adopulus, p. 242, "A review of that case shows a decidedly different set of circumstances than those in this appeal."

This appeal is therefore dismissed.

NUNUWA HAMO, for herself and all others similarly situated, Petitioner

v.

HONORABLE ERNEST F. GIANOTTI, Associate Justice of the High Court, for the Districts of Truk and Ponape, Respondent

Civil Appeal No. 297

Appellate Division of the High Court

June 15, 1979

Original appellate division action for mandamus to compel judge to recuse himself in all pending cases in which petitioner and members of the class she represented were parties, the class being those represented by the Micronesian Legal Services Corporation, because of bias and prejudice toward the corporation's attorneys on the judge's part. The Appellate Division of the High Court, per curiam, held the requested remedy would be ordered where events showed an appearance that judge could not act with impartiality and must have inevitably produced a degree of prejudice against the attorneys, without hereby approving of actions of the legal services attorneys of the type creating prejudice.

1. **Statutes—Construction—Retrospective Effect**

   Generally, whether a statute is given retrospective operation depends on whether it is remedial or procedural, in the absence of specific statutory direction or legislative history indicating a contrary intent; if, however, it affects substantive rights it can be given only prospective application.

2. **Statutes—Construction—Retrospective Effect**

   Right to trial before an unbiased judge is a substantive one, not necessarily dependent on statute, is essential to due process and thus a constitutional right, and a statute designed to provide a means of obtaining disqualification of a judge for bias is clearly remedial or procedural, serving to implement the basic due process right and should be applied retrospectively. (5 TTC § 351)

3. **Judges—Disqualification—Affidavits**

   Facts presented by affidavit in support of a motion to disqualify a judge are to be taken as true, though they are subject to determination of their legal sufficiency. (5 TTC § 351)

4. Judges—Disqualification—Justified

Where head of Micronesian Legal Services Corporation sent judge a letter referring to deterioration of their professional relationship and advising that legal services attorneys would not appear before the judge until the situation was fully resolved, and during a conference between the two there was a confrontation and unfortunate language by the judge, setting a pattern of continuing conflict between the judge and legal services attorneys, and the Senate of the Interim Congress of Micronesia asked the Secretary of the Interior to suspend the judge, pending an investigation, there was an appearance that judge would be unable to act with impartiality in matters where legal services attorneys were involved, and events must have inevitably produced a degree of prejudice against the attorneys on the judge's part, and application for mandamus to compel judge to recuse himself in all pending cases represented by the legal services attorneys would be granted, without thereby approving of the actions of such attorneys which create prejudice. (5 TTC § 351)

Counsel for Petitioner: THEODORE R. MITCHELL

Before BURNETT, *Chief Justice*, HEFNER, *Associate Justice*, and LAURETA, *Designated Judge*

PER CURIAM

This is an original action in the Appellate Division of the High Court seeking a Writ of Mandamus to compel respondent to recuse himself in all pending cases in which the named petitioner and members of the class which she claims to represent are parties. All are represented by attorneys of the Micronesian Legal Services Corporation, and allege that, by reason of bias and prejudice against those attorneys, respondent would not try their cases with impartiality.

The matter was set down for hearing on an Order to Show Cause on March 5, 1979, and oral argument by petitioners' counsel heard on that day. It was subsequently determined that respondent had not in fact received notice of the action and the hearing; final submission for decision was deferred to allow him an opportunity to respond. On

March 19, 1979, we were advised that he did wish to respond, but nothing has been filed to date.

Also, on March 16, 1979, counsel for petitioners asked that decision be deferred to give an opportunity to submit a supplemental memorandum of law concerning the effect of Public Law IC–20; this memorandum was filed on April 2, 1979.

There seems little room for question that the action is properly maintainable as a class action. Motions to disqualify respondent have been filed in forty-three (43) cases in Truk, and in forty-four (44) cases in Ponape. All of these motions are based on the same facts, and the same legal question is common to all.

At the time of filing the motions in the Trial Court and this action in the Appellate Division the only statutory provision for disqualification provided:

> No judge shall hear or determine or join in hearing and determining an appeal from the decision of a case or issue decided by him. No judge shall sit in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to participate in the hearing and determination of the case. (5 TTC, Section 351)

This Section was substantially the same as 28 U.S.C. 455, prior to its amendment in 1974. As such it embodied primarily a subjective test, that is, that a judge should not sit if "in his opinion" it were improper to do so.

Public Law IC–20, effective March 10, 1979, amended Section 351, and again brought Trust Territory law into conformity with the Federal law as it was amended in 1974. It substitutes objective standards for determination of disqualification in place of the prior subjective "in his opinion" standard.

Section 351 now differs from 28 U.S.C. 455 in that it adds bias and prejudice against counsel, subsection (3)(a), as grounds for disqualification. While it became effective

March 10, 1979, no specific provision was made for the question of its retrospective or prospective application. The Federal amendment provided that it should "not apply to trial of any proceeding commenced" prior to the date of the act or to appellate review of any proceeding "fully submitted" prior to the date of the act. Section 3, P.L. 93–512, December 5, 1974.

It seems reasonable to assume that the Interim Congress, by omitting any restriction as to pending case application, intended that amended Section 351 be applied to all such cases. One District Court applied the amended Section 455, notwithstanding the prospective clause. *Samuel v. University of Pittsburgh*, 395 F. Supp. 1275 (W.D. Pa. 1975).

[1] Generally speaking, whether a statute is given retrospective operation depends on whether it is remedial or procedural, in the absence of specific statutory direction or legislative history which indicated a contrary intent. If, however, it affects substantive rights of the parties, it can be given only prospective application. *Turner v. United States*, 410 F.2d 837 (5th Cir. 1969).

[2] The right to trial before an unbiased judge is a substantive one, not necessarily dependent on statute.

"Trial before 'an unbiased judge' is essential to due process." (Cite omitted.) *Johnson v. Mississippi*, 91 S. Ct. 1778, 1780 (1971).

The right is thus a constitutional one, grounded on the Bill of Rights, 1 TTC Section 4. A statute designed to provide a means of obtaining disqualification is clearly remedial or procedural, serving to implement the basic due process right. This is all that 5 TTC Section 351, as amended, does and it should be given effect as to all cases now pending. We thus, as an Appellate Court, "apply the law in effect at the time" we render our decision. *Thorpe v. Housing Authority*, 89 S. Ct. 518 (1969).

No good purpose would be served by any detailed recitation of the factual allegations upon which petitioner bases the claim of bias and prejudice; in balance, they do not reflect favorably on either respondent or counsel.

It appears that differences between counsel and respondent originated in the Truk District, and surfaced with a letter written by the then directing attorney of the M.L.S.C. office, Truk, referring to "the deterioration of our professional relationship," and advising that none of the Truk M.L.S.C. staff would appear as counsel "until this situation is fully resolved." While addressed to respondent, this letter was not delivered to him until after copies had been mailed to a number of other officials having judicial, legislative and administrative responsibility for Truk.

A conference between respondent and the Truk directing attorney, on January 10, 1979, at which time the letter was delivered, produced a confrontation, unfortunate language by respondent, and set a pattern of continuing conflict between him and other M.L.S.C. attorneys, all of which is detailed by affidavits and transcripts of Court proceedings.

On February 28, 1979, the Senate of the Interim Congress of Micronesia adopted H.J.R. No. IC–20, calling upon the Secretary of the Interior to suspend respondent, pending investigation of charges made against him. According to petitioner's application: "To a significant extent, the Interim Congress bases its action upon events and occurrences arising out of the conflict between Respondent E. F. Gianotti and the attorneys of M.L.S.C." The record clearly evidences the truth of this allegation.

Petitioner also alleges that, by reason of a report to the Secretary of the Interior by the executive director of M.L.S.C., the Solicitor of the Department traveled to Micronesia for the purpose of investigating his conduct. Whether

that was the reason for the Solicitor's trip does not appear, though counsel's claim of "credit" for it is of record.

On January 29, 1979, this Court, in *Sinding v. Gianotti*, Civ. App. No. 286 [unreported decision], ordered production of a transcript of the January 10, 1979, conference. Petitioner alleges that publication of that transcript, containing admittedly intemperate language by respondent, would be a further cause for bias against counsel. The allegation and the factual basis for it is a matter of record.

[3] Facts presented by affidavit in support of a motion to disqualify are to be taken as true, though subject to determination of their legal sufficiency. In the present situation, we have no response, by affidavit or otherwise, to rebut them.

> . . . the factual allegations contained in the Affidavit must be taken as true and the Court has no power or authority to contest in any way whatsoever the necessary acceptance of truthfulness of the facts alleged, even though the Court may be aware of facts which would indicate clearly the falsity of any such allegations. *Berger v. United States*, 255 U.S. 22, 33, 41 S. Ct. 230, 65 L. Ed. 481 (1921). (And other citations omitted.) *State of Cal. v. Kleppe*, 431 F. Supp. 1344, 1348 (1977).

Amended Section 351(2) requires that "a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In *Webbe v. McGhie*, 549 F.2d 1358 (10th Cir. 1977) the Court noted, under the identical requirement of 28 U.S.C. 455, ". . . appearance of impartiality is virtually as important as the fact of impartiality."

[4] Here, based upon the full record of this matter, we conclude that there is, at least, an "appearance" that respondent would be unable to try these matters with impartiality, by reason of their representation by M.L.S.C. attorneys.

We note also that the amended Section 351 provides, in subsection (3)(a), for disqualification for "personal bias or prejudice concerning a party or his counsel." Whatever may have been the state of respondent's personal feelings toward counsel prior to the January 9, 1979, letter and its publication, events transpiring since that time must inevitably have produced a degree of prejudice against counsel.

We do not mean to suggest approval of the actions of counsel which result in the creation of prejudice. The January 9, 1979, letter from the Truk directing attorney, by which he announced a unilateral decision to withdraw from respondent's Court, might well be considered as a calculated effort to produce just such a result. Other possible courses of action, better designed to preserve professional responsibilities, and advance the cause of his clients, suggest themselves.

The letter asserts that "decisions and orders of the Court demonstrate your fixed opinion of Micronesian Legal Services Corporation and myself." At no time prior to this had such a "fixed opinion" been made the basis of a motion to disqualify.

Further reference was made to having been "overwhelmed by trial settings"; nothing appears of record to show any motions for continuances, requests for assistance from other attorneys of M.L.S.C., or any other effort to obtain assistance in dealing with the problem. It does not even appear that the executive director of M.L.S.C. was made aware of any problem prior to the letter which precipitated open conflict.

We do not question assertions that there were problems for M.L.S.C. in meeting its responsibility to Truk clients, but are by no means persuaded that those problems have been met in a professionally responsible manner. The capacity of M.L.S.C. to deal with a problem, when it elects to deal with it, is well demonstrated by the "overwhelm-

ing" concentration of its resources in support of its Truk directing attorney. Had only a small portion of those resources been directed to resolution of the initial problem, both Court and counsel might have been spared the difficulty which inevitably ensued.

The application for Mandamus is granted. Pursuant thereto, it is ORDERED that respondent, the Hon. E. F. Gianotti, be, and he hereby is, commanded to disqualify himself from presiding in or determining any of the actions in which petitioner or any of the class whom she represents is a party, including those cases now pending in the States of Truk and Ponape in which parties are represented by the Micronesian Legal Services Corporation.

ITSCO; TIMOTHY, et al.; SWEET, et al.; and LATTON
v.
TRUST TERRITORY OF THE PACIFIC ISLANDS
Civil Appeal No. 315
Appellate Division of the High Court
Marshall Islands District
August 17, 1979

Government appealed from denial of motions to set aside default judgments against it. The Appellate Division of the High Court, Gianotti, Associate Justice, held that government was properly defaulted where process was served upon it and it did not answer because it thought service defective.

1. **Civil Procedure—Process—Duty To Answer When Service Is Defective**
   Defendant receiving actual notice of commencement of various actions could not fail to respond on the theory that in its opinion the process was defective and no responsive pleading was required; even if the service was defective, defendant had a duty to raise the matter by a special appearance contesting service and/or service of process, and upon defendant's failure to do so the court properly gave plaintiffs default judgments.

2. **Civil Procedure—Process—Duty To Answer When Service Is Defective**
   Any question of service of process must be properly raised; the party served cannot sit mute.