UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: INTERSTATE REALTY MANAGEMENT COMPANY, ROWAN ASSOCIATES, & MICHAEL J. LEVITT, Respondents.	HUDALJ 11-F-022-CMP-5 September 1, 2011

DISMISSAL ORDER

Before the Court is the Parties' *Joint Motion to Dismiss.* For the reasons stated below, said motion is **GRANTED**.

Background

On March 31, 2011, Respondents filed a *Motion for Disqualification and Extension of Time* and a *Memorandum of Points and Authorities in Support of Motion for Disqualification and Extension of Time* ("Motion for Disqualification"). The *Motion for Disqualification* requested that the Undersigned be disqualified, and that HUD's only other sitting ALJ, Judge J. Jeremiah Mahoney, be disqualified as well. (Mot. for Disqualification and Extension of Time [hereinafter Mot. for Disqual.].) As predicate for their *Motion for Disqualification*, Respondents argued that both Judges should be disqualified due to their pending personal litigation against HUD, and the resulting appearance of partiality or bias. (Mem. P. & A. in Supp. of Mot. for Disqual. 5-6.) And, that following disqualification, the case should be transferred to an ALJ at an agency other than HUD. (*Id.* at 6.)

On May 20, 2011, the Court issued an *Order Denying Respondents' Motion for Disqualification.* The Court attached a copy of a Memorandum it had received on May 11, 2011 from David Anderson, the Court's supervisor ("Anderson Memorandum"). (Order Den. Mot. Disqual.; Mem. from David T. Anderson, Director, Office of Hearings and Appeals, U.S. Department of Housing and Urban Development [hereinafter Anderson Mem.].)

The *Anderson Memorandum* instructed the Undersigned, in part to

> [c]ease disqualifying [himself] from presiding in cases assigned to [him], and to cease issuing notices of disqualification, unless specific facts exist indicating bias or partiality concerning the particular case at hand which could overcome the presumption of honesty and integrity of ALJs and hearing officers, i.e. unless actual bias or partiality exists.

(Anderson Mem. 1.) It also stated, in part:

> Both HUD and OGE have concluded that the mere pendency of your discrimination claims against HUD do not warrant disqualification. HUD, as the employing agency, is entitled to make this determination and instruct you accordingly . . . Accordingly, you are again instructed to perform your described duties by presiding over assigned cases.
>
> . . .
>
> Be advised that non-compliance with this instruction, and with the legal opinions of the HUD Associate General Counsel and the Office of Government Ethics, may give rise to the commencement of an adverse personnel action against you.

(*Id.* at 2.) Based on the *Anderson Memorandum*, this Court denied *Respondents' Motion for Disqualification*, vacated the order for the hearing scheduled for May 23, 2011, and dismissed as moot outstanding remaining motions. (Order Den. Mot. for Disqual.)

On May 31, 2011, Respondents filed a *Motion for Certification and Stay* with its supporting memorandum. Respondents sought certification of the May 20th *Order Denying Respondents' Motion for Disqualification* and a stay pending Secretarial review. (Resp't Mot. for Cert.)

On June 16th, 2011, this Court granted Respondents' *Motion for Certification and Stay* because the issues contained therein were issues of law and policy on which there is a substantial difference of opinion, and an immediate appeal from the May 20th Order may have materially advanced the ultimate termination of the litigation.

On August 22, 2011, Respondents requested the Secretary to *Affirm Cessation of Review of Certified Ruling* because the Parties had entered into a settlement on August 17, 2011. Although not explicit in the Secretary's *Order on Secretarial Review Affirming Cessation of Review of Certified Ruling*, dated August 22, 2011, this Court interprets said

Affirmation to return jurisdiction over the case to the Undersigned as the Secretary has ceased action on it.

Discussion

In the *Joint Motion to Dismiss*, the Parties recite that they "have resolved the above-referenced matter as evidenced by the attached [thereto] settlement agreement." As such, nothing remains for this Court to resolve and this case is hereby **DISMISSED** with prejudice.

There are, however, two matters contained in the Secretary's *Order on Secretarial Review Affirming Cessation of Review of Certified Ruling* that require clarification. First, the Secretary's Designee, Laurel Blatchford, makes three distinct factual errors. The Designee states:

> On May 20, 2011, ALJ Fernández denied Respondents' Motion for Disqualification and Extension of Time stating that "Respondents have not argued that specific facts exist indicating bias or partiality concerning the particular case at hand which could overcome the presumption of honesty and integrity of the Undersigned." The ALJ also quoted a *letter* to him from David T. Anderson, Director, Office of Hearing [sic] and Appeals ("Anderson Letter"), which referenced opinions by HUD Associate General Counsel Peter Constantine and [sic] Office of Government Ethics that concluded that the mere pendency of ALJ Fernández's discrimination claims against HUD did not warrant disqualification. Based on these opinions, *Judge Anderson*, instructed *ALJ Mahoney*, under pain of discipline, to "perform your described duties by presiding over assigned cases."

(Emphasis added). Succinctly put, Mr. Anderson is not a *Judge*. And, although ALJ Mahoney received a similar *memorandum* to the one issued to Judge *Fernández*, that memorandum was not the subject of the issues on Certification.

Second, footnote 1 of the Designee's decision states:

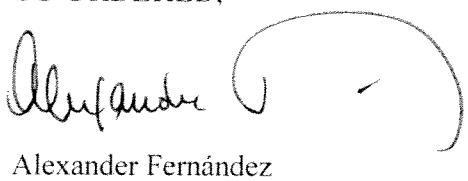
> As the case has settled, the ALJ's ruling concerning disqualification has no precedential value.

The Court agrees with the Designee that the ruling has no precedential value. However, it is Hornbook Law that settlements have no effect on whether or not a decision carries precedential weight. Indeed, if that were the case, parties around the United States would be free to impact judicial decisions by contract. The ruling has no precedential value because it is merely the decision of one ALJ, in one case, and not a decision by the

Secretary. It carries no more precedential weight than a district court judge's decision would have over another district court judge. Noteworthy, however, is that the May 11, 2011 Memorandum from David Anderson to both ALJ Fernández and ALJ Mahoney has not been rescinded.

This matter is **DISMISSED WITH PREJUDICE**.

SO ORDERED,



Alexander Fernández
Administrative Law Judge