

ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2006-02

Issued on October 5, 2006 By The

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

OPINION SOUGHT

A Level 3 Grievance Evaluator asks if it is a violation of the Code of Conduct for Administrative Law Judges for him to preside over a Level 3 proceeding when the agency's representative is his sister, who served as the Grievance Evaluator at the Level 2 conference.

FACTS RELIED UPON BY THE COMMITTEE

A grievance procedure is available to most state employees, including employees at the requester's agency. These employees may file grievances challenging a broad range of personnel actions, including disciplinary actions and other actions relating to hiring, promotion, compensation, hours, and terms and conditions of employment.

Normally, an employee files a grievance with her immediate supervisor; this is called Level 1. The supervisor issues a written decision on the grievance, and if the employee is dissatisfied, she may appeal it; the grievance is then heard by the Level 2 Grievance Evaluator, usually the supervisor of the grievant's supervisor. After conducting a conference with the grievant, the Level 2 Grievance Evaluator, who is also the agency's designee, issues a written decision. Again, if the grievant is dissatisfied, she may appeal the decision to Level 3, where the Level 3 Grievance Evaluator will conduct a formal hearing and issue a decision.

Here, the requester works full time as a Level 3 Grievance Evaluator for a state agency; he is an attorney. Although in the past the agency employed two Level 3 Evaluators, presently, the requester is the sole Level 3 Evaluator. His sister also works for the agency and, as part of her duties, now serves as a Level 2 Grievance Evaluator for all grievances that arise within the department she now oversees. (There are twelve departments within the agency.) The requester states that the Level 2 Grievance Evaluator almost always appears as a witness at the Level 3 hearing.

According to the requester, at the Level 3 hearing, grievants usually appear without an attorney, although they are entitled to such representation. During his tenure, of the cases he has heard, approximately 25% were appeals from the department for which his sister is now responsible. The requester has further indicated: "If a grievance is denied at Level 2 and proceeds to me at Level 3, my sister will be present at the hearing, representing the agency as the respondent. Thus, the conflict issue would not only encompass the fact that she would have held and issued the Level 2 grievance decision, but that also she would be present for the respondent at the hearing over which I would preside."

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMITTEE

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 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 West Virginia Code § 6B-2-5a, the Commission promulgated the Code of Conduct for Administrative Law Judges 158 C.S.R. 13 (2005).

Several relevant provisions, found at 158 C.S.R. 13 § 4.3 (2005), read:

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.E. the administrative law judge or the judge's spouse or a person within the third degree of relationship¹ to either of them or the spouse of such a person:

4.3.d.1.E.1. is a party to the proceeding, or an officer, director or trustee of a party;

4.3.d.1.E.2. is acting as a lawyer or representative in the proceeding;

4.3.d.1.E.3. is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

4.3.d.1.E.4. is to the judge's knowledge likely to be a material witness in the proceeding.

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

¹ The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece.

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

Jurisdiction

Before addressing the facts, the Committee must determine whether the Code of Conduct applies to the requester. Although the requestor's agency title is Grievance Evaluator, his official job title is Hearings Examiner. The job description prepared for this position by the Division of Personnel reads:

Employee performs advanced professional work adjudicating administrative hearings for a state agency... Researches cases, reviews physical, financial or employment information, and drafts decisions... Makes decisions based on admissible evidence.

As such, notwithstanding his title, the requester is subject to the provisions of the Code of Conduct for Administrative Law Judges.

Disqualification

Rule 4.3.d. sets forth the various conditions that would disqualify an ALJ from presiding over a particular matter. With one notable exception, however, Rule 4.3.e. allows an otherwise disqualified ALJ to disclose the basis of the disqualification to the parties and their representatives who may then decide to waive the disqualification and allow the ALJ to continue to participate in the proceeding.

Rule 4.3.e.1. mandates the disqualification of an ALJ who has a personal bias or prejudice concerning a party, the parties and lawyers or representatives. Thus, if this Committee finds that the requester has an **actual** bias or prejudice concerning his sister, then it need not analyze Rule 4.3.d to determine whether the requester should offer his remittal of disqualification. Bias is defined by <http://www.allwords.com/> as "an inclination to favor or disfavor one side against another in a dispute". Webster's online dictionary defines prejudice as a "partiality that prevents objective consideration of an issue or situation". <http://www.websters-dictionary-online.net/>

If the drafters of the Code intended to interpret "bias" or "prejudice" to encompass the relationship between the requester and his sister, they would not have gone to the trouble of including subsection 4.3.d.1.E. Further, the requester has not revealed anything in his request that would suggest that he would be biased or prejudiced in his sister's favor. In fact, he wrote: "I have every intention of recusing myself in these cases, for the simple reason that, although I **would still render an impartial and unbiased decision**, I feel it necessary to avoid any appearance of misconduct." (emphasis added) We cannot say that the requester is actually biased or prejudiced herein.

Our next inquiry is whether the requester must be disqualified, or whether he may instead offer a remittal of disqualification. Applying Rule 4.3.d.1.E. to this situation, we find that the requester's sister's role meets each of the four subsections:

1. The requester's sister can be said to be a party to the proceeding since she is the agency's designee;
2. As the requester indicated in his correspondence, his sister would be at the hearing representing the agency as the respondent;
3. As the grievant's supervisor, and as the agency's designee, it is in the requester's sister's interest to have her decision upheld;
4. As the Level 2 Grievance Evaluator, the requester's sister will almost always be called as a witness.

However, the requester's sister is more than a party, a representative, or a witness. Indeed, she is all three, and it is her decision which the requester must review to determine its validity. As Rule 4.3.d.1. reads, "An administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned...." This directive precedes the specific instances discussed earlier, and acts as a general admonition. See Brown v. Dietrick, 191 W. Va. 169, 173, 444 S. E. 2d 47 (1994).

The Code of Conduct was based, in part, on the National Association of Administrative Law Judges Model Code of Conduct for State Administrative Law Judges, which is appended to the Legislative Rule. The Commentary to this Rule in the Model Code reads: "Under appropriate circumstances, the fact that 'the judge's impartiality might reasonably be questioned' under [the Rule]... may require the judge's disqualification."

From the facts before us, we cannot say that grievants, most of whom appear *pro se*, would understand the nuances of the Code. Indeed, a grievant may reasonably believe that the requester would look more favorably upon a relative than on an unrelated party. And, as the Code requires, not only must the requester proceed without bias or prejudice, he must avoid the appearance of impropriety. Otherwise, public confidence in the integrity and impartiality of the administrative judiciary is eroded.

The Code of Judicial Conduct, which governs the conduct of judicial officers, has similar provisions regarding disqualification.² Although we are not bound by them, opinions by the Judicial Investigation Commission (JIC) are consistent with our opinion today. For example, on March 1, 1993, the JIC wrote that it would be improper for a judicial officer to hear cases in which the officer's brother, an attendance director with a board of education, was a party or had to testify in a matter before the court. On February 25, 1994, the JIC found that a judicial officer was disqualified from presiding at proceedings in which the judicial officer's nephew by marriage is an attorney.

Given this particular factual situation, the Committee finds that the requester's impartiality might reasonably be questioned if he did not recuse himself. Therefore, it would violate the Code of Conduct for Administrative Law Judges for the requester to preside over Level 3 hearings in which his sister participates as the agency's representative, as a material witness, and/or as a party.

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 Committee notes that this decision is limited to the facts and circumstances of this particular case. Individuals subject to the Code of Conduct for

² Although the provisions regarding remittal of disqualification are not found in the Code, they are set forth in the Commentary and at W. Va. Code § 51-2-8. See also West Virginia Trial Court Rule 17.

Administrative Law Judges, faced with a similar situation involving a person within the third degree of relationship, should seek guidance from this Committee before proceeding further.



Vice Chairman