ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2006-01

Issued on May 4, 2006 By The

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

OPINION SOUGHT

In 2004, the State Legislature amended the West Virginia Governmental Ethics Act, directing the State Ethics Commission, in consultation with the West Virginia State Bar, to draft a Code of Conduct for State Administrative Law Judges. As directed, a Code of Conduct was drafted, using the Model Codes of Judicial Conduct for State Administrative Law Judges developed by the National Association of Administrative Law Judges and the American Bar Association as guides. Following the required public comment period, the proposed Code was submitted for review by the Legislature's Legislative Rule Making Review Committee and approved by the Legislature during the 2005 regular session. The Code became effective on July 1, 2005.

The Commission's Committee on Standards of Conduct for Administrative Law Judges is also authorized to render advisory opinions on the meaning and application of the Code of Conduct for Administrative Law Judges. Persons subject to the Code of Conduct for Administrative Law Judges may make a written request for such an opinion. Persons who rely in good faith upon any such Committee opinion are immune from any sanctions under the rule. 158 C.S.R. 13 § 5.3 (2005).

Here, an Administrative Law Judge (ALJ) asks if it is a violation of the Code of Conduct for Administrative Law Judges for him to continue his outside law practice and volunteer activities while maintaining his position as a full time ALJ. He also asks whether his past payment and receipt of referral fees related to cases in his private practice violated the Code of Conduct for Administrative Law Judges.

FACTS RELIED UPON BY THE COMMITTEE

The requester is a full time ALJ for a state agency which employs two other ALJs. An ALJ with this agency is required to be an attorney, duly licensed to practice law in West Virginia. Such ALJs have the power and authority to hold and conduct hearings, to determine all questions of fact and law presented during the hearing, and to render a final decision on the merits of the complaint, subject to the review of the employing agency.

Complaints must be filed with the requesting ALJ's agency within three hundred sixty-five days after the alleged act occurred. Although such complaints are predominantly employment related, the agency also accepts complaints not related to employment issues. Of the 500+ complaints filed with the agency in Fiscal Year 2005, only 77 complaints were not related to employment issues; of the 500+ complaints closed in FY 2005, only 45 were closed by ALJs.

When the agency hired the requestor, he brought his outside practice and volunteer activity with him. More particularly, he represents disabled clients in proceedings seeking to obtain employment related health and retirement benefits, which is limited to federal administrative and appellate practice. He also provides *pro se* assistance to disabled individuals involving attempts to obtain employment related health and retirement benefits. According to the requesting ALJ, his clients must be unable to work; they have to be receiving government disability benefits which are obtained through a process that ordinarily takes more than a year after they have become too disabled to work.

Although in the past he received from and paid referral fees to attorneys who sometimes practice before his agency, the requesting ALJ has stated that he will no longer pay or receive any referral fees. In the past, he has either recused himself from cases involving these attorneys or, more recently, disclosed to the parties and counsel his past association with such an attorney in relation to a fee generating case. Further, according to the requesting ALJ, only one attorney in West Virginia represents the entity against which he litigates.

The requesting ALJ claims that his past use of agency property or resources has been minimal. The agency's executive director has recently imposed a complete ban on the requesting ALJ's use of any agency property or resources.

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMITTEE

W. Va. Code § 6B-2-5a reads:

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

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

One relevant provision, found at 158 C.S.R. 13 § 4.5.g.1 (2005), reads:

> Subject to applicable law and relevant agency rules, an administrative law judge may practice law if such activity would neither affect the independent professional judgment of the administrative law judge nor the conduct of the judge's official duties. An attorney who is an administrative law judge shall not accept the representation of a client who is a litigant before the tribunal for whom the administrative law judge serves or if there is a likelihood that such person will appear before the judge. An administrative law judge shall not practice law before the administrative tribunal for which the judge serves.

158 C.S.R. 13 § 4.5.d (2005), in pertinent part, reads:

> 4.5.d.1 An administrative law judge shall refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judge's official position or involve the judge in frequent transactions with lawyers or persons likely to come before the agency in which the judge serves.
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> 4.5.d.3 An administrative law judge shall manage the judge's … financial interests to minimize the number of cases in which the judge is disqualified. As soon as judges can do so without serious financial detriment, judges shall divest themselves of … financial interests that might require frequent disqualification.

ADVISORY OPINION

Effective July 1, 2005, Administrative Law Judges are governed by the Code of Conduct for Administrative Law Judges. As such, the requesting ALJ is subject to the provisions of the Code of Conduct for Administrative Law Judges.

As noted above, the Code of Conduct for Administrative Law Judges specifically allows full time ALJs to engage in the outside practice of law so long as it does not affect the ALJ's independent professional judgment or the conduct of the ALJ's official duties.

The requesting ALJ no longer engages in a practice that involves referral fees. As a result, the only financial dealings conceivably covered by this Rule are those with the requesting ALJ's individual clients. As the facts show, the likelihood that any of the requesting ALJ's clients would come before his agency is slim.

Therefore, it would not violate the Code of Conduct for Administrative Law Judges for the requesting ALJ to continue his outside practice of law and related volunteer activity, so long as he abides by the following conditions:

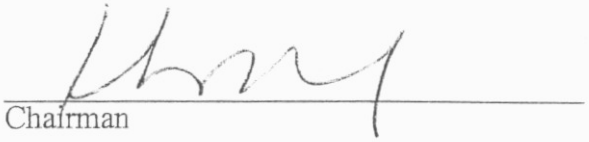
- does not represent anyone who appeared before him in his capacity as an ALJ in the preceding twelve months pursuant to W. Va. Code § 6B-2-5(h)(1)(A)
- does not represent a client in any matter which involves or is likely to involve the agency by which he is presently employed
- does not counsel or advocate for a client against any interest of the State of West Virginia
- does not use State letterhead, office space, resources, materials, office supplies, email, mail service, or equipment beyond the *de minimis* use authorized by W. Va. Code § 6B-2-5(b)(1)
- does not perform work related to his private practice on State time
- does not ask subordinates to perform legal research or any other tasks related to his private practice
- does not accept any subordinate's voluntary offer of any assistance on tasks related to his private practice
- recuses himself from hearing any cases involving attorneys related to his private practice within the last two years: with whom he practices or practiced; to whom he referred a case; and from whom he received referral of a case
- recuses himself from hearing any cases in which a former or present client is a party

An agency is entitled to impose stricter standards on its employees, for example by completely banning an ALJ's use of state resources in her/his outside practice of law and/or volunteer activity.

The requesting ALJ has also asked the Committee to rule on whether his past payment and receipt of referral fees (to and from another attorney) violated the ALJ Code of Conduct. The

Committee's advisory opinions are prospective only, and since the requesting ALJ has stated that he will no longer pay or receive any referral fee, the Committee finds that this issue is moot.

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. 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. 158 C.S.R. 13 § 5.10 (2005).



Chairman