Office of Administrative Hearings
Code of Hearing Officer Conduct
Opinion No. 2011-01

TO: Executive Branch Hearing Officers and Administrative Law Judges

FROM: Terry L. Thurbon
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DATE: July 18, 2011

Recently, questions have been raised by state employees subject to the Code of Hearing Officer Conduct (2 AAC 64.010 – 2 AAC 64.050) about issues having the common theme of potential improper influence on decisionmaker deliberations. In particular, questions have been asked about whether involvement of non-deliberators in the deliberative process as staff assistants and peer reviewers or supervisors of the decisionmaking individual or entity runs afoul of the canons of conduct on decisional independence, by facilitating improper *ex parte* contacts or otherwise creating the fact or appearance of improper influence. The concerned individuals have sought guidance on remaining compliant with the code of conduct.

Instead of issuing separate opinions on discrete questions, I am issuing this consolidated opinion. It will be distributed widely, not just to those who raised the questions and to hearing officers and administrative law judges who may be grappling with similar ones, but also to executive branch adjudicators who may benefit from being aware of the ethical concerns hearing officers and administrative law judges must sometimes address in the deliberations leading up to final executive branch decisionmaking.

Background

Alaska's executive branch employs or contracts with hearing officers and administrative law judges who are subject to the Code of Hearing Officer Conduct.[1] Some are part of Alaska's central hearing panel, the Office of Administrative Hearings (OAH), for which the governing statutes provide broad jurisdiction and a mandate to promote decisional independence.[2] Others are part of in-house hearing units with narrowly focused jurisdiction.[3] Still others are engaged by contract to conduct hearings in single case or small numbers of cases in a specific subject area.[4] Collectively, they hear a wide range of cases using three decisionmaking models:

(1) the hearing officer/administrative law judge is the decisionmaker, individually or as a member of a panel;

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[1] AS 44.64.050(b); AS 44.64.200(4); 2 AAC 64.010(b).

[2] *See* AS 44.64.020(a)(4) (requirement to enhance decisional independence); AS 44.64.030 (jurisdiction).

[3] *E.g.*, Department of Health and Social Services (public assistance matters); Department of Labor and Workforce Development (employment security claims); Division of Motor Vehicles (driver licensing implied consent matters); Regulatory Commission of Alaska (regulated utility matters); Workers' Compensation Board (workers' compensation claims); Workers' Compensation Appeals Commission (workers' compensation appeals).

[4] *E.g.*, Vocational Rehabilitation matters; Individuals with Disabilities Education Act (IDEA) matters.

(2) the hearing officer/administrative law judge hears the case on behalf of and prepares a proposed decision or recommendation for consideration by the decisionmaker, which is an agency head, board or commission;

(3) the hearing officer/administrative law judge assists a decisionmaker (often a board or commission) to hear the case, by some combination of handling prehearing matters, presiding at the hearing, assisting a presiding officer, advising on legal issues, and drafting orders and decisions.

Whether functioning as decisionmaker, recommender or advisor, hearing officers and administrative law judges engage in deliberative processes that sometimes include others. They might be called upon to assist final decisionmakers—a department head or a regulatory board—with case-specific deliberations. They might confer with fellow panelists, or with other colleagues in their work groups of professional neutrals. They might follow formal or informal procedures for obtaining pre-decision peer review, including substantive and editorial feedback.[5]

The professional neutrals of some adjudicatory agencies or work groups include staff attorneys, law clerks, interns or externs, any of whom might be tasked by the hearing officer or administrative law judge to assist with various aspects of a case. When deliberating, a decisionmaker occasionally will seek independent legal advice from an attorney who has not appeared on behalf of a party to the case. Decisionmaking bodies such as boards and commissions, accustomed to conducting meetings with assistance from staff, sometimes will seek to include staff in deliberation sessions on adjudicatory matters heard on behalf of the body by a hearing officer or administrative law judge. These are circumstances that give rise to questions about the hearing officers' and administrative law judges' ethical obligations to foster both the fact and appearance of decisional independence.

Two particular questions are addressed in this opinion:

- whether a formal peer review procedure that consists of multiple reviews, including a supervisory review, interferes with the decisional independence of, or results in improper *ex parte* communication with, the decisionmaker;

- whether a hearing officer or administrative law judge should refrain from participating in a closed deliberative session if the decisionmaker plans to include non-deliberators such as staff.

The overarching question is who may appropriately be involved in the private, deliberative process for an adjudication without undermining decisional independence, imperiling a party's due process protections or creating an appearance of improper influence, thereby calling into question compliance with the code of conduct.

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[5] For example, one agency's in-house hearing unit has developed a formal, two-stage peer review procedure that calls for a team of peers and then a supervisor to review all draft decisions prior to issuance as final decisions. In contrast, other hearing units and the central hearing panel (OAH) have less formal methods of obtaining pre-decision peer review by consulting colleagues and soliciting feedback on drafts.

Analysis

In making hearing officers and administrative law judges subject to a code of conduct, the legislature prescribed five fundamental canons of conduct to be incorporated into the code. Three are implicated by the questions addressed in this opinion. Hearing officers and administrative law judges must

> (1) uphold the integrity and independence of the office;
> (2) avoid impropriety and the appearance of impropriety;
> (3) perform the duties of the office impartially and diligently[.[6]]

The code of conduct regulations elaborate on how to comply with these canons. The pertinent parts of 2 AAC 64.030(b) provide as follows:

> (1) to uphold the integrity and independence of the office and of the hearing function, a hearing officer or administrative law judge shall … avoid improper ex parte communications with private and agency parties about the subject of a hearing request, so that the integrity and independence of the office and the hearing function will be preserved;
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> (2) to avoid impropriety and the appearance of impropriety, a hearing officer or administrative law judge shall
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> (A) respect and follow the law;
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> (B) act in a manner that promotes public confidence in the hearing function;
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> (3) to perform the duties of the office or of the hearing function impartially and diligently, a hearing officer or administrative law judge
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> (A) shall faithfully follow the law;
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> (C) may not be swayed by partisan interests or fear of criticism;
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> (F) shall refrain from initiating, permitting, or considering improper ex parte communications[.]

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[6] AS 44.64.050(b)(1)-(3). Under 2 AAC 64.030(a), the fundamental canons prescribed by statute are also part of the code of conduct created by regulation.

By express adoption in the Code of Hearing Officer Conduct, the Alaska Code of Judicial Conduct commentary guides application of these requirements.[7]

Under the latter code, it is permissible for a judge to discuss the substance or merits of a case with other judges, with law clerks, and even with some court staff, provided that the person with whom the judge discusses the case is not forbidden to take part in the neutral adjudicative function due to a conflict or other disqualification.[8] The judge, however, is not authorized to engage in *ex parte* communications with staff such as investigators or court employees whose functions include providing evidence in proceedings before the court.[9]

Similar concerns arise under the Code of Hearing Officer Conduct with respect to executive branch adjudications, including during decisionmaker consideration of the case when the decisionmaker is engaged in the functional equivalent of jury deliberations.[10] The Code of Hearing Officer Conduct requires hearing officers and administrative law judges to uphold and preserve the independence of the office by, among other things, avoiding improper *ex parte* communications.[11]

> "[I]improper ex parte communication" means an oral or written communication between a decision-maker, whether intermediate or final, and a party to an administrative hearing, a witness in a proceeding, or a person trying to influence the decision-maker that occurs outside of the presence of the other parties and without notice and an opportunity to participate being given to the other parties[.[12]]

The obligation does not stop at avoiding such communications. Those subject to this code must refrain from even permitting, as well as from initiating or considering, such communications.

In short, hearing officers and administrative law judges have an ethical duty to prevent themselves and, to the extent possible, the decisionmakers for whom they hear cases from being influenced, or appearing to be influenced, in their decisionmaking by private contacts with people not within the group of neutrals who appropriately can take part in the adjudication deliberative process. The hearing officer or administrative law judge who heard the case can take part in the deliberative process, even if the deliberations occur in private—in executive session, for instance.[13] An independent legal advisor who did not hear the case for the decisionmaker

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[7] 2 AAC 64.030(c) (adopting the commentary and decisions of the Alaska Code of Judicial Conduct as guidance for the Code of Hearing Officer Conduct).

[8] Commentary on Canon 3B(7)(d), Alaska Code of Judicial Conduct.

[9] *Id*. (using the examples of custody investigators and juvenile intake officers as court staff with whom a judge may not privately discuss the case).

[10] The Alaska Supreme Court has characterized the deliberations of a board considering disciplinary action as "the functional equivalent of a jury deliberation." *Amerada Hess Pipeline Corp. v. Regulatory Comm'n of Alaska,* 176 P.3d 667, 677 (Alaska 2008).

[11] 2 AAC 64.030(b)(1).

[12] 2 AAC 64.990(a)(13).

[13] *Storrs v. State Medical Board*, 664 P.2d 547, 553 (Alaska 1983) (indicating that the State Medical Board properly included the hearing officer, who heard a complex case with an extensive record, and prepared a lengthy proposed decision for the board's consideration, in the deliberative session, to provide valuable assistance to the board).

likely can provide procedural advice, though whether this can occur in an off-the-record deliberative session is questionable.[14]

The ethical duty to prevent the fact and appearance of improper influence does not preclude use of peer review procedures or demand that deliberations be carried out on the record, in open session, if they involve only the decisionmaker and the hearing officer or administrative law judge. But it does dictate that the hearing officer or administrative law judge take appropriate steps to ensure that he or she complies with the code of conduct while participating in the deliberative process. This might require that he or she counsel colleagues and decisionmakers about the ethical and legal—particularly due process—implications of involving non-neutrals in deliberations, or that he or she disclose or report such involvement if *ex parte* communications result.[15]

Even if the decisionmaker is not in fact influenced by improper *ex parte* communications, the communications are impermissible because they create an appearance of improper influence. So concerned was the legislature about the fact and appearance of improper influence flowing from *ex parte* communications that it made initiating such communications, directly or indirectly, with "the hearing officer assigned to the hearing or the individual, board, or commission with authority to make the final decision" a violation of the executive branch and legislative branch ethics acts.[16]

Moreover, the appearance, not just the fact, of improper influence can result in violation of a party's due process rights. The Alaska Supreme Court concluded as much in a professional license disciplinary action in which a non-deliberator—the board's Executive Director—was included in the board's deliberative session, to serve as scrivener and advise on procedural matters.[17] Organizationally, the Executive Director was the nominal supervisor of the staff who prosecuted the disciplinary action, but she had not taken an active role in that prosecution. The court was satisfied that, though she had been present, she had not participated in the deliberations and "that the purposes of her attendance were entirely ethical."[18] Nonetheless, the court found a due process violation, reasoning that parties associated with the prosecution or defense should be excluded from the deliberations "to assure both the fact and appearance of impartiality in the Disciplinary Board's decisional function[.]"[19]

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[14] *See Skvorc v. Alaska Board of Personnel*, 996 P.2d 1192, 1206 (Alaska 2000) (concluding that no conflict of interest occurred when an assistant attorney general attended a personnel board hearing and gave the board advice on procedural matters because she was from a different office than that of the attorney prosecuting the case before the board and "she did not attend the deliberations").

This opinion is not intended as advice to agencies about the proper role of independent legal advisors who have not heard the case on behalf of the decisionmaker. Such advice is within the purview of the attorney general as legal advisor to state agencies and officials, not of the state's chief administrative law judge when providing ethics guidance under the Code of Hearing Officer Conduct. An agency or official seeking advice on what role an independent advisor can play in executive branch adjudications should contact the attorney general's office.

[15] When inadvertent or unavoidable *ex parte* communications do occur, the usual way to minimize the risk of a due process problem is to disclose the communications to the parties so that they have an opportunity to respond, perhaps seeking disqualification of the adjudicator(s) potentially influenced by the communications.

[16] *See* AS 24.60.030(i); AS 39.52.120(e).

[17] *In re Robson*, 575 P.2d 771, 775 (1978).

[18] *Id.*

[19] *Id.*

Many executive branch decisionmakers wear multiple hats, only one of which is that of adjudicator. Non-adjudicative or pre-adjudication deliberations may be subject to different legal requirements. This opinion does not endeavor to address due process or other legal concerns about who can be present during those deliberations, nor would it be appropriate to do so in this context. However, the conduct of deliberations by the individual, panel or entity charged with making a decision as part of or following adjudication by a hearing officer or administrative law judge implicates the hearing officer's or administrative law judge's ethical obligations under the code of conduct. Accordingly, the following guidelines are provided to assist with code compliance regarding decisional independence as affected by deliberative processes:

1. Pre-issuance review of decisions by peers, including supervisors, and other colleagues such as staff attorneys and law clerks, is perfectly permissible as long as the reviewer is a member of the neutral group and does not function as a conduit for influence from an outsider such as a party to the case.

2. If a hearing officer or administrative law judge, who chooses to or is required to submit a decision for pre-issuance peer review, discovers that the chosen or assigned reviewer is not an appropriate neutral by virtue of the reviewer's communications with or role relative to a party, he or she should decline to receive feedback from the reviewer or, if the discovery comes too late, should disclose to the parties the circumstances suggesting that *ex parte* communication has occurred, so that the parties may seek disqualification, if appropriate. It may also be appropriate for the hearing officer or administrative law judge to take other steps short of disqualification to mitigate the impact of the particular communication that has occurred.

3. A hearing officer or administrative law judge may properly invoke decisional independence to reject peer review feedback. This is particularly so if the feedback calls for the hearing officer or administrative law judge to change findings of fact, conclusions of law, recommendations or results. But promoting decisional independence does not trump other code of conduct obligations, such as the requirements to faithfully follow the law, to be impartial, not to be swayed by partisan interests, and to promote public confidence in the hearing functions. Decisional independence should not be invoked to evade scrutiny of compliance with these other code of conduct requirements.

4. A hearing officer or administrative law judge who hears a case on behalf of another executive branch decisionmaker may be present for the decisionmaker's closed deliberations, to provide advice and assistance regarding the specific case, but generally should not remain present if individuals other than the decisionmaker (non-deliberators) also will be present in the closed session.

5. If a hearing officer or administrative law judge discovers that non-deliberators are expected to be present during adjudicative deliberations, he or she should inform the decisionmaker of any potential due process and other concerns of conducting closed deliberations with non-deliberators present. If the decisionmaker determines to go

forward in a closed session that includes non-deliberators (other than the hearing officer or administrative law judge), the best practice would be for the hearing officer or administrative law judge to decline to be present for the closed session and to so state on the oral record, if possible, and in a written notice to the case parties. If he or she does not leave the closed session, it may become necessary for him or her to disclose to the case parties the fact of the non-deliberator's presence and the content of any *ex parte* communication that occurred during the closed session.

6. If a hearing officer or administrative law judge discovers only after joining the decisionmaker's closed session (for instance, by teleconference) that a non-deliberator is present, he or she should raise the concerns discussed in paragraph 5 above before the non-deliberator communicates about the merits of the case, if possible. If he or she discovers that the non-deliberator has already so communicated, the hearing officer or administrative law judge should recommend that those communications be disclosed to the case parties. The best practice in most cases would be for the hearing officer or administrative law judge to leave the session and make such a disclosure to the case parties if the decisionmaker has declined to do so.

The above guidelines may not embody all actions a hearing officer or administrative law judge could take to avoid or mitigate the fact or appearance of improper influence resulting from the deliberative process construct used in a given case. Hearing officers and administrative law judges are encourage to think carefully about the interplay between adjudication deliberative process and the ethical canons with which they must comply, and to raise additional questions if any occur. Irrespective of other steps that can be or are taken, reasonable reliance on the guidelines above will constitute mitigation under 2 AAC 64.060(c) in the event of an alleged violation of the code of conduct regarding the subjects addressed herein.

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