



## Supplemental Materials for Ethics: Remaining Independent and Neutral

### Case Law on Due Process Right to be Heard by an Impartial Hearing Officer

1. A party attacking a judge's impartiality must demonstrate that the alleged bias stemmed from an extrajudicial source and resulted in an opinion reached on a basis other than what the judge learned from his participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).
2. *Cinderella Career and Finishing Schools, Inc., v. Federal Trade Commission*, 425 F.2d 583, 138 U.S.App.D.C. 152 (1970). FTC Chairman should have recused himself from participating in review of the Hearing Examiner's initial decision because he'd made public statements indicating prejudice.
3. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Mayor who is responsible for the city's finances cannot also be the judge presiding over the traffic court that is the city's primary source of revenue.
4. Board of optometrists could not adjudicate a case against a corporation where board members would receive direct financial benefit if the ruling was adverse to the corporation. *Gibson v. Berryhill*, 411 U.S. 564 (1973).
5. *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984). An administrative agency is a neutral fact-finding body when it is neither an adversary nor an advocate of a party.
6. ALJ had lunch with counsel and witness for school district. It created such an appearance of partiality as to taint the entire proceedings. *Wells v. Del Norte School Dist. C-7*, 735 P.2d 770 (Colo. Ct. App. 1987).
7. *Texaco Refining v. Board of Appeals of the City of Delaware City*, 579 A.2d 1137 (1989). In a tax assessment appeal, the city's attorney simultaneously represented the city as an advocate and acted as an advisor to the Board on legal matters which arose during Texaco's appeal. The appellate court held that when advocacy and advisory functions are combined, it violates the principles of due process.
8. There is a presumption that government officials will perform their function without bias. *State of Alabama ex rel Siegelman v. U.S.E.P.A.*, 911 F.2d 499 (11<sup>th</sup> Cir. 1990).
9. *Beer Garden Inc. v. State Liquor Authority of the State of New York*, 568 N.Y.S.2d 25 (1991). Petitioner's liquor license was revoked by the state liquor authority (SLA). The person who was counsel to the SLA during the

investigation and prosecution was subsequently appointed a commissioner to the SLA. She did not recuse herself from voting when the hearing was concluded. The appellate court annulled and remanded the matter back to the SLA for new proceedings in which this commissioner was to be recused holding that acting as counsel for the board and as commissioner during the course of the same proceeding blurred the separate and distinct functions of prosecution and adjudication.

10. *Davenport Pastures, LP, v. Morris County Board of County Commissioners*, 291 Kan. 132, 238 P.3d 731 (2010): Rancher applied for damages due to board's decision to vacate two roads that provided ranch access. District Court Judge awarded \$30,000. Board appealed and awarded \$4,050 on remand. Rancher appealed. Attorney for board was legal advisor to board, recommended appraiser that board hired as sole expert witness, examined the 3 board members during hearing, advised board members to agree on one damage figure, represented board at all court proceedings against rancher, board agreed on damage amount recommended by expert attorney recommended, and drafted board's report without knowledge of or input by rancher. Rancher's due process rights were violated as multiple roles played by attorney for board created probability of bias that rose to an unconstitutional level.
11. *Absmeier v. Simi Valley Unified School District*, 196 Cal.App.4<sup>th</sup> 311, 126 Cal.Rptr.3d 237 (2011): District's personnel director was dismissed and challenged termination. School board appointed hearing officer to hear challenge "to ensure impartiality." Hearing officer subsequently moved from area "terminated all work and further consideration of the matter." Board hired law firm to review record transcript and exhibits and provide Board with a report and recommendation. Law firm filed 46-page decision which contained findings of fact. Law firm weighed evidence and resolved conflicts in testimony in favor of the district and ruled dismissal should be upheld. Court held law firm had conflict of interest in dual roles as legal counsel and substitute ALJ and could not balance its duty of loyalty to the board with the obligation to be a neutral fact finder. Due process was violated due to law firms bias in favor of board.
12. *Hall v. Superior Court*, 3 Cal.App.5<sup>th</sup> 792 (CA App., 5<sup>th</sup> Dist., Div. 1, 2016): Driver petitioned for a writ of mandamus seeking an order directing the Department of Motor Vehicles to vacate the revocation of his license. Superior Court denied the writ but granted driver relief by remanding to the DMV for a new hearing. Driver filed notice of appeal. Held: DMV Hearing Officer's acts of accepting bribes in other cases violated driver's due process rights. Appropriate action was to vacate the revocation, not remand for new hearing.

### **Florida Cases on Right to be Heard by an Impartial Hearing Officer**

1. Judge must leave the impression of impartiality upon all who appear before the court. *Love v. State*, 569 So.2d 807 (Fla. 1<sup>st</sup> DCA 1990).

2. Litigant is entitled to confidence that hearing officer before whom he or she appears is impartial. *Ducre v. State*, 768 So.2d 1159 (Fla. 2d DCA 2000).
3. Use of non-lawyer hearing officers does not violate due process. Propriety of the proceedings not affected. “if the constitution allows for non-lawyers to sit on the county court bench, it surely allows for non-lawyers to sit as hearing officers in driver’s license suspension hearings.” *Griffin v. DHSMV*, 909 So.2d 538, 30 Fla. L. Weekly D2065 (2005); *Gurry v. DHSMV*, 902 So.2d 881, 05 Fla. L. Weekly D1358 (2005) and *Schweiker v. McClure*, 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982).
4. Extensive participation by trial judge, such as excessive questioning of witnesses, may amount to usurping functions of counsel and be an abuse of discretion and latitude of courts in such respects, *Bumby & Stimpson, Inc. v. Peninsula Utilities Corp.*, 169 So.2d 499 501 (Fla. 3d DCA 1964).
5. By interposing objections and severely limiting scope of cross examination, hearing officer left impression of bias. She went beyond role of fact-finder by extensively questioning witnesses and answering questions for witnesses. Hearing officer abused her discretion when she participated to the point of interposing objections to relevancy and instructing witnesses not to answer questions. *DHSMV v. Pitts*, 815 So.2d 738, 27 Fla. L. Weekly D999 (2002).
6. Hearing officer impermissibly acted as advocate for DHSMV; recessed hearing to locate registration certificate for machine used for motorist’s breath test and then entered it as evidence violating due process rights. *Griffin v. DHSMV*, 909 So.2d 538, 30 Fla. L. Weekly D2065 (2005).
7. Terminated college faculty member requested hearing. College appointed hearing officer to hear case that was one of the board members that voted to fire him. Faculty member filed for writ of prohibition to challenge refusal to disqualify herself from hearing. Writ was granted. *Jones v. Florida Keys Community College*, 984 So.2d 556, 33 Fla. L. Weekly D1294 (2008).
8. Hearing officer is not subject to bias disqualification because of preliminary ruling on an issue. *Dooley v. Florida Keys Community College*, 908 So.2d 1139, 30 Fla. L. Weekly D1919 (2005).
9. Pelham signed the notice of violation, was in charge of the attorneys prosecuting the violations, was the Department’s only witness, reviewed the hearing officer’s findings and issued the final order. “Thus, Pelham was prosecutor, witness, and ultimate judge of the facts and law. Most significantly, in this final role Secretary Pelham necessarily passed upon his own evidence. To approve the hearing officer’s findings of fact and conclusions of law, he had to conclude that his own testimony was competent and substantial. Even with the best of intentions, this can hardly be characterized as an unbiased, critical review.” *Ridgewood Properties v. Dept. of Community Affairs*, 562 So.2d 322, 15 Fla. L. Weekly S367 (’90).

10. Hearing officer was disqualified from presiding over formal administrative proceeding by various statements she made, which objectively demonstrated bias and prejudice against one party. *World Transp. Inc., v. Central Florida Regional Transportation*, 641 So.2d 913, Fla.App.5.Dist. (1994)

### **Combining Investigative, Prosecutorial and Adjudicative Functions Within One Board, Commission or Agency is NOT Necessarily a Violation of Due Process**

It is not unusual to receive a “due process” objection to the action of the agency or to the hearing itself on the ground that a board, commission or agency cannot conduct investigative hearings regarding a matter and subsequently conduct an adjudicative hearing regarding that same matter. It is often argued that combining investigative, prosecutorial and adjudicative functions within a single agency either violates

the right to a reasoned decision based solely on the record, due to *ex parte* contact

OR

the right to impartial decision-maker.

However, the case law is clear that the combination of investigative and adjudicative functions does not, in and of itself, constitute a due process violation.

Neither an individual ALJ nor a tribunal can be directly involved as a prosecutor in a case and simultaneously or subsequently adjudicate that same case. Neither can the individual ALJ or the tribunal have a direct or indirect financial interest in the outcome. See below:

*Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456 (1975): Physician had license suspended by medical board and appealed. Federal district court (368 F.Supp. 796) held statutes authorizing suspension without the intervention of an independent, neutral and detached decision-maker were unconstitutional and unenforceable. The board appealed. U.S. Supreme Court held members of the medical board were not constitutionally precluded from themselves holding adversarial license suspension hearing based on the Board’s own investigation and did not establish prejudice or prejudgment on the part of the board.

School board may fire striking teachers for violating anti-strike law even though the board was the party against which they were striking. Familiarity with the facts and prior positions on policy don’t themselves disqualify. *Hortonville School Dist.1 v. Hortonville Educ. Assoc.*, 426 U.S. 482 (1976).

“...Pelham signed the notice of violation. Pelham was in charge of the attorneys prosecuting the alleged violations. Pelham was the Department’s only witness in its case in chief. Pelham reviewed the hearing officer’s findings. Pelham issued the final order. Thus, Pelham was prosecutor, witness, and ultimate judge of the facts and law. Most significantly, in this final role Secretary Pelham necessarily passed upon his own evidence. To approve the hearing officer’s findings of fact and conclusions of law, he had to conclude that his own testimony was competent and substantial. Even with the best of intentions, this can hardly be characterized as an unbiased, critical review.” *Ridgewood Properties, Inc., v. Dept. of Community Affairs*, 562 So.2d 322, 15 Fla. L. Weekly S367 (1990).

*Rand v. City of New Orleans*, --- So.3d ----, 2012 WL 6218289 (La.App. 4 Cir.), 2012-0348 (La.App. 4 Cir. 12/13/12): Administrative hearing process following a citation under city's automated traffic enforcement system (ATES), under which a hearing officer hired by the city as an independent contractor occupied inconsistent positions as both prosecutor and adjudicator, violating the due process rights of cited motorists. Due process requires that a decision-maker not have a direct or indirect financial stake which would give a possible temptation to the average person to make him/her partisan toward maintaining a high level of revenue generated by his adjudicative function.

*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System*, 211 Ca.App. 4<sup>th</sup> 522, 149 Cal.Rptr.3d 729 (Cal.App. 2012): Same attorney serving as both prosecutor in the hearing regarding retiree's claims and the advising staff person from the agency to the PERS Board when the board made its decision did not violate due process because the person did not vote or act in a supervisory capacity.

*Haygood v. Louisiana State Board of Dentistry*, 101 So. 3d 90, 2011-1327 (La.App. 4 Cir. 9/26/12): Dual role played by Louisiana State Board of Dentistry's general counsel in acting as both adjudicator over disciplinary proceedings and as advocate on behalf of Board by cross-examining witnesses, supplying objections to complaint counsel, and questioning dentist's credibility violated dentist's due process right to a fair hearing before an impartial adjudicator.