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VIA FEDEX

November 26, 2013

U.S. Department of Justice  
Complaint Adjudication Office  
Att: Mark L. Gross  
Patrick Henry Building, Room A4810  
601 B Street, NW  
Washington, DC 20530

**RE: EEO Complaint of Ashley Tabaddor**  
**Docket Number: EOI-2013-00081**

Dear Mr. Gross:

We are writing in response to the correspondence, dated November 5, 2013, directed to your attention from counsel for the Agency concerning the above-referenced complaint. The Agency asserts that the record in this matter does not support a finding of discrimination or reprisal on its part. As summarized below, we respectfully disagree.<sup>1</sup> In addition, as a matter of procedural integrity, it appears from the supplemental affidavit of Mr. Rosenblum that he may have had access to affidavits and other materials submitted to the investigator in this matter (e.g. that of Mr. JuanCarlos Hunt) prior to the investigator's issuance of its Report of Investigation ("ROI"). Given Mr. Rosenblum's involvement in the subject matter of this complaint, we are requesting that his role in the complaint investigation and decision process be disclosed and clarified.

### **Agency Statement of Facts**

The Agency begins by stating it "largely" agrees with Judge Tabaddor's statement of material undisputed facts included in the correspondence from our office dated September 4, 2013. But, having voiced its agreement, the Agency then goes on to dispute many of those same facts without reference to any support.

First, the Agency alleges that there is no dispute Judge Tabaddor was "*advised*" to recuse herself from all cases involving individuals from Iran. In reality, as evidenced in the ROI and cited in our September 4 prior correspondence, the Agency *ordered* Judge Tabaddor to recuse herself from all such cases in perpetuity. [See ROI, Ex. 9 (p. 3 (Question 8), p. 13); Ex. 9.1 (p. 14).]

Second, the Agency characterizes its recusal order as being premised on Judge Tabaddor's "high-profile activities on behalf of *individuals from Iran*." Nowhere in the ROI is there any

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<sup>1</sup> The following summary is not and is not intended to be a waiver of any allegation of fact or law by Judge Tabaddor. Judge Tabaddor reserves all rights to raise any claim, engage in discovery or otherwise take any action allowable by law in connection with the matters addressed herein.



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evidence that Judge Tabaddor engaged in advocacy on behalf of any particular individual from Iran, or of any other nationality. Nor was Judge Tabaddor proposing to accept an invitation to attend the White House Round Table event as a representative for any individual or organization. Mr. Rosenblum specifically cited the Agency's reasoning for the recusal order as being Judge Tabaddor's association with the "Iranian-American community" not advocacy on behalf of any individual. [See ROI, Ex. 7.2 (p.3-4).] Further, Mr. Rosenblum approved Judge Tabaddor's attendance at the White House event because he was satisfied that she was not appearing on behalf of any person, organization or entity. [See *id.*, Ex. 7.1 (p.2)]

Third, the Agency misstates Judge Tabaddor's reprisal complaint as being limited to a claim that the Agency refused to "reverse its [recusal] decision" in retaliation for engaging in protected activity. As set forth in Judge Tabaddor's complaint and affidavit, and supported by the documents submitted with both, the Agency retaliated against her because she protested the Agency's discriminatory conduct relating to her recusal by thereafter subjecting her to adverse treatment in restricting her participation in outside activities.<sup>2</sup> [See ROI, Ex. 1 (p.9-10); Ex. 7 (8-9).]

### **Adverse Employment Action**

The Agency further asserts that its recusal order had no adverse effect on Judge Tabaddor's employment "in any way." This ignores the nature of Judge Tabaddor's employment. As an Immigration Judge, independent decision-making authority and actual and perceived impartiality are critical conditions of Judge Tabaddor's day to day employment. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998) (the prohibition on discrimination in the terms, conditions or privileges of employment "not only covers 'terms' and 'conditions' in the narrow contractual sense, but 'evinces a congressional intent to strike at the entire spectrum of disparate treatment. . . in employment.'"). The Agency's actions have caused Judge Tabaddor to be recused from an entire class of cases solely on the basis of race and national origin. In doing so, the Agency's action has undermined Judge Tabaddor's essential judiciary function in making recusal decisions on a case-by-case basis and exercising unimpaired judicial independence. Further, the Agency's action has caused Judge Tabaddor to perform her duties as an Immigration Judge under the stigma of having had her impartiality impugned, such that she is segregated from her similarly situated colleagues both in her job authority and in being subject to different case assignment and recusal standards. See, e.g., *Lelaind v. Public Utilities Commission*, 576 F.Supp.2d 1079, (N.D. Cal. 2008) (adverse employment action includes undermining an employee's authority).

The EEOC decision cited by the Agency addresses whether a "proposed action or a preliminary step" constitutes an adverse employment action, in that case a letter warning the complainant that his work performance was unsatisfactory, and finds that it does not. *Diaz v. Department of the Air Force*, EEOC Request No. 05931049, 1994 EEO PUB LEXIS 3552, at \*5-6 (April 21,

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<sup>2</sup> It appears that the ROI does not include complete copies of the exhibits submitted by Judge Tabaddor in connection with the complaint and her affidavit. For the sake of clarity and accuracy in the record, we have enclosed complete copies of both the complaint and affidavit herein.



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1994). Here, as addressed above, the Agency ordered Judge Tabaddor's blanket and indefinite recusal from all cases involving individuals from Iran. This is not a mere proposed action.

**Agency's Pretextual Reliance on 5 C.F.R. 2635.502(a)(1)-(2)**

Judge Tabaddor also disagrees with the Agency's continued reliance on 5 C.F.R. § 2635.502 as providing a legitimate, nondiscriminatory reason for the Agency's recusal order. The Agency's proffered explanation is pretext.

The Agency misstates the scope of 5 C.F.R. § 2635.502 in its correspondence in representing that it provides generally for recusal any time a reasonable person would question an employee's impartiality. Instead, the provision narrowly and specifically delineates circumstances under which an employee's appearance of impartiality is to be considered. The regulation reads in relevant part:

(a) Consideration of appearances by the employee. Where an employee knows that **a particular matter** involving **specific parties** is likely to have **a direct and predictable effect on the financial interest** of a member of his household, **or** knows that a person with whom he has a **covered relationship** is or represents a party to such matter, **and** where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

5 C.F.R. § 2635.502(a) (emphasis added).

The Agency has never contended that Judge Tabaddor's recusal is based on her having a financial interest in a particular matter involving specific parties. The Agency further has never contended that Judge Tabaddor's recusal order is based on her having a "covered relationship" with a party or representative of party in a particular matter. The recusal order, instead, is an open-ended order for undifferentiated recusal in any case involving individuals from Iran without any problematic link to Judge Tabaddor's relationship to any such individual. The regulation relied on by the Agency, on its face, requires case-specific recusal determinations based on certain specific relationships between an employee and a party involved, and only then, if such particular relationship raises an appearance of impropriety.

In addition to lacking any colorable basis in law, the Agency's claim of an appearance of impartiality fails on the record. Other than citing to the White House event, an activity that the Agency approved for Judge Tabaddor, the Agency has failed to cite to any facts to support their claim that a reasonable person would have a basis to question Judge Tabaddor's impartiality in hearing cases involving individuals from Iran. Moreover, they have failed to provide any



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explanation or meaningful analysis as to why Judge Tabaddor's approved attendance at the White House event would form a reasonable basis for anyone to question her impartiality.<sup>3</sup>

To be sure, the Department of Justice encourages employee participation in outside volunteer, academic and community activities. See Memorandum, *Approval for Participation in Outside Organizations and Activities by Department of Justice Employees*, May 19, 2000 (<http://www.justice.gov/jmd/ethics/memo/memo05192000.htm>). It would be anomalous for such participation to result in the wholesale recusal of Immigration Judges from certain classes of cases; particularly, where Judge Tabaddor has always received the appropriate ethics approval for her participation in outside activities.

### **Agency's and Mr. Rosenblum's Submissions Demonstrate Discriminatory Intent**

The counter-examples offered by the Agency, and Mr. Rosenblum in his supplemental affidavit, as demonstrating other instances in which they allege 5 C.F.R. § 2635.502 would apply and result in a recusal order like that issued to Judge Tabaddor only highlight the Agency's discriminatory intent in this case.

The Agency posits that if Judge Tabaddor were of Swedish origin she still would have been ordered to recuse herself from all cases involving individuals from Iran based on her being active in the Iranian-American community. But, such a blanket recusal order would still not be supported under 5 C.F.R. § 2635.502 as explained above. Further, the Agency fails to appreciate that such conduct would still be discriminatory. Title VII prohibits discrimination based on association with a particular race or national origin, even if the complainant is not of that same race or national origin. See *Chacon v. Ochs*, 780 F.Supp. 680 (C.D. Cal. 1991). Here, all hypotheticals aside, the Agency has admitted that its recusal order was motivated by Judge Tabaddor's association with the Iranian-American community, and on this ground alone, a finding of discrimination is supported. That Judge Tabaddor is not, in fact, Swedish, further supports a finding of discriminatory animus in the Agency's actions.

Taking a different approach, Mr. Rosenblum posits in his supplemental affidavit that if an Immigration Judge from a particular country publicly stated that all individuals from that country were not entitled to asylum under any circumstances, then such Immigration Judge should be recused from all cases involving individuals from that country. This, however, is not in any way analogous to any conduct by Judge Tabaddor, as there is no claim or evidence that Judge Tabaddor has ever made such a statement about members of any country. Moreover, such conduct would appear to raise an issue of actual partiality or bias which the Agency expressly stated was not the basis for its recusal order to Judge Tabaddor. [See ROI, Ex. 7.2 (p.4).]

A more apt inquiry in this respect is whether an Immigration Judge who is African American and involved in the African American community would be prohibited from hearing cases involving individuals from any country in Africa. Or, likewise, if an Immigration Judge who is Mexican

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<sup>3</sup> This is further underscored by the fact that the Agency admits that they do not claim that Judge Tabaddor is actually biased, and that no party has ever filed a request for Judge Tabaddor to recuse herself from any case involving individuals from Iran.



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American and involved in the Mexican American community would be prohibited from hearing cases involving individuals from Mexico. Or, similarly, if an Immigration Judge who is known to be Jewish and to be actively involved in organizations like the Anti-Defamation League would be required to recuse himself or herself from cases involving people of Jewish ethnicity or religion. We reiterate that at the time of the Agency's recusal order Judge Tabaddor was singled out for unprecedented treatment. No similar action had been taken against any other Immigration Judge to the best of her knowledge. Nor is any precedent for such a recusal order shown in the ROI. Although Mr. Rosenblum's supplemental affidavit purports to provide one such example, it, in fact, demonstrates the Agency's ill intent. First, the example post-dates Judge Tabaddor's protestation of the Agency's recusal order and institution of this administrative process. Second, Mr. Rosenblum admits that no similar blanket recusal order was actually issued in that case.

#### **Lack of Due Deliberation on the Part of the Agency**

Lastly, Mr. Rosenblum's supplemental affidavit questions whether Mr. Hunt, who (as noted above) submitted an affidavit to the investigator in this matter, still held the position of the Deputy Designated Agency Ethics Official (DDAEO) at the time the Agency issued the recusal order and Judge Tabaddor protested it as discriminatory. From Mr. Rosenblum's own materials it appears that Mr. Hunt was the DDAEO until at least approximately March 20, 2013 when Mr. Rosenblum sent Mr. Hunt an email advising him otherwise (and apparently attempting to do so in a retroactive manner having been informed of Judge Tabaddor's complaint). Mr. Hunt's affidavit in this matter states that the Agency's recusal order is facially discriminatory and not supported by 5 C.F.R. § 2635.502 and further provides that at the point Mr. Rosenblum's action "escalated" from a routine review of a request to participate in an outside activity to Judge Tabaddor's recusal, Mr. Rosenblum should have referred this matter up his chain of command, including to the DDAEO, before acting. [ROI, Ex. 14 (p.3-4, 6, 8).]

Fundamentally, Mr. Rosenblum's supplemental submission demonstrates a startling lack of deliberative process in the Agency's determination to issue the recusal order and refuse reconsideration of the same. Mr. Rosenblum states that in making the decision to order Judge Tabaddor's blanket recusal he (i) talked to two people under his own supervision and (ii) talked to two other people entirely outside his chain of command. In doing so, he characterized Judge Tabaddor as a "high level" advocate for Iranians, a claim that the Agency has failed to support with any facts. [See, e.g., ROI, Ex. 7.2 (3-4).] Further, Mr. Rosenblum precluded Judge Tabaddor from seeking informal review of his decision within the Agency by instructing her, without basis, that there is no such available review. [*Id.* at 2.] The Agency has not come forward with any research memoranda, any citation to case law or policy, or any like documentation of it having considered any authority actually supporting its actions before it took them. The complete absence of any evidence of this nature is particularly glaring when contemplating a matter as serious as ordering the unprecedented, indefinite, blanket recusal of a sitting Immigration Judge. This glare is particularly blinding in the face of internal dissent and a stated Department of Justice policy of encouraging engagement in outside activities. The superficial process underlying the Agency's actions further evidences discriminatory intent and belies any finding of a legitimate basis for the Agency's order.



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In light of the foregoing, and the entirety of the record in this matter, Judge Tabaddor respectfully requests that the Complaint Adjudication Office issue a final agency decision finding that the Agency discriminated against her and engaged in reprisal as set forth in the complaint, and that the Complaint Adjudication Office order the remedies sought by Judge Tabaddor therein.

Please direct any correspondence in this matter to my attention and feel free to contact me should you need any additional information.

Sincerely,

**Cooley LLP**

A handwritten signature in blue ink, appearing to read "Ali M. M. Mojdehi".

Ali M. M. Mojdehi

Enclosures

cc: Jill A. Weissman (via e-mail)

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