Office of Administrative Hearings
Code of Hearing Officer Conduct
Opinion No. 2008-01

TO: Kristin Knudsen, Chair
Workers' Compensation Appeals Commission

FROM: Terry L. Thurbon
Chief Administrative Law Judge

DATE: February 22, 2008

You have asked my opinion on whether the Code of Hearing Officer Conduct (2 AAC 64.010 – 2 AAC 64.050) precludes you from serving on a three-member panel of commissioners to hear appeals raising legal issues requiring application/interpretation of statutory amendments enacted in legislation regarding which you provided legal advice when serving as an assistant attorney general. My understanding is that this question arose in two appeals, in each of which one party has asked that you recuse yourself because of your previous testimony before the legislature and/or your (presumed) role in drafting a bill review letter on the 2005 amendments to AS 23.30. Specifically, they have asserted that you have a conflict in hearing the appeals, or otherwise cannot be impartial, because you necessarily formed an opinion about the meaning or effect of certain amendments.

For the reasons explained below, even if you formed an opinion on the meaning or effect of amendments to AS 23.30 in your past work as an advocate and advisor, no conflict of interest or other violation of the code will arise from your decision not to recuse yourself, if that is what you decide, provided that you can be fair and impartial to the parties in hearing the appeals and will objectively consider their legal arguments. I base this opinion on a review of (1) the parties' recusal-related filings[1] and the facts summarized in the "Background" below[2]; (2) the Code of Hearing Officer Conduct provisions; (3) the July 18, 2005 bill review letter for the legislation that amended AS 23.30; and (4) 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 under other circumstances that could arise in these or other appeals in the future.

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[1] Specifically, I reviewed the following filings: December 10, 2007 Employee[']s AS 23.30.008(l)(4) Objection and December 17, 2007 Employer/Carrier's Opposition to Employee's AS 23.30.008(l)(4) Objection, both filed in *Terrasond, LTD v. Iversen* (AWCAC Appeal No. 07-046); December 6, 2007 Motion for Recusal of Commission Chair, with accompanying affidavits of Soule and Faust, and December 17, 2007 Memorandum in Opposition to Motion for Recusal of Commission Chair, all filed in *Municipality of Anchorage v. Faust* (AWCAC Appeal No. 07-028).

[2] Some of the background facts were drawn from Code of Hearing Officer Conduct Opinion 2007-01 in which a question about your past advocacy before the legislature regarding the AS 23.30 amendments was addressed.

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 AS 23.30. 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.

Before the bill was signed into law, the Department of Law prepared a bill review letter—a type of Attorney General's Opinion that summarizes the effect of the bill's provisions and identifies potential constitutional or other legal infirmities for consideration by the governor in deciding whether to sign the bill into law. A bill review letter functions to give the governor objective advice. It is not a form advocacy nor is it legal advice to anyone other that the public officer or entity with whom the attorney has an attorney-client relationship.[3]

A party in each of the two appeals asserts that the bill review letter addresses the meaning or effect of a change in the law at issue in the appeals. They presume that you were the primary author of the bill review letter, or at least played a large role in the analyses that went into the letter. You are precluded by attorney-client privilege from disclosing the extent of your involvement in drafting the bill review letter.[4] For purposes of this opinion, therefore, I will assume that you drafted all portions of the bill review letter that discuss the provisions at issue in the two appeals, and that the letter reflects your objective legal advice to the governor.

Your employment as an assistant attorney general terminated when you were appointed chair of the commission more than two years ago.

Through counsel, one party to each of the appeals referenced in note 1 has asked that you recuse yourself from participating as part of the three-member panel constituted of yourself as chair and two representative commissioners. Collectively, they assert that you have a conflict of interest or otherwise cannot be impartial because (1) you testified before the legislature on the amendments to AS 23.30; (2) you (presumably) were a primary drafter of the bill review letter; (3) you have formed an opinion about the meaning or effect of provisions at issue in the appeals; and (4) that you have professionally counseled the parties through the bill review letter because they are citizens of the state. You have asked me whether your role as an advocate during the legislative process or in advising the governor through the bill review letter 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 appeals.

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[3] Under AS44.23.020(a), the attorney general is "the legal advisor of the governor and other state officers." The attorney general is required to "furnish[] written legal opinions to the governor, the legislature, and all state officers and departments as the governor directs [and to] give legal advice on a law, proposed law, or proposed legislative measure upon request by the legislature or a member of the legislature[.]" These duties do not create an attorney-client relationship between the attorney general and individual citizens of the state.

[4] My understanding is that you asked the attorney general whether the executive branch would waive attorney-client privilege so that you could describe your role in drafting the bill review letter but the decision was that the privilege will not be waived.

Analysis

Under the Code of Hearing Officer Conduct, you must refrain from hearing a case that presents a conflict of interest.[5] 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 appeals.[6] As explained in Code of Hearing Officer Conduct Opinion 2007-001, if you had previously represented a party to one or both of these appeals on the specific subject of the appellant's workers' compensation claim, you would have a conflict within the meaning of the code, but your prior representation of the executive branch before the legislature on the general matter of then-pending legislation does not give rise to a conflict. Similarly, your presumed role as an advisor to the governor on the legislation, and any opinion you may have formed on the meaning or effect of the AS 23.30 amendments in that role, does not give rise to a conflict of interest because the governor, not individual citizens who might be affected by the changes in the law, was the attorney general's client.

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 which they testified or regulations the agency adopted.

Forming an opinion about the meaning or effect of law does not create a conflict of interest for a hearing officer later tasked with hearing a case in which the parties dispute the meaning or effect of the law. If it did, no hearing officer could hear a case raising the same legal issue previously adjudicated in another matter heard by the hearing officer.

In establishing a standard for determining whether a hearing officer's or administrative law judge's previous legal work creates a conflict of interest, the code modifies the word "subject" with "specific" precisely so that work of a general nature and work representing or advising clients who are not parties to cases before the hearing officer does not disqualify the hearing officer from cases that share legal or policy issues in common with the general work or previous representation and advice. To conclude otherwise would be to say, for instance, that no workers' compensation attorney who advocated for or against statutory changes to workers' compensation law, or who functioned as the Workers' Compensation Board hearing officer, or served as a superior court judge hearing workers' compensation cases before the commission was created, could serve on the commission 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, or formed an opinion while serving as a legal adviser or a neutral adjudicator.

Your situation does not present a conflict of interest under the code. Instead, the concerns about your past work on the legislation, and about any opinion you may have formed or expressed when working on the bill review letter, raises a question about your ability to conform

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5 2 AAC 64.040(a).

6 *Id*. at paragraph (a)(2).

to the canon in 2 AAC 64.030(b)(3) requiring you to perform the hearing function impartially. The canon provides, in pertinent part, that you must "faithfully follow the law" and "may not be swayed by partisan interests or fear of criticism."[7] Hearing officers regularly face legal issues on which they may have formed an opinion about the meaning or effect of a law during their education or professional experience, or even may have expressed an opinion through a ruling in a prior case. An opinion expressed in a bill review letter is not so very different from an opinion expressed in an adjudicatory decision: both are supposed to reflect the neutral, objective analysis of the author, informed by his or her own research and the arguments (if any) presented by others.

Whether in response to a reconsideration motion or through briefing in a new case raising the same legal issues, hearing officers frequently revisit their previously formed legal opinions. They are obliged under the code of conduct to follow the law faithfully, even if that means (as it sometimes does) reversing their own prior decisions. They also are obliged under the code to follow the law and, if a closer examination of the law so dictates, to change their previously formed opinions, without regard to whether they might be criticized for the inconsistency. A violation of the code, therefore, could occur if a hearing officer, fearing criticism, failed to objectively consider and decide legal issues, and faithfully follow the law in doing so, whether or not the hearing officer had previously formed or expressed an opinion on the issues. The forming or holding of a general legal opinion does not, in and of itself, reasonably call into question an adjudicator's ability to hear a particular case impartially.[8]

If you are not predisposed to decide the issues in either of the two appeals in a particular way, but rather will keep an open mind and fairly consider the parties' legal arguments, notwithstanding the positions you previously advocated before the legislature or any opinions you previously formed or expressed in the bill review letter or elsewhere, 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 appeals.

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

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[7] 2 AAC 64.030(b)(3)(A) & (C).

[8] 2 Richard Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 9.8 at 648-649 (4th ed. 2002) (explaining that "[a] prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification)."