

ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2008-01

Issued on September 4, 2008 By the

WEST VIRGINIA ETHICS COMMISSION

**COMMITTEE ON STANDARDS OF CONDUCT FOR
ADMINISTRATIVE LAW JUDGES**

OPINION SOUGHT

An attorney who is employed full time with a large labor union asks if the Code of Conduct for Administrative Law Judges prohibits him from engaging primarily in mediation as a part time, contract Administrative Law Judge (ALJ) with a state agency.

FACTS RELIED UPON BY THE COMMISSION

The Requester has been employed by the union as an in house staff attorney for about two years. He was recently offered a part time, contract ALJ position for a state agency. The agency is charged with resolving problems arising in the respective employment relationships within various government agencies. Some public employees belong to the union that employs the Requester.

In his earlier practice, the Requester concentrated on labor and employment law; he represented at least three unions which represented public employees. At the time of this request, however, the Requester works exclusively for the union. He has neither worked for anyone else- nor has he received any remuneration from any former client-since December 2005, other than independent work as a mediator.

The Requester has disclosed his current employment to the state agency. The Requester acknowledges that, should a case involving his employer arise, he would recuse himself. Although his title is Administrative Law Judge, the Requester has been hired to mediate cases. He will not preside over any cases as an ALJ.¹

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5a reads:

Code of conduct for state administrative law judges.

(a) As used in this section, "state administrative law judge" means any public employee, public officer or contractor functioning as a hearing

¹ In the event that the Requester's duties expand in the future to include the adjudication of complaints, the Requester is directed to our ruling in A.L.J. A.O. 2008-02, also issued today.

officer, referee, trial examiner or other position in state government to whom the authority to conduct an administrative adjudication has been delegated by an agency or by statute and who exercises independent and impartial judgment in conducting hearings and in issuing recommended decisions or reports containing findings of fact and conclusions of law in accordance with applicable statutes or rules, but does not include any person whose conduct is subject to the code of judicial conduct promulgated by the West Virginia Supreme Court of Appeals.

ADVISORY OPINION

Jurisdiction

Before addressing the facts, the Committee must determine whether the Code of Conduct for Administrative Law Judges applies to the Requester. Although the Requester's agency title is ALJ, the only actual work he is expected to perform for the agency is to mediate cases. Thus, notwithstanding his title, do his actual duties subject him to the jurisdiction of the Code of Conduct?

The Code applies to those individuals, including contractors, who "... have the authority to conduct an administrative adjudication, ... and who exercise independent and impartial judgment in conducting hearings and in issuing recommended decisions or reports containing findings of fact and conclusions of law in accordance with applicable statutes or rules...." Jg.

Mediation assists the parties in identifying, clarifying and resolving issues regarding a grievance at any stage of the grievance process. Mediation is a voluntary option the parties may choose for resolving their dispute quickly. According to the Requester's agency's website,

Mediation is a private, informal way to resolve a dispute. A mediator is a neutral third person who tries to aid disputing parties in reaching a mutually agreeable solution to their differences. Mediation emphasizes problem solving. The mediator's role is to facilitate communication to help the parties resolve their dispute, not to decide who is right or wrong, or to impose a settlement upon them. The mediator may assist the parties in generating alternatives to solve the problem.

The mediator doesn't tell them what to do, or make a judgment about who is right or who is wrong. Control over the outcome of the case stays with the parties.

Further, according to the state agency's website, the state agency provides mediation services free to the parties. The agency's ALJs serve as mediators. "If the parties

cannot settle the grievance through mediation, the mediator will not discuss the case with the ALJ assigned to hear and decide the matter, or otherwise participate in deciding the case. Likewise, the parties cannot call the mediator as a witness in a subsequent grievance hearing, and statements made by the parties during mediation are confidential and are not admissible in the grievance hearing."

The Requester will not conduct hearings, adjudicate contested matters, make recommended findings of facts or conclusions of law, or issue judicial decisions. Instead, his only involvement with cases on the state agency's docket will be to mediate cases assigned to him.

Determining whether the Requester is subject to the Code of Conduct for ALJs is similar to ascertaining whether public servants may accept secondary employment with companies their agencies regulate. W. Va. Code § 6B-2-5(h)(1) prohibits full time public employees with regulatory authority from working for any employer regulated by the government agency for whom the employee works.

In its Ethics Advisory Opinions interpreting the foregoing provision, the Commission has looked to an employee's actual job responsibilities. See especially A.O. 94-31. This Committee adopts the Commission's approach, and considers that it is the Requester's duties rather than his job title that determines whether he is subject to the Code. Thus, notwithstanding his title, the Requester is **not** subject to the provisions of the Code of Conduct for Administrative Law Judges since he does not conduct hearings, adjudicate contested matters, or issue judicial decisions.

As set forth in the ALJ Code of Conduct, however, the Requester's agency is entitled to impose stricter standards on its ALJs than those imposed by the Code of Conduct. Accordingly, the Requester should consult with his agency to determine what the agency's policy is regarding his service as a contract mediator while continuing his present employment by an employer whose members appear before the agency.

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.



Jon Turak, Committee Chair