

Office of Administrative Hearings
Code of Hearing Officer Conduct
Opinion No. 2007-01

TO: Kristin Knudsen, Chair
Workers' Compensation Appeals Commission

FROM: Terry L. Thurbon
Chief Administrative Law Judge

DATE: January 19, 2007

You have asked my opinion on whether the Code of Hearing Officer Conduct (2 AAC 64.010 – 2 AAC 64.050) permits you to participate in the appeal (request for extraordinary review) from the Workers' Compensation Board ("board") decision in the Scott A. Dennis matter (your case number 07-001). This confirms the oral opinion I provided to you yesterday that as long as you believe you can be fair and impartial to the parties in hearing the matter, no conflict of interest or other violation of the code will arise from your decision not to recuse yourself at this stage, if that is your ultimate decision. I base this opinion on a review of (1) the documents you provided¹ and the facts you described in our telephone conversations, as summarized in the "Background" below; (2) the Code of Hearing Officer Conduct provisions; and (3) commentary to the Alaska Code of Judicial Conduct, which under 2 AAC 64.030(c) can be used as a guide in interpreting and applying the Code of Hearing Officer Conduct.

This opinion is limited to the specific circumstances described below. This opinion does not address any questions concerning recusal or disqualification as to any other case or under other circumstances that could arise in the Dennis matter in the future.

Background

Prior to being appointed chair of the Workers' Compensation Appeals Commission ("commission"), you served as an assistant attorney general for the State of Alaska. When you were an assistant attorney general, you testified before one or more committees of the legislature on a then-pending bill that made statutory changes to title 23 of the Alaska Statutes. You were not a legislator. You were not a legal advisor to the legislature. You testified before the legislative committees in your capacity as a legal representative of an executive branch agency, the Department of Labor and Workforce Development. Your employment as an assistant attorney general terminated when you were appointed chair of the commission more than a year ago.

¹ You provided the Workers' Compensation Board's December 20, 2006 Interlocutory Decision and Order; Batchelor & Associates' January 10, 2007 Request to Permit Chair Kristin Knudsen to Be Excused from Participation in the Present Matter; Griffin & Smith's January 12, 2007 Limited Non-opposition to Scott Dennis' Request to Permit Chair Kristin Knudsen to Be Excused from Participation in the Present Matter; Daniel Cadra's January 17, 2007 Response of State of Alaska to Scott Dennis' "Request to Permit Chair Kristin Knudsen to Be Excused from Participation in the Present Matter" and Attachment 1 thereto.

In the Scott A. Dennis matter, a question was raised concerning AS 23.30.010, one of the provisions affected by the bill on which you testified. The board asked the parties to “conduct research into the legislative history of AS 23.30.010 and provide a complete and thorough presentation to the Board.”² Beginning at page 21 of its decision, in a section captioned “Legislative History of the 2005 Amendments to the Workers’ Compensation Act,” the board quoted or paraphrased testimony of committee hearing witnesses. Specifically, the board’s decision describes testimony or statements attributed to Assistant Attorney General David Floerchinger, Workers’ Compensation Division Director Paul Lisankie, you in your then-role as an assistant attorney general, and the then-Deputy Attorney General Scott Nordstrand.

The board went on at pages 27 through 36 of its decision to characterize the parties’ arguments concerning the legislative intent. In those ten pages, the board mentioned the parties’ reliance on Mr. Floerchinger, Mr. Lisankie’s and your testimony before the legislature.

In the Findings of Fact and Conclusions of Law section on the statutory issue (pages 37-42), the board’s decision purports to rely on your testimony and that of Mr. Floerchinger and Mr. Lisankie in reaching what it characterizes as a finding about the effect of the 2005 statutory amendments. The board’s decision (page 41) also sets out what purports to be findings about some of your testimony, comparing in a conclusory fashion the predicates for your testimony to the situation in Mr. Dennis’ case.

Through counsel, Mr. Dennis has asked that you be excused from participating in the case because the parties’ briefing below and the board’s decision focused on your advocacy before the legislature. You have asked me whether your role as an advocate during the legislative process gives rise to a conflict or would otherwise violate the Code of Hearing Officer Conduct should you decide not to recuse yourself from hearing the appeal.

Analysis

Under the Code of Hearing Officer Conduct, you must refrain from hearing a case that presents a conflict of interest.³ Under the code, a conflict of interest would exist if you “previously represented or provided legal advice to a party on a specific subject” that would be before the commission in the Dennis appeal.⁴ Certainly, if you had previously represented one of the parties to the appeal on the specific subject of Mr. Dennis’ workers’ compensation claim, you would have a conflict within the meaning of the code. Your prior representation of the executive branch before the legislature on the general matter of then-pending legislation is different.

General legal work such as drafting, testifying about or advocating for statutory or regulatory changes does not give rise to a conflict of interest precluding a hearing officer from later applying the statutes or regulations in his or her capacity as a neutral. If it did, every principal agency head or board or commission within the executive branch would have a conflict preventing that individual or entity from hearing and deciding cases that involve statutes about

² December 20, 2006 Interlocutory Decision and Order at p. 1.

³ 2 AAC 64.040(a).

⁴ *Id.* at subsec. (a)(2).

which they testified or regulations the agency adopted. The code modifies the word “subject” with “specific” precisely so that work of a general nature does not disqualify a person from later hearing cases raising specific subjects just because the general work shares something in common with the case-specific subjects. To conclude otherwise would be to say, for instance, that no workers’ compensation attorney or non-attorney lobbyist or citizen activist who advocated for or against statutory changes to workers’ compensation law could serve on the board without declaring a conflict in every case involving laws on which the person had previously advocated a position before a court, the legislature or an administrative agency.

In short, your situation does not present a conflict under the code. Instead, the parties’ and board’s use of your testimony before the legislature raises a question about your ability to conform to the canon in 2 AAC 64.030(b)(3) requiring you to perform the hearing function impartially. The canon provides that you “may not be swayed by partisan interests or fear of criticism.”⁵ If you are not predisposed to decide the issues in Mr. Dennis’ case in a particular way, but rather will keep an open mind and fairly consider the parties’ arguments, notwithstanding the positions you, former your colleague or your former client agency advocated before the legislature, you should have no problem conforming to the impartiality canon. If you do not believe you can be fair and impartial to the parties, then you should recuse yourself from the appeal.

If you have any questions about this opinion, please contact me.

⁵ 2 AAC 64.030(b)(3)(C).