

ADMINISTRATIVE LAW JUDGE ADVISORY OPINION NO. 2012-02

Issued on August 2, 2012 By the

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

OPINION SOUGHT

A Manager of Hearing Examiners at a state agency asks whether the Code of Conduct for Administrative Law Judges prohibits the agency's hearing examiners from hearing cases for another, related agency.

FACTS RELIED UPON BY THE COMMISSION

Approximately two years ago, the West Virginia Legislature enacted legislation that resulted in the creation of the Requester's agency. The purpose of the legislation was to establish an independent agency ("independent agency" or "Requester's agency") to hear appeals of an existing agency's ("existing agency") administrative actions. Before the creation of the independent agency, the existing agency also conducted the administrative hearing when a party to the action appealed the action taken by the existing agency. The existing agency employed hearing examiners to conduct such hearings. Those hearing examiners' responsibilities included: conducting hearings; ruling upon evidentiary issues; and drafting decisions/orders containing findings of facts and conclusions of law, upon consideration of the designated record. The hearing examiners sent their draft or recommended decisions/orders to the existing agency's Commissioner's for approval.

With the passage of the legislation, a transition phase was implemented to deal with matters that arose before the effective date of the legislation. The existing agency established an interim policy whereby the existing agency was to retain jurisdiction over incidents that occurred before June 11, 2010. The independent agency has jurisdiction over incidents that occurred after June 11, 2010.

Most of the independent agency's hearing examiners are not lawyers. Their responsibilities 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 the existing agency's action. The final, approved order by the hearing examiner is then provided to the independent agency's Chief Hearing Examiner for approval. If the Chief

were to disagree, he would leave the hearing examiner's final order as is, but articulate his disagreement and the basis thereof in the final order.

Hearings at each agency are similar since each is subject to the Administrative Procedures Act. W. Va. Code § 29A-5-1 *et seq.* There are some differences. For example, the existing agency is the petitioner in hearings conducted by the existing agency. In hearings conducted by the independent agency, however, the party subject to the action is the petitioner.

The Requester's agency's hearing examiners have been directed to preside over pre-June 11, 2010 matters, i.e. they sit as hearing examiners for the existing agency, and follow the existing agency's procedures. Regarding such proceedings, the existing agency creates a file with all of its documents, schedules the hearing for one of the Requester's agency's hearing examiners, and sends the files prior to the hearing directly to the relevant hearing examiner. (For post-June 11, 2010 matters, the independent agency creates a file, schedules a hearing, and forwards the file prior to the hearing to one of its hearing examiners.)

The Requester asks whether the Code of Conduct for ALJs prohibits the independent agency's hearing examiners from sitting as hearing examiners for the existing agency since it is a party to the case and directs the conduct of the judge.¹

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.

¹ The Requester further inquires whether the existing agency is legally obligated to handle its own hearings in cases where the incident occurred before June 11, 2010. This Committee declines to comment thereon, finding this to be an administrative policy decision, not one which implicates the ALJ Code of Conduct.

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....”

Thus, the Commission promulgated the Code of Conduct for Administrative Law Judges, W. Va. CSR § 158-13-4 (2006). The Code 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.

4.1.b. The fact that an administrative law judge rules in favor of the agency by which he or she is employed or serves under contract, standing alone, does not establish a lack of independence.

4.1.c. The compensation of an administrative law judge may not be conditioned upon the outcome of a proceeding before that judge.

4.1.d. No provision in this rule prohibits an agency or administrative judiciary, in the interest of uniformity and consistency, from establishing policies interpreting case law, statutory law, and legislative rules, or from establishing operational policies.

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.b. Adjudicative responsibilities.

4.3.b.1. An administrative law judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, employment status or fear of criticism.

4.3.b.8. An administrative law judge should not be subject to the authority, direction or discretion of one who has served as investigator, prosecutor or advocate in a proceeding before the judge.

4.3.b.9. An administrative law judge shall not be subject to undue or improper influence from the head of an agency whose decision is being reviewed.

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....

ADVISORY OPINION

First, this Committee must determine whether the agency's hearing examiners are subject to the Code of Conduct for Administrative Law Judges (Code of Conduct). In ALJ AO 2012-01, issued today, the ALJ had identical duties to those over whom the Requester herein supervises. Based upon their duties outlined above, it is clear that they fulfill administrative adjudicative duties. Thus, this Committee finds that the Requester's subordinate hearing examiners meet the statutory definition of Administrative Law Judge (ALJ), and are therefore subject to the provisions of the Code of Conduct for Administrative Law Judges. W. Va. Code § 6B-2-5a

Next, this Committee takes administrative notice that many administrative agencies employ or contract with ALJs to preside over matters in which the agency is a party, and/or the ALJs are reviewing the agency's decision. Indeed, the Code of Conduct at § 4.1.b. recognizes that "the fact that an administrative law judge rules in favor of the agency by which he or she is employed or serves under contract, standing alone, does not establish a lack of independence." § 4.3.b.1. further provides: ".... A judge shall not be swayed by partisan interests, public clamor, **employment status** or fear of criticism." (emphasis supplied)

The ALJ Code of Conduct further provides:

4.3.b.8. An administrative law judge should not be subject to the authority, direction or discretion of one who has served as investigator, prosecutor or advocate in a proceeding before the judge.

4.3.b.9. An administrative law judge shall not be subject to undue or improper influence from the head of an agency whose decision is being reviewed.

The Requester asks whether it is permissible for the Requester's agency's hearing examiners to preside over the existing agency's cases since, *inter alia*, the existing agency "directs the conduct of the judge". This Committee finds that the creation of files and scheduling of hearings constitute ministerial tasks. Thus, the tasks the existing agency performs related to the hearings over which the independent agency's hearing examiners preside do not compromise the integrity of the process requiring the Requester's agency's hearing examiners to disqualify themselves.

If, however, the Commissioner of the existing agency were to direct the hearing examiners to rule in the existing agency's favor, or otherwise exercise substantive control over the proceeding or outcome, then the ALJ Code of Conduct would be implicated. Having a process whereby the Commissioner of the existing agency issues the existing agency's final order—even if the Commissioner rejects the hearing examiner's recommended decision—does **not** violate the ALJ Code of Conduct. Rejecting a recommended decision does not constitute interfering with the independent decision-making of the ALJ; hence, it does not violate the ALJ Code of Conduct.

Indeed, the laws of many administrative agencies, including the West Virginia Ethics Commission, provide that the ALJs make recommended decisions to the agency; thereafter, the agency whose decision is being reviewed issues the final order. See, *e.g.*, W. Va. Code § 6B-2-4(j) and W. Va. CSR § 158-17-4.1. (2005).

CONCLUSION

The assignment of the Requester's agency's hearing examiners to hear the existing agency's cases does not violate the ALJ Code of Conduct, so long as the Commissioner of the existing agency does not interfere with the independence of the independent agency's hearing examiners.

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