

ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2010-02

Issued on October 7, 2010 By The

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

OPINION SOUGHT

A **Chief Administrative Law Judge** asks, pursuant to the Code of Conduct for Administrative Law Judges, how long an Administrative Law Judge (ALJ) must wait before hearing and deciding grievances, and conducting mediations in cases filed against a public agency that was the ALJ's former client.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the Chief Administrative Law Judge (ALJ) for a state agency. The agency is charged with resolving problems arising in the respective employment relationships within various government agencies. The agency's six ALJs adjudicate and mediate cases involving public employees and government employers. Many of the ALJs have a background in the public sector.

The Requester is responsible for the supervision of the employing agency's ALJs. One of the ALJs he supervises was formerly employed by the State of West Virginia as an attorney assigned to the employment unit of a State agency. He was not assigned to a particular division or branch of the public agency, but represented the agency involving all divisions or branches in a variety of employment matters.

The ALJ was terminated in the summer of 2006, and hired by the Requester's agency one year later. For the past three years, the ALJ has not conducted any hearings or mediations involving his former client agency, or involving any attorney who may have been involved in the decision to terminate him.

The Requester recognizes that the Code of Conduct for Administrative Law Judges (Code), and this Committee's interpretation thereof through the issuance of advisory opinions, imposes limitations to resolve conflicts of interest, real or perceived. Noting that four years have passed since the ALJ's termination, the Requester asks how long the ALJ must wait before hearing and mediating cases involving the ALJ's former client agency. The former client agency objects to the Board's assignment of the ALJ to mediate or adjudicate cases involving the ALJ's former client agency.

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5a required that the 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. In accordance with W. Va. Code § 6B-2-5a(b), the Commission promulgated the Code of Conduct for Administrative Law Judges 158 C.S.R. 13 (2005).

158 C.S.R. 13 § 4.1 (2005), captures the purpose of the Code:

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

4.1.a. An independent and honorable administrative judiciary is indispensable to justice in our society. An administrative law judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the administrative judiciary will be preserved. The provisions of this rule should be construed and applied to further that objective.

158 C.S.R. 13 § 4.2 (2005), in pertinent part, reads:

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

4.2.a. An administrative law judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

4.2.b. An administrative law judge shall not allow family, social, political, employment or other relationships to influence judicial conduct or judgment....

158 C.S.R. 13 § 4.3 (2005), in pertinent part, reads:

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

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;

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The Requester recognizes that, in its earlier opinions, this Committee has imposed a two year waiting period on ALJs who, in their prior employment, represented parties in contested matters before the agency. See, e.g., ALJ AOs 2008-02 and 2009-01.

In ALJ AO 2008-02, this Committee held that an ALJ who divested herself of all public employee cases in her private practice could serve as an ALJ, if she:

1. recused 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. recused herself from hearing any cases in which a former or present client is a party; and
3. recused herself from hearing any cases in which she or an associate served as a lawyer in the case.

In ALJ AO 2009-01, this Committee ruled that the foregoing limitations applied, but clarified that they "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."

The facts herein present a unique scenario, and require this Committee to determine whether the identified conflict of interest, real or perceived, is so great that it requires a lifetime ban on the ALJ hearing cases involving his former agency client (and/or attorneys associated therewith with whom he worked). If the ALJ's separation from employment had been voluntary, then this Committee would have held that its previous two year waiting period is sufficient so long as

thereafter, for a reasonable period of time, the ALJ disclosed his former employment. See ALJ AO 2009-01.

The Requester has stated that his agency intends to schedule cases involving his former agency client for the ALJ to mediate. Further, he may be assigned to adjudicate matters involving his former agency client in the future, but will **not** be assigned to any cases in which an attorney who was directly involved in the ALJ's dismissal personally appears. Finally, the Requester is concerned about its operational efficiency since at least three other ALJs have conflicts with public agencies which impact their assignment to cases.

This Committee is sensitive to the burden its limitations may impose upon agencies that employ ALJs with previous public sector experience. This Committee is equally mindful, however, 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 ALJ to the ALJ Code of Conduct. This Committee must weigh and balance the Agency's needs with the public's potential perception of impropriety---a perception that the ALJ's ability to carry out adjudicatory responsibilities with integrity, impartiality, and competence could be impaired because he was terminated from his former employment, particularly where, as here, the ALJ's former client agency does not consent.

While this Committee recognizes that it derives its jurisdiction from the Code of Conduct, it may look to opinions on judicial ethics for guidance. See ALJ AO 2006-02. One Due Process challenge to a West Virginia Supreme Court Justice's bias, real or perceived, recently reached the United States Supreme Court. The Court wrote:

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. See Tumey, 273 U.S., at 532, 47 S.Ct. 437; Mayberry, 400

U.S., at 465-466, 91 S.Ct. 499; Lavoie, 475 U. S., at 825, 106 S.Ct. 1580. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow, 421 U.S., at 47, 95 S.Ct. 1456.

Caperton v. A. T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2263 (2009).

The Court required the Justice's recusal to ensure due process, and stated:

Disqualification was required under the principle that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required ..., or which might lead him not to hold the balance nice, clear and true ..., denies the ... due process of law."

Id. at 2254. (internal citation omitted) See also Rissler v. Jefferson County Board of Zoning Appeals, 2010 WV 35274 (per curiam) (Conflicts of interest involving two board members and the Zoning Appeals Board's attorney resulted in the denial of due process.)

While the ALJ Code employs a different standard, the analysis and reasoning are the same. Here, after the passage of four years since his termination, the ALJ believes that he can mediate and adjudicate cases involving his former client agency impartially. Otherwise he would have recused himself pursuant to 158 C.S.R. 13 § 4.3.d. The ALJ's former employer, however, believes the ALJ is biased against his former client agency.

According to the ALJ's former employer, many of the agency's personnel who worked directly with the ALJ continue to be employed there. It is usually their decisions being challenged before the Requester's agency. Thus, although only one of the ALJ's former co-workers regularly appears before the agency to defend the agency's employment decisions, other personnel who may have been involved in the State's decision to terminate the ALJ continue to appear before the agency either as a party, or as an employee involved in the underlying employment action.

The Caperton Court did not state whether recusal was required in future cases involving the same party, and, if so, for how long. The dissenting opinion, however, posed a number of concerns, one of which is directly relevant here:

“How long does the probability of bias last? Does the probability of bias diminish over time...?” *Id.* at 2269 (Roberts, C. J., dissenting)

This Committee takes administrative notice that a termination from employment engenders different feelings in a person than does a retirement or resignation. Indeed, it is human nature for a person to harbor ill will towards an employer who ended the person’s employment against her or his wishes. And while normally that ill will may dissipate over time, here it is likely—given the nature of long term employment of State employees—that the personnel with whom the ALJ was closely involved will continue to play a key role in the former client agency’s public employment cases. Thus, this Committee recognizes that the **perception** of bias may continue indefinitely, regardless of whether the ALJ in fact harbors ill will.

As a result of the foregoing, this Committee hereby finds that the situation presented, regardless of the ALJ’S good intentions, creates an appearance of impropriety. See 158 C.S.R. 13 § 4.2.b. (“An administrative law judge shall not allow family, social, political, employment or other relationships to influence judicial conduct or judgment....”) Indeed, the situation offers a possible temptation that might lead the ALJ not to hold the balance nice, clear and true. See Caperton at 2254. See also 158 C.S.R. 13 § 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....”)

The Code of Judicial Conduct governs the conduct of judicial officers and has similar provisions regarding disqualification. As a result, court decisions interpreting the Judicial Code are relevant here. In one such case, the West Virginia Supreme Court wrote: “The question of disqualification focuses on whether an objective assessment of the judge’s conduct produces a reasonable question about impartiality, not on the judge’s subjective perception of the ability to act fairly.” State ex rel. Brown v. Dietrick, 191 W.Va. 169, 174, n. 9, 444 S.E.2d 47, 52, n. 9 (1994).

The principal tenet in the ALJ Code is to maintain the public’s confidence in the fairness of the administrative judiciary. The first rule requires ALJs to uphold the integrity and independence of the administrative judiciary. 158 C.S.R. 13 § 4.1.

An independent and honorable administrative judiciary is indispensable to justice in our society. An administrative law judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the

administrative judiciary will be preserved. The provisions of this rule should be construed and applied to further that objective.

158 C.S.R. 13 § 4.1.a.

This Committee need not determine whether the ALJ has an actual bias. The facts demonstrate that the ALJ has a conflict with his former client agency based on their past relationship. The ALJ Code, with its guarantee of an independent judiciary and its prohibitions against the appearance of impropriety and/or partiality, requires recusal. Therefore, the ALJ must be recused from adjudicating cases involving his former client agency for the remainder of his employment, unless and until the ALJ's former client agency consents.

Next, we must determine whether the limitation on adjudicating cases also applies to mediating cases? Before assigning cases for adjudication, the Requester's agency normally schedules a mediation session. In ALJ AO 2008-01, this Committee wrote:

Mediation assists the parties in identifying, clarifying and resolving issues regarding a grievance at any stage of the grievance process. A mediator does not conduct hearings, adjudicate contested matters, make recommended findings of facts or conclusions of law, or issue judicial decisions.

In order to effectively mediate a case, the ALJ must enjoy the parties' trust. As one seasoned mediator noted:

From the moment they enter into a conflict, mediators strive to gain the trust of the parties. Throughout the mediation they work to build and maintain the parties' trust of the mediation process, the mediators, and between the parties themselves. When trust levels are high, parties are less defensive and more willing to share information with other parties at the mediation table and in private sessions with the mediator -- information that may be crucial to finding a mutually acceptable solution.

How important is trust in mediation? Experienced mediators who have addressed the issue tend to speak with a single voice. Canadian mediator Alan Gold put it succinctly when he said, "The key word is 'trust.' Without it, you're dead. Without it, stay home!"

Salem, Richard. "Trust in Mediation." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: July 2003 <http://www.beyondintractability.org/essay/trust_mediation/>. (internal citation omitted)

If a party perceives that the ALJ is biased against it due to his termination, then it cannot conceivably trust the ALJ. As a result, the party is likely to just show up for the mandatory mediation, but decline to participate meaningfully. This only delays the process.¹

As a result, the restriction imposed herein on adjudication also applies to mediation. Specifically, the ALJ must be recused from mediating cases involving his former client agency for the remainder of his employment, unless and until the ALJ's former client agency consents.

This advisory opinion is limited to questions arising under the Code of Conduct for Administrative Law Judges 158 C.S.R. 13 § 1-1 (2005), et seq., and does not purport to interpret other laws or rules. The facts presented are unique to the affected ALJ. A request involving a different ALJ's separation from employment from an agency that has cases before the ALJ's employing agency may result in a different outcome, depending on the specific facts.

Thus, the Commission declines to make a broad ruling herein. Instead, such determinations must be decided on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may **not** be relied upon as precedent.

S/S
R. Kemp Morton, Acting Committee Chairperson

¹ As one law professor noted, "[I]t arguably makes sense for trial judges to err in favor of recusal in terms of judicial economy. There is less harm in recusing too frequently than too rarely. For example, in the first scenario, a different judge with less of a potential conflict simply hears the case, generating minor procedural costs and delays; in the second, the result will be more appeals with remands and new trials, in addition to the general cost of allowing more actual bias. If a judge recuses herself, it generally comes very early in the proceedings and wastes fewer resources of the parties or the courts." 59 DePaul L. Rev. 529, 542.