge erred by failing to recuse himself in a bench trial after he had adjudicated pretrial motions and had reviewed the grand jury proceedings. Id. at 129. Defendant contended that by hearing the motions and reviewing the grand jury proceedings, the Judge had been exposed to prejudicial and inadmissible evidence. Ibid. The Appellate Division quoted Marshall in which it cited R. 1:12-1 and noted that “a judicial statement of opinion in the course or the proceeding in the case or in another case in which the same issue is presented [does] not require disqualification.” Id. at 130.

Respondent’s Appeal is an attempt to manipulate the system and it should not be allowed. It may appear that when in doubt, a judge should recuse, but as stated in Dalal, *supra*, the New Jersey Supreme Court has warned against succumbing to a party’s tactics to seek a new judge. 221 N.J. at 607.

The lack of any personal bias by Judge Downey is best stated by her when she decided the Respondent’s Motion for Recusal:

I don’t have any personal knowledge of any disputed facts in this case at all. The first this case was handled by Judge Berich before she retired from the bench. . . . and it’s been all new and a learning matter for me in terms of finding out about the facts of this case. What happened with this particular decedent.

[1T14-12 to 20.]

Respondent also incorrectly states that “[w]hile serving in that capacity as an Assemblywoman, she was the primary sponsor of the Presumption Bill that lead to the enactment of that statute.” (See Rb 8). The Judge of Compensation actually stated that:

[A]t that time, yes, I was a sponsor of this bill which concerns the employment benefits and Corona Virus Disease 2019 infections contracted by essential employees. But being an assembly member on a bill as far as I can see from any of the Rules of Judicial Conduct and including the fact that I tried to look at what cases there were available to see if there was any reasoning whatsoever that it would make me specifically not be permitted to be able to sit in this matter because of any undue prejudice and I know that I don’t have any undue prejudice. I don’t feel one way or another regarding this matter in terms of again, a subjective way because I don’t know either party. I am sitting here listening to the facts.

[1T:17-15 to 1T18-3.]

If Respondent’s argument that sponsoring a Bill would preclude a judge from sitting on a case that involved the statute that was promulgated by that Bill, it would create chaos. Judge Downey sponsored Assembly Bills Nos. 782 and 4134, which involved an increase and clarification of the effective dates of awards for hand and feet claims in workers’ compensation cases. (See copy of Bills at Pa18-21). According to Respondent’s argument in the present case, Judge Downey sponsorship of the hands & feet bills, that were passed into law, would mean that

she should recuse herself from any workers' compensation case involving a hand or a foot! Judge Downey's reasoning in denying the motion for recusal was based on Rules of the Court, the Code on Judicial Conduct, and the applicable case law and there is no factual or legal basis for supporting a recusal in this matter.

CONCLUSION

The decision of the Workers' Compensation Judge, denying the Recusal Motion should be affirmed. This matter should proceed in the Workers' Compensation Court.

Respectfully,

MARTIN MELODY, LLC.

A handwritten signature in black ink, appearing to read "Eugene Melody, Sr.", written in a cursive style.

Eugene Melody, Sr., Esq.

# LEITNER TORT DEFAZIO & BRAUSE

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CERTIFIED BY THE NEW JERSEY SUPREME COURT AS A WORKERS' COMPENSATION LAW ATTORNEY

July 3, 2024

Randolph Brause, Esq.  
Attorney ID # 031651986  
On the Letter-Brief

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*REPLY LETTER-BRIEF ON BEHALF OF RESPONDENT-APPELLANT,  
TOWNSHIP OF OCEAN SCHOOL DISTRICT*

---

Honorable Judges of the Superior Court of New Jersey  
Appellate Division  
Richard J. Hughes Justice Complex  
Trenton, NJ 08625-0006

Re: Giuseppe Amato (Petitioner-Respondent) v. Township of Ocean School  
District (Respondent-Appellant)  
Claim Petition No.: 2021-19450  
Appellate Docket No.: A-2542-23

Civil Action: On Appeal from an Order Denying Recusal of Judge,  
from the State of New Jersey Department of Labor and  
Workforce Development, Division of Workers  
Compensation, Freehold Vicinage

Sat Below: Honorable Joann Downey, J.W.C.

Dear Judges:

Kindly accept this Reply Letter-Brief on behalf of respondent-appellant  
pursuant to R. 2:6-2(b).

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PROCEDURAL HISTORY

Respondent-appellant, Township of Ocean School District ("respondent"), relies and incorporates the Procedural History set forth in its initial Letter-Brief. (Rb6).<sup>1</sup>

STATEMENT OF FACTS

Respondent relies upon and incorporates the Statement of Facts set forth in its initial Letter-Brief. (Rb5-6).

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<sup>1</sup>"Rb refers to respondent's initial Letter-Brief filed on June 7, 2024.  
"Ra" refers to respondent's appendix to its initial Letter Brief.  
"Pb" refers to petitioner's Brief filed on June 21, 2024.  
"1T" refers to February 21, 2024 motion transcript.  
"2t" refers to March 14, 2024 motion transcript.

LEGAL ARGUMENT

POINT I

THE JUDGE OF COMPENSATION SHOULD HAVE  
GRANTED RESPONDENT'S MOTION FOR RECUSAL  
TO AVOID THE APPEARANCE OF BIAS.  
(1T12-22 to 1T22-17, Ra66)

The Judge of Compensation should have recused herself from hearing this workers compensation case because she expressed an opinion on a fundamental issue in this case, whether the decedent was an essential employee, before hearing any evidence. The Judge of Compensation's opinion stemmed from her extrajudicial experience that she gained as an Assemblywoman and a primary sponsor of the "Presumption Bill" (N.J.S.A. 34:15-31.11), and not on any evidence in the record.

Petitioner argues that the Judge of Compensation was not the "primary sponsor" of the Presumption Bill, but she was only a sponsor along with four State Senators and three other Members of the Assembly. (Pb2). It is of no moment whether she was a primary sponsor or only one of eight sponsors. The appearance of bias arose when the Judge of Compensation shared her opinion that teachers are essential employees under N.J.S.A. 34:15-31.11, and that she used her extrajudicial experienced that she gained during "the law making" of this Bill to reach this conclusion. (1T18-9-12).



Contrary to petitioner's argument, this is not a situation in which a judge is being accused of bias based on a professional relationship 30 years earlier with one of the attorneys as in Johnson v. Salem Corp., 189 N.J. Super. 50, 60 (App. Div. 1983), aff'd as modified, 97 N.J. 78 (1984), or because the judge's former law firm partner was a municipal counsel for a municipality long ago in a matter in which that municipality was now a party in a matter before the judge. Ferren v. City of Sea Isle City, 243 N.J. Super. 522, 527 (App. Div. 1990). (Pb10). Those cases involved general life experiences and general associations involving judges that did not relate to any issues that were before the judge.

Here, the Judge of Compensation expressed an opinion that teachers, in general and in this case, are to be considered essential employees. This was a fundamental contested issue in this case, in which the Judge of Compensation appeared to base her opinion on her service in the State Legislature in sponsoring this Bill. This is not a case of forum shopping as petitioner argues. (Pb11). This issue would not have come up but for this Judge of Compensation's background in the State Legislature, and her apparent bias in favor of petitioner's claim that the decedent was an essential worker.

This is also not analogous to prohibiting this Judge of Compensation from hearing any workers' compensation claims that involved injuries to hands

or feet because she sponsored Assembly Bills Nos. 782 and 3143, which increased compensation for work related injuries to hands and feet, as petitioner argues. (Pb15-16). Here, N.J.S.A. 34:15-31.11 identifies specific workers who would be considered to be essential, including fire, police, and other emergency responders, healthcare services, emergency transportation, social services, and other care services, but does not mention teachers. Yet, the Judge of Compensation chose to include teachers. To use petitioner's analogy, this would be comparable to finding that the Bills that increased compensation for hand and foot injuries also increased compensation for back injuries.

The Judge of Compensation acknowledged that during conferences, which occurred before hearing any testimony or evidence, she revealed that she believed that the decedent would qualify as an essential employee, but asserted that she had not made a decision at that point. (1T15-2-21). The Judge of Compensation concluded that she would not recuse herself because she could "make the decision fairly and impartially and look at the law and apply the law as the law is presented and as I know it." (1T22-11-15). The Judge of Compensation's also found that "The only thing that I have knowledge of is the law and the law making – I don't think that's extrajudicial

knowledge. I think that's judicial knowledge." (Emphasis added). (1T18-9-12).

The Judge of Compensation's involvement in the "law making," at a minimum, raises a question of impartiality. A Judge of Compensation may only rely upon evidence in the record. Here, the Judge of Compensation expressed an intention to rely upon information that she acquired that was outside the record. The record below of the recusal motion and the essential worker motion demonstrate substantive and procedural bias. R. 1:12-2 requires recusal not only when there is bias, but when the circumstances would lead the parties to believe that they cannot receive a fair and unbiased hearing.

The Judge of Compensation's involvement in the enactment of this statute and her strong feelings on treating teachers as essential employees reached "a point where it may well appear to the clients that one side is being favored over another" and "that it may well be appropriate before this case reaches trial for the judge to consider whether [s]he should step down from hearing the actual trial of the case because of the degree of involvement." Panitch v. Panitch, 339 N.J. Super. 63, 71 (App. Div. 2001).

The Judge of Compensation therefore should have granted respondent's motion for recusal.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Order denying respondent's motion to recuse the Judge of Compensation should be reversed, and this matter should be remanded for hearing by another Judge of Compensation.

Respectfully submitted,  
LEITNER TORT DeFAZIO & BRAUSE, P.C.  
Attorneys for Respondent-Appellant

By: s/Randolph Brause  
RANDOLPH BRAUSE