

ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2009-01

Issued on February 4, 2010 By the

WEST VIRGINIA ETHICS COMMISSION COMMITTEE ON STANDARDS OF CONDUCT FOR ADMINISTRATIVE LAW JUDGES

OPINION SOUGHT

An **Administrative Law Judge** (ALJ) with a state agency who previously worked for a statewide union that represents public education employees asks how long he must wait before hearing and deciding matters filed by public education employees, and whether he must recuse himself from all cases where the grievant is a member of and represented by his former employer.

FACTS RELIED UPON BY THE COMMISSION

The Requester, an attorney, began work as a full time ALJ for a state agency on September 16, 2008. The agency is charged with resolving disputes arising in the respective employment relationships involving public employees and government employers, including public education employees.

The Requester worked for over twenty years for a statewide union that represents public education employees. He supervised the representation of public education employees in employment disputes by union representatives and contract attorneys in administrative and court proceedings. He occasionally represented public education employees in administrative and court proceedings.

The Requester's employer agency imposed a one year ban on his hearing public education employee disputes. Although more than one year has passed, presently the Requester only hears cases involving non-education employees because of certain restrictions contained in an earlier opinion this Committee issued. See ALJ AO 2008-02. The Requester states: "Because of my prior experience and keen interest in public education employment law, I would like to begin participation in those cases as soon as possible."

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5a required that the State Ethics Commission, in consultation with the West Virginia State Bar, propose rules for legislative approval establishing a code of conduct for state administrative law judges, incorporating, *inter alia*, the following provisions:

(1) A state administrative law judge shall uphold the integrity and independence of the administrative judiciary;

(2) A state administrative law judge shall avoid impropriety and the appearance of impropriety in all activities; and

(3) A state administrative law judge shall perform the duties of the office impartially and diligently....

That Code is codified in the Legislative Rules, 158 C.S.R. 13 (2005).

Legislative Rule 158 C.S.R. 13 § 4 reads:

4.1. A state administrative law judge shall uphold the integrity and independence of the administrative judiciary.

4.2. A state administrative law judge shall avoid impropriety and the appearance of impropriety in all activities.

4.3. A state administrative law judge shall perform the duties of the office impartially and diligently.

4.3.d. Disqualification.

4.3.d.1. An administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

4.3.d.1.A. the administrative law judge has a personal bias or prejudice concerning a party or a party's lawyer or other representative involved in the proceeding;

4.3.d.1.B. the administrative law judge served as lawyer or representative in the matter in controversy, or a lawyer with whom the judge practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it...

4.3.e. Remittal of disqualification.

4.3.e.1. An administrative law judge disqualified by the means of §4.3.d may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, following disclosure of any basis

for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers or representatives, independently of the judge's participation, all agree that the judge should not be disqualified and the judge is willing, the administrative law judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

ADVISORY OPINION

The Requester asks two questions: First, whether the three specific conditions imposed in ALJ Advisory Opinion 2008-02 apply to him; and Second, whether he must recuse himself from all cases where the grievant is a member of and represented by his former employer. This Committee will address each question in turn.

Earlier, an attorney who represented public employees asked, if she divested herself of all public employee cases, whether and when she could act in an adjudicative capacity as an ALJ for a state agency without violating the Code of Conduct. This Committee answered the question in ALJ AO 2008-02, relying on 158 C.S.R. 13 § 4.3.d., and authorized the attorney to serve as an ALJ, with three specific conditions:

1. recuse herself from cases that involve attorneys, within the last two years: with whom she practiced; against whom she practiced; to whom she referred a case; or from whom she received referral of a case;
2. recuse herself from hearing any cases in which a former or present client is a party; and
3. recuse herself from hearing any cases in which she or an associate served as a lawyer in the case.

ALJ Advisory Opinion 2008-02 has precedential effect and may be relied upon in good faith by other similarly situated administrative law judges. This Committee is charged with interpreting and enforcing the ALJ Code of Conduct, which has only been in effect since July 2005. As a result, it is to be expected that the body of law interpreting the Code, found in this Committee's advisory opinions, will evolve over time, especially when the application thereof is unduly harsh and/or results in unforeseen consequences.

The Requester states that a small number of attorneys practice public education employment law in West Virginia. Therefore, if the foregoing conditions apply to him, he would be excluded from hearing most education related grievances for another year.

Thus, we examine whether or not to apply the same conditions in the present situation. And, as we have in the past, we look for guidance to opinions issued by the Judicial Investigation Commission (JIC) interpreting the Code of Judicial Conduct. Similar to previously cited provisions in the ALJ Code of Conduct, Canon 3E(1)(b) of the Code of

Judicial Conduct, reads: "A judge shall perform the duties of judicial office impartially and diligently." The Canon also sets forth the standards for disqualification.

The JIC cited Canon 3E when it advised a family law master that s/he could not hear any cases involving an attorney with whom s/he previously practiced law if that case was pending while the family law master was an attorney at the firm. The opinion further advised: "Cases which came to the law firm after you were no longer an associate could be heard by you. However, for a reasonable time you should disclose your former relationship with the law firm in such cases." (30 April 1997JIC advisory opinion)

This Committee is mindful of the importance of maintaining the integrity of the administrative judiciary. Public confidence in the impartiality of the administrative judiciary is maintained by the adherence of each judge to the ALJ Code of Conduct. While it is admirable that the Requester desires to use his expertise to assist the State Agency as soon as possible, this Committee must weigh and balance the Requester's desires (and the Agency's needs) with the public's potential perception of impropriety--- a perception that the judge's ability to carry out adjudicatory responsibilities with integrity, impartiality, and competence could be impaired because of his former employment.

Further, there is nothing in the record to show that the Requester's agency will be unduly burdened by the application of the foregoing two year prohibition. Therefore, absent such evidence or any compelling reason to the contrary, this Committee finds that two years is a reasonable period of time for the Requester to refrain from hearing public education employment cases. Although under different facts, a shorter time period may be reasonable, we leave that question for another day.

This Committee also clarifies that the restrictions established in ALJ AO 2008-02 only apply to cases which arose **during** his former employment **and** on which he or an associate served as a lawyer. For those cases which arose after the Requester's employment with the union, once the two year waiting period has passed, he may hear them. This limitation is not intended to be a lifetime ban on hearing cases involving former associates. Following the two year period, the Requester shall disclose his former relationship with the union, for a reasonable period of time thereafter, as set forth above.

Second, the Requester asks whether he must recuse himself from all cases where the grievant is a member of and represented by his former employer. Pursuant to 158 C.S.R. 13 § 4.3.1.B, the Requester shall recuse himself from participation in any case where an individual he represented was a party. He shall **not** be required to recuse himself from all other cases where the grievant is a member of and represented by his former employer, so long as the grievant: is not an individual he represented during his previous employment, or is not represented by a former associate of the Requester. For those cases where the grievant's action has arisen after the Requester left the

union's employment and the grievant is represented by an attorney with whom the Requester has not been associated, the Requester may serve as an ALJ. In those cases, however, he should evaluate each such complaint on a case by case basis, applying the provisions of C.S.R. 13 § 4.3.d., to determine whether he should recuse himself.

Further, even if after his review of a complaint the Requester does not believe it is necessary to recuse himself, he shall disclose to the parties his previous employment and responsibilities related thereto. Either party or counsel would then be in a position to decide whether to file a motion to disqualify the ALJ. "There is no obligation imposed on counsel to investigate the facts known by the judicial officer that could possibly disqualify the officer. The judicial officer is duty bound to disclose them *sua sponte*." (15 August 1995 JIC advisory opinion). This requirement is consistent with the Commentary to Canon 3 of the Code of Judicial Conduct which reads: "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."

The Requester's agency is entitled to impose stricter standards on its ALJs than those imposed by the Code of Conduct.

This advisory opinion is limited to questions arising under the Code of Conduct for Administrative Law Judges, Legislative Rule 158 C.S.R. 13 § 1-1 (2005), *et seq.*, and does not purport to interpret other laws, rules or agency policies. This opinion has precedential effect and may be relied upon in good faith by other administrative law judges, unless and until it is amended or revoked, or the law is changed.



Jonathan E. Turak, Committee Chairperson