

ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2012-01

Issued on August 2, 2012 By the

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

OPINION SOUGHT

A **Hearing Examiner** with a state agency who previously worked as a West Virginia state trooper, whose son presently serves as a state trooper, asks two questions:

1. Does a law enforcement career approximately 20 years ago reasonably call his decisions as a Hearing Examiner into question?
2. Does active membership and service as an officer in a law enforcement social/charitable organization—which includes two active duty West Virginia state troopers who appear as essential witnesses at hearings before the Requester—create a conflict that reasonably calls his decisions into question?

FACTS RELIED UPON BY THE COMMISSION

The Requester, a Hearing Examiner by title, is employed by a state agency. His duties include: conducting hearings; ruling upon evidentiary issues; and rendering decisions containing findings of facts and conclusions of law, upon consideration of the designated record. Such decisions are based on the determination of the facts of the case and the applicable law, and serve to affirm, reverse or modify a decision issued by a separate, but related, state agency in an underlying proceeding.

The Requester worked for over 20 years as a West Virginia state trooper before retiring about 20 years ago. His son is currently a West Virginia state trooper. At each proceeding over which he presides, the Requester discloses to the parties his former law enforcement service, and his son's present service. He does not conduct hearings in the county to which his son is assigned.

The nature of the Requester's agency's proceedings necessarily involves the participation of law enforcement officials as essential witnesses. As a result, many West Virginia state troopers, members of County Sheriff Departments, and municipal police agencies, with whom the Requester has never served in a law enforcement capacity, regularly appear before the Requester.

The Requester is a member and officer of an organization of active and retired police officers, including active and retired West Virginia state troopers. He receives no

compensation for his service. The group is a fraternal organization that meets monthly to socialize and raise funds for charity. Two members of the organization are active duty West Virginia state troopers who appear at hearings as essential witnesses and present evidence before the Requester.

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.

W. Va. Code § 6B-2-5a(b) provides, "In accordance with the provisions of chapter twenty-nine-a of this code, the commission, in consultation with the West Virginia state bar, shall 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.

W. Va. CSR § 158-13-4 (2006) reads, in pertinent part:

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.

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.

4.3. 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 ... in any proceeding in which the judge's impartiality might reasonably be questioned....

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.

4.5. A state administrative law judge shall regulate the judge's extra-judicial activities to minimize the risk of conflict with judicial duties.

4.5.c. Civic and charitable activities.

4.5.c.1. An administrative law judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

4.5.c.1.A. An administrative law judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.

4.5.c.1.B. An administrative law judge should not use or permit the use of the prestige of the judge's office for the purpose of soliciting funds for any educational, religious, charitable, fraternal or civic organization, but the judge may be listed as an officer, director or trustee of such an organization.

ADVISORY OPINION

Before addressing the facts, this Committee must determine whether the Code of Conduct applies to the Requester. Based on the Requester's duties outlined above, it is clear that he fulfills administrative adjudicative duties. Thus, this Committee finds that the Requester meets the statutory definition of Administrative Law Judge (ALJ), and is therefore subject to the provisions of the Code of Conduct for Administrative Law Judges. W. Va. Code § 6B-2-5a

The Requester asks two questions: First, whether a law enforcement career approximately 20 years ago reasonably call his decisions as a Hearing Examiner into question; and Second, whether his active membership and service as an officer in a law enforcement social/charitable organization—which includes two active duty West Virginia state troopers who appear as essential witnesses at hearings before the Requester—create a conflict that reasonably calls his decisions into question.

As to the first question, this Committee recognizes that ALJs bring to the administrative bench a variety of vocation backgrounds. Indeed, the Requester's vast experience in law enforcement was likely a factor in his selection for his present position, since that experience could assist him in his adjudicative duties. As a result, the Committee hereby finds that the Requester's prior service in law enforcement does not compromise the integrity of the administrative judiciary or create the appearance of impropriety. Thus, the Code of Conduct does not require the Requester to disqualify himself from hearing cases even though his agency's proceedings involve the participation of law enforcement officials as essential witnesses. The Requester is directed, however, to continue to recuse himself from proceedings in which his son is a witness, or participated in the investigation.

The second question, however, requires more extensive analysis. As this Committee has previously stated, we are 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. Thus, this Committee must weigh and balance the Requester's conduct (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 association with the fraternal group.

The Code of Conduct expressly permits ALJs to be members and officers of civic organizations. W. Va. CSR § 158-13-4.5.c.1. Nonetheless, membership comes with certain conditions.

W. Va. CSR § 158-13-4.5.c.1.A. reads:

An administrative law judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.

Here, it is not the organization that is likely to appear before the Requester, but two active members thereof. This Committee must determine whether the Requester must recuse himself from those cases where a member of the organization appears as a witness, or is otherwise involved, in a case assigned to the Requester. This Committee finds that the fact that the Requester is a member and officer of a private organization to which the testifying officer's belong does **not** meet the definition of a proceeding in which the judge's impartiality might reasonably be questioned.

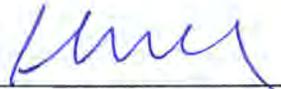
Nonetheless, the Requester should disclose on the record his membership and the testifying officer's membership in the private organization. Either party or counsel would then be in a position to decide whether to file a motion to disqualify the Requester. See ALJ AO 2009-01 (ALJ required to disclose to the parties his previous employment and responsibilities related thereto).

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

Finally, this Committee takes this opportunity to remind the Requester, and other ALJs, that they are expressly prohibited from direct involvement in raising funds for organizations to which they belong. W. Va. CSR § 158-13-4.5.c.1.B. reads:

An administrative law judge should not use or permit the use of the prestige of the judge's office for the purpose of soliciting funds for any educational, religious, charitable, fraternal or civic organization, but the judge may be listed as an officer, director or trustee of such an organization.

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 (2006), *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