

("VIPD"). At that time, plaintiff was also employed by the VIPD as the Director of its Planning, Research & Evaluation Bureau. On April 8, 2003, defendant issued Directive 012-03 requiring all VIPD personnel traveling inter-island first to notify defendant of their travel plans as well as to follow various additional administrative procedures. As a result of allegations that plaintiff used government bulk tickets to travel between St. Thomas and St. Croix in violation of these procedures, defendant ordered an investigation and immediately reassigned plaintiff, effective May 4, 2003, to the VIPD's Motor Vehicle Bureau. Although plaintiff's compensation remained unchanged, her responsibilities and authority apparently both decreased. Sometime thereafter, in a brief telephone conversation, VIPD Director of Internal Affairs Ray Martinez advised Ms. Gallivan, then an assistant attorney general in the Office of Collective Bargaining, that plaintiff had been transferred because of unauthorized travel. Ms. Gallivan simply responded that it was the commissioner's prerogative to take the action he did. Mr. Martinez and Ms. Gallivan had no further contact on this subject.

On May 13, 2003, plaintiff appealed her transfer to the Public Employees Relations Board of the Virgin Islands ("PERB").² Michael Sanford of Sanford, Amerling & Associates represented her

2. The PERB is a statutorily created independent board of the government of the United States Virgin Islands, composed of five members appointed by the Governor with the advice and consent of the Legislature. See V.I. Code Ann. tit. 24, § 364 (1997). It has the authority, among many other responsibilities, to hear disputes over alleged unfair labor practices. Id. § 378.

in these proceedings. On July 28, 2003, the PERB issued an opinion dismissing plaintiff's appeal for lack of jurisdiction.

Undeterred, on January 20, 2004, plaintiff, through her union, filed with the PERB an unfair labor practice charge ("ULPC") against the VIPD. Plaintiff is the president of the local chapter of her union, and in that capacity she had chosen not to support defendant's nomination as police commissioner in early 2003. The charge alleged plaintiff's transfer was simply retaliation by the defendant for these activities in her union-related capacity. She sought both reinstatement to her former position and a cease and desist order preventing the VIPD from attempting to transfer her again.

Ms. Gallivan, in her position as an assistant attorney general of the Virgin Islands in the Office of Collective Bargaining, represented the VIPD in connection with plaintiff's ULPC. Ms. Gallivan signed a form letter dated January 26, 2004 to the defendant police commissioner requesting him to forward information to use in the VIPD's defense. After a brief review of the three-page ULPC, she also signed the VIPD's answer, which consisted of a general denial filed with the PERB on January 27, 2004. This was the customary form of response by the Virgin Islands Government to ULPCs since a response under the PERB's rules was required within seven days of receipt of a ULPC. Both the January 26, 2004 letter and the answer to the ULPC had been prepared for Ms. Gallivan by her legal assistant Juliette Thomas.

On February 2, 2004, the PERB sent Ms. Gallivan a form letter outlining the procedures for handling the ULPC and informing her that the PERB had scheduled an informal conference for March 19, 2004.³ Because Ms. Gallivan had not received any written response from the VIPD to her January 26, 2004 letter, Ms. Thomas sent a follow-up memorandum to the commissioner on February 26, 2004. No response was ever received. Ms. Gallivan entered a notice of appearance with the PERB on behalf of the VIPD on March 15, 2004. Ms. Thomas also prepared a brief one-page synopsis of the case for Ms. Gallivan a few days before the date of the informal hearing. Ms. Gallivan has no recollection of ever reviewing the synopsis. There is no evidence she ever interviewed any witness, reviewed any documents other than the ULPC complaint, prepared for the informal hearing, or actually appeared before the PERB in the matter. Due to the volume of ULPCs which she handled, it was her practice to do little work on them before the informal hearing. If the matter was not resolved at that preliminary level, a formal hearing with testimony was later convened. The informal conference on this matter never took place because plaintiff voluntarily withdrew her charge the

3. At this conference, Ms. Gallivan apparently would have been expected to "present statements of those facts which form the basis of the charge or defense." See Letter from PERB to Counsel of Feb. 2, 2004, at 1. Any facts the parties disputed were required to "be substantiated by persons having personal knowledge of the facts" and the parties were also told to "be prepared to present any legal arguments regarding the charge." Id.

day it was scheduled. This ended the ULPC as well as Ms. Gallivan's involvement in the matter.

A few months later, in May, 2004, Ms. Gallivan left her government position to become an associate with the Sanford law firm. In the meantime, plaintiff's conflict with defendant and the VIPD continued to intensify. On September 9, 2004, a twelve count criminal information was filed against plaintiff based on her allegedly improper travel⁴ in 2003, and defendant suspended her indefinitely soon thereafter. Plaintiff contested this suspension, appealing yet again to the PERB, which ultimately determined on November 23, 2004 that it lacked jurisdiction over plaintiff's claim.

Plaintiff, represented by Mr. Sanford and Ms. Gallivan, filed the present lawsuit on May 12, 2005 in the District Court of the Virgin Islands. The complaint seeks back pay from the time of plaintiff's September, 2004 suspension as well as damages to her reputation. It further requests injunctive relief, including the reinstatement of plaintiff to the position in the VIPD that she had held prior to her transfer in May, 2003. Defendant, who is being represented by the Office of the Virgin Islands Attorney General, answered on June 3 and filed the pending motion to disqualify both Ms. Gallivan and the Sanford firm.

4. The criminal information charged plaintiff with fraudulently obtaining thousands of dollars worth of VIPD travel funds for what was allegedly personal travel between November, 2002 and June, 2003.

A motion to disqualify a party's counsel requires the court to "balance the right of a party to retain counsel of his choice and the substantial hardship which might result from disqualification as against the public perception of and the public trust in the judicial system." McKenzie Constr. v. St. Croix Storage Corp., 961 F. Supp. 857, 859 (D.V.I. 1997). "The district court's power to disqualify an attorney derives from its inherent authority to supervise the professional conduct of attorneys appearing before it." Id. (citing Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972)).

Practicing attorneys in the Virgin Islands are governed by the American Bar Association's Model Rules of Professional Conduct. See VECC, Inc. v. Bank of Nova Scotia, 222 F. Supp. 2d 717, 719 (D.V.I. 2002); Local Rule 83.2(a)(1). The Model Rules specifically address the unique concerns raised by former government attorneys entering the private sector. Rule 1.11(a) provides that "a lawyer who has formerly served as a public officer or employee of the government ... shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent" to the representation. See ABA Model Rules of Prof. Conduct, Rule 1.11 (2003 ed.) (hereinafter "MRPC"). The informed consent of the VIPD, of course, has not been forthcoming.

Rule 1.11 applies to an attorney's involvement in a quasi-judicial or administrative proceeding such as plaintiff's ULPC before the PERB. That rule defines "matter" expansively: "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties." See MRPC, Rule 1.11(e)(1).

It is clear that plaintiff's current lawsuit and the January, 2004 ULPC flow from the same core of facts. The federal court complaint alleges retaliatory behavior by the defendant due to plaintiff's failure to support defendant's nomination as police commissioner of the VIPD and seeks plaintiff's reinstatement to her previous position in the VIPD. The ULPC made those same allegations and sought the same relief. The parties in the ULPC were nominally different,⁵ but this distinction is inconsequential.

The crucial question under Rule 1.11 is whether Ms. Gallivan participated "personally and substantially" in the earlier related ULPC stemming from plaintiff's dispute with defendant and the VIPD. The rules are silent as to the specific

5. The complaint appears to have been filed by plaintiff's union, the United Steelworkers of America Supervisors Union, but it was clearly handwritten in the first person by plaintiff. The named defendant was the VIPD, though the body of the complaint focused on defendant's allegedly improper activity. In the instant federal action, defendant is sued in both his individual capacity and his official capacity as the police commissioner.

meaning of this phrase, though "substantial" is defined as a "material matter of clear and weighty importance." MRPC, Rule 1.0(1). Similarly, the Third Circuit has not had occasion to consider the parameters of 1.11's "personal and substantial" requirement, but other federal courts have. In Babineaux v. Foster, the most thorough look at the issue, the Eastern District of Louisiana explained that this provision means something more than a "tenuous and nominal" connection to the prior case. See No. 05-0021, 2005 WL 711604, at *5-6 (E.D. La. Mar. 21, 1995). Rather, Rule 1.11 is triggered when the attorney is "personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question." Id. (citation omitted).

The court in this District has recognized that generally "a determination of 'personal and substantial' participation requires presentation of facts (generally through sworn testimony) establishing actual and personal involvement in the matter in question." Rennie v. Hess Oil Virgin Islands Corp., 981 F. Supp. 374, 376 (D.V.I. 1997). To that end, we held a hearing, at which Ms. Gallivan, Mr. Martinez and Ms. Thomas testified. In light of their testimony and the other evidence related to Ms. Gallivan's involvement with plaintiff's ULPC, we find that her participation did not rise to the level of "personal and substantial." Ms. Gallivan was unquestionably involved personally as the sole attorney representing the VIPD against plaintiff's ULPC, but the court finds this representation

was limited, pro forma and ultimately nominal. The ULPC never developed to involve Ms. Gallivan in any substantial or meaningful way. There was simply no "investigative or deliberative process" in which Ms. Gallivan participated to warrant her disqualification in the present case.

We acknowledge that Ms. Gallivan signed the VIPD's answer to the ULPC, and this fact alone does carry weight with the court. The MRPC require that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so." See MRPC, Rule 3.1 (2003 ed.). That said, there is no evidence that the answer was anything other than a form response due to the PERB's strict seven-day time requirements. Ms. Gallivan testified at the evidentiary hearing that she made no factual inquiry prior to filing the answer and that this "general denial" was her office's standard procedure for handling ULPCs. Ms. Gallivan never spoke with the defendant about the ULPC. The VIPD never responded to either Ms. Gallivan's January 24 request for information or to Ms. Thomas's February 26 memorandum. Ms. Gallivan's brief May, 2003 telephone conversation with Mr. Martinez was months before the ULPC was filed, and Ms. Gallivan never immersed herself in the matter. Even assuming Ms. Gallivan read the one-page synopsis prepared by Ms. Thomas, it merely dealt with procedural issues before the PERB and contained no underlying facts about the ULPC itself. Thus, Ms. Gallivan was never exposed to any information, let alone confidential information, that could be

used in her current representation of plaintiff. See MRPC, Rule 1.11, cmt. 4. We read Rule 1.11 as requiring us to put substance over form. Without passing judgment on Ms. Gallivan's conduct under Rule 3.1, we are convinced by the testimony that she had no meaningful involvement in the investigation of plaintiff's ULPC.

This determination is bolstered by the relevant case law. In Babineaux the court refused to disqualify a former city attorney from representing the plaintiff in her employment suit against the city and mayor. 2005 WL 711604, at *1. The plaintiff's attorney had aided in the representation of the city in a prior grievance filed by plaintiff based on the same facts as her federal complaint. This involvement centered on his receipt of two "confidential" letters apparently containing factual information that the city intended to use in its defense. Id. at *6. Despite this prior participation, the court found that there was neither "evidence that [the attorney] conducted any investigation in connection" with the prior complaint nor that he "spent any substantial amount of time on the matter." Id. The court determined that the attorney's largely administrative role was merely "cursory involvement" that did not rise to the level of "personal and substantial" to implicate Rule 1.11. Id.

In addition, the court in Blaylock v. Philadelphia Housing Authority found an attorney's prior supervisory involvement in the plaintiff's earlier related grievance hearing an insufficient basis to disqualify his subsequent representation

of her, although on slightly different grounds than those upon which the court relies today. 2003 WL 928500, at *2 (E.D. Pa. Mar. 5, 2003).

While, as noted above, the Third Circuit has not had occasion to consider Rule 1.11, it has faced the predecessor rule under the Model Code of Professional Responsibility. The Model Code contained the ABA's ethical guidelines for attorneys from 1969 until it was replaced by the Model Rules of Professional Conduct in 1983. Disciplinary Rule 9-101(b), under the Model Code, provided that "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." In United States v. Miller, 624 F.2d 1198 (3d Cir. 1980), the court affirmed the disqualification of an attorney who had assisted in the preparation of the criminal case against his client while he was still employed as an assistant U.S. attorney. While this involvement, namely an advisory consultation with other government attorneys, was itself minimal, the court applied a New Jersey-specific standard that required the disqualification of former prosecutors who had "responsibility, whether exercised or not" over prior cases. Id. at 1200. Thus, the court disqualified the attorney under this "more restrictive standard" even though it had determined there was nothing unethical about his representation of Miller. Id. at 1203. In our view, Miller does not undermine our conclusion that prior cursory involvement is not a basis for disqualification

under Rule 1.11's "personal and substantial" participation language.

Defendant also suggests that Rule 1.9(a) applies to disqualify both Ms. Gallivan and her firm. This rule states that a "lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse" to the former client absent the former client's informed consent. See MRPC, Rule 1.9 (2003 ed.). The court agrees with Magistrate Judge Cannon's recent determination that the language of Rule 1.11 precludes the application of Rule 1.9(a) to former government attorneys. See *United Steelworkers of America v. Gov't of the Virgin Islands*, No. 05-0021 (D.V.I. May 10, 2005); see also *Babineaux*, 2005 WL 711604, at *2-5. The American Bar Association's Committee on Ethics and Professional Responsibility supports this interpretation. In a Formal Opinion, it stated, "Rule 1.11 alone determines the conflict of interest obligations of a former government lawyer, and ... the provisions of Rule 1.9(a) and (b) do not apply." See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 409 (1997).

Having found both that Ms. Gallivan did not violate Rule 1.11 and that Rule 1.9 is inapplicable to former government attorneys, there is no basis for disqualifying either Ms. Gallivan or the Sanford firm from representing plaintiff in the present case. Accordingly, the motion to disqualify will be denied.

