

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Hon. Sean F. Cox

CITY OF DETROIT, ET AL.,

Case No. 77-71100

Defendants.

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**MOTION BY LOCAL 207 OF THE AMERICAN FEDERATION OF STATE,
CITY AND MUNICIPAL EMPLOYEES (AFSCME)
REQUESTING THE HONORABLE SEAN F. COX TO RECUSE HIMSELF
FROM HEARING OR DECIDING MATTERS RELATED TO THE REQUEST
FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF FILED BY
THE DETROIT WATER AND SEWERAGE DEPARTMENT**

Pursuant to the Federal Rules of Civil Procedure, Local 207 of the American Federation of State, City and Municipal Employees (AFSCME) ("Local 207") requests the Honorable Sean F. Cox to recuse himself from hearing or deciding matters related to the DWSD's motion for preliminary and permanent injunctive relief against any strike, picketing or similar conduct.

As grounds for this motion, Local 207 states as follows:

1. 28 U.S.C. s. 455 provides that the Court should disqualify itself from any proceeding "in which his impartiality might reasonably be questioned."

2. In this case, this Court has essentially become a part of the management negotiating team by repeatedly issuing, at management's private request, orders that have changed major contractual and bargaining rights of Local 207's members while denying any efforts by Local 207 or any other labor organization to intervene or oppose those changes.
3. As set forth in the attached answer to the DWSD's motion for injunctive relief, the good faith of management and its efforts or lack thereof to resolve the underlying dispute is a crucial factor in any decision on granting any injunctive relief.
4. This Court self-evidently cannot at the same time be the supervisor, prime mover, and confidant of the DWSD management team on labor relations and a neutral judge of the actions of a team of which it is a crucial part.
5. The actions of this Court that have made it part of the management team are as follows:
 - A. On November 4, 2011, this Court *sua sponte* issued a permanent injunction without notice or hearing to the persons affected and without any sworn evidence to support it. This order set aside Local 207's contract and its right to bargain on the central issues of job security (job classifications, subcontracting, seniority), overtime and promotions, discipline, and union representation.
 - B. Following that order, this Court denied motions to intervene by Local 207 and three other unions.

- C. The Michigan Employment Relations Commission has refused to process any unfair labor practice charges involving the Water Board without clarification as to whether those charges do, or do not, run afoul of this Court's November 4 Order and yet this Court has refused to entertain motions from the unions as to the scope of its November 4 order (R. 2465, Order Striking Unauthoriz. Motion).
- D. The Court has, however, on an ex parte basis, entertained and granted motions from the DWSD that not only allow it to file petitions and charges at MERC but that direct MERC how to rule on those petitions (R. 2470, Order).
- E. Moreover, the Court is now entertaining, without any opportunity for comment by the unions, DWSD motions to exempt itself from all City charter provisions, ordinances, civil service rules and the like, many of which have established the wages and working conditions of City employees for many years (R. 2473, DWSD Mot to Clarify Order of Nov. 4, paras 1-5, 37-39).
- F. Similarly, the Court is now entertaining, without any opportunity for comment by the unions, a DWSD motion allowing the DWSD to set up its own defined contribution retirement plan, which will set important conditions of employment for new employees and will potentially affect the stability of the pension funds for existing employees and retirees (R. 2473, DWSD Mot. To Clarify Order of Nov. 4, paras 46-52).

- G. The Court is also now entertaining, without any opportunity for comment by the unions, a DWSD motion that seeks to “clarify” the November 4 order by declaring that the unions may not avail themselves of the fact finding and mediation procedures available to all public employees under state law (R. 2473, DWSD Mot to Clarify Order of Nov. 4, paras 55-56).
- H. Finally, this morning at 8:45 AM, the Court issued a temporary restraining order without any attempt to notice counsel for Local 207 that any such request would be considered at that time, in violation of Rule 65. Indeed, counsel had previously discussed with this Court’s Master attending a conference at this matter on Monday afternoon. At no point was counsel given notice that such action would occur at 8:45 AM.
- I. The Court cannot serve as a neutral on any request to modify or dissolve the temporary restraining order or on the hearing on the preliminary injunction because the Court has served as a member of the management team that has so inflamed the membership of Local 207 and has repeatedly refused to notify or even hear from any union on issues that are of vital importance to them.

Local 207 therefore moves that the Honorable Sean F. Cox recuse himself from ruling on the DWSD’s motion for preliminary or permanent injunctive relief against a strike and picketing and other conduct in conjunction with that strike.

By AFSCME Local 207’s attorneys,
SCHEFF, WASHINGTON & DRIVER, P.C.

s/George B. Washington

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Dated: October 1, 2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

Hon. Sean F. Cox

CITY OF DETROIT, ET AL.,

Case No. 77-71100

Defendants.

**BRIEF IN SUPPORT OF LOCAL 207'S MOTION REQUESTING THE HONORABLE
SEAN F. COX TO RECUSE HIMSELF FROM HEARING OR DECIDING THE
DWSD'S REQUEST FOR A PRELIMINARY INJUNCTION RESTRAINING STRIKES,
PICKETING AND RELATED ACTS**

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CONTROLLING OR MOST APPROPRIATE AUTHORITIES

28 U.S.C. S. 455

STATEMENT OF FACTS

Local 207 filed a motion to recuse with its initial motion to intervene. This Court did not rule on that motion. Local 207's renews that motion because the facts requiring recusal are more obvious now than they were then.

On November 4, 2011, this Court issued an order setting aside Local 207's contract and its right to bargain on central issues of job security (job classifications, subcontracting, seniority), overtime and promotions, discipline, and union representation. The Court issued that order without any notice to the unions of the proposed changes and without any hearing or even sworn evidence of any kind. The Court simply signed onto recommendations contained in an unverified report submitted to it by a group of management officials who had submitted it, in private, to the Court.

Following that order, this Court denied motions to intervene by four separate unions.

After that, the Michigan Employment Relations Commission has, as this Court knows, refused to proceed on unfair labor practice charges involving the Water Board without clarification as to whether those charges do, or do not, run afoul of this Court's November 4 Order. But the Court has refused to entertain motions from the unions as to the scope of its November 4 order (R. 2465, Order Striking Unauthoriz. Motion) at the same time that it has not only entertained motions from the DWSD to allow it to file petitions and charges at MERC but has also issued specific orders directing MERC how to rule on those petitions (R. 2470, Order).

Moreover, the Court is now entertaining DWSD motions to exempt itself from all City charter provisions, ordinances, civil service rules and the like, many of which have established the wages and working conditions of City employees for many years (R. 2473, DWSD Mot to Clarify Order of Nov. 4, paras 1-5, 37-39). In addition, the Court is entertaining a motion

allowing the DWSD to set up its own defined contribution retirement plan, which will set important conditions of employment for new employees and will potentially affect the stability of the pension funds for existing employees and retirees (R. 2473, DWSD Mot. To Clarify Order of Nov. 4, paras 46-52). Finally, the Court is entertaining a motion that seeks to “clarify” the November 4 order by declaring that the unions may not avail themselves of the fact-finding and mediation procedures available to public employees under state law (R. 2473, DWSD Mot to Clarify Order of Nov. 4, paras 55-56).

As the above history sets forth, the Court has established itself as the supervisor and facilitator of management’s plans to drastically alter the employees’ working conditions and their contractual and bargaining rights. Acting under the Court’s supervision, the management has announced plans to eliminate most of the current employees of the DWSD—and has refused to bargain on almost any subject, confident that it and it alone has access to this Court to decide when, what, and how it must bargain about any subject.

ARGUMENT

The federal statute on disqualification provides as follows: “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. s. 455(a).

In this case, the Court cannot be or appear to be impartial. It has become a part of the management team at the DWSD. The Court has done all that management has asked for—and never heard the objection of a single union to any of management’s plans.

As set forth in the accompanying brief opposing the DWSD’s motion for preliminary relief, this Court lacks jurisdiction over most of that motion. As to the rest, management’s good

faith is a critical determining factor in whether it is entitled to any of the relief it seeks. As this Court has essentially become the supervisor of management—and its confidant in the absence of any input from the unions—it should recuse itself from ruling on the DWSD's motion.

CONCLUSION

For the reasons stated, Local 207 asks that the Honorable Sean F. Cox recuse himself from ruling on the DWSD's motion for preliminary and permanent injunctive relief.

By the Local 207's attorneys,
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Dated: October 1, 2012

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing motion, brief, and attached exhibits on the parties of record by filing the document under the Court's ECF system.

s/George B. Washington
GEORGE B. WASHINGTON (P 26201)

Dated: October 1, 2012