NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion 594 - 11/2/88 (21-88)

Topic: Administrative Law Judges; Applicability of Code of Judicial Conduct.

Digest: Administrative Law Judges are not prohibited from acting as arbitrators in circumstances where it is unlikely that their decisions as arbitrators will be submitted to their agency for administrative review.

Code of Judicial Conduct: Canon 5E

Code: Canons 8,9

QUESTION

May administrative law judges (ALJs) employed by the Public Relations Board (PERB) serve as arbitrators in hearings held under the auspices of the American Arbitration Association (AAA) and/or the Waterfront Commission of New York Harbor (Waterfront Commission)?

The hearings held before the AAA would be unrelated to the official responsibilities of the ALJs, while those held before the Waterfront Commission would be deemed part of their expanded official duties.

OPINION

Central to our analysis of the question posed is a determination of whether the Code of Judicial Conduct (CJC) applies in all of its particular prohibitions to ALJs. For the reasons hereinafter set forth, we believe that the CJC should not be so applied, and that the ability of ALJs to act as arbitrators should ordinarily be determined by the administrative agencies to which they are assigned.

Canon 5E of the CJC states, "A judge should not act as an arbitrator or mediator." The CJC's Compliance Section makes that prohibition applicable to all full-time judges, and defines "judge" to include:

> "Anyone, whether or not a lawyer, who is an officer of a *judicial system* performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate . . . ." (Emphasis added.)[1]

Consistent with the principles contained in Canons 8 and 9 of the Lawyer's Code of Professional Responsibility (CPR), ethics committees have extended the applicability of the CJC to employees of administrative agencies performing quasi-judicial functions, thereby seeming to construe the term "judicial system" to include administrative agencies which have some adjudicatory aspect. *See, e.g.*, N.Y. State 365 (1974); N.Y. State 337 (1974); N.Y. State 327 (1974); ABA Inf. 1522 (1986). Whether the committees are literally applying the CJC itself, or merely applying its principles by analogy to the less specific provisions of the CPR, is problematic. It usually makes no difference. The analysis and the result would be essentially the same. Questions relating to political activity, partiality or prohibited conflicts of interest are often more easily addressed by applying the CJC, rather than the CPR, where the object of inquiry is a lawyer performing a quasi-judicial function.

Beyond these areas of common concern, however, it is necessary to consider whether it makes sense to subject persons who are more properly regarded as part of an administrative — rather than a judicial — system to the full rigor of the CJC, in all its many particulars. We believe that it does not make sense to do so. Careful scrutiny is especially appropriate for those provisions of the CJC that are made applicable only to full-time judges (*viz.*, Canon 5C(2), D, E, and G, and Canon 6C). Indeed, the question posed provides an excellent illustration of why the principles contained in the CJC must be carefully — and only partially — applied when operating by analogy in the realm of administrative agencies.

A wide variety of agencies exists, serving many different functions, with significant differences in structure, organization and methods of operation. The extent to which an agency's adjudicatory function is separated from its

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1 Section 33.5(a) of the Rules Governing Judicial Conduct is to the same effect. It provides, "No judge, other than a part-time judge, shall act as an arbitrator or mediator." 22 NYCRR 33.5(a). PERB ALJ's, however, are not members of the Unified Court System and, therefore, are not deemed subject to the Rules.

other operations and purposes may be very different. So, too, agencies may differ as to what extent they may need to use their personnel in arbitrating or mediating disputes.

A single, inflexible rule such as that provided by Canon 5E could significantly disable an agency from fulfilling its intended purpose, with no countervailing interest or benefit being served. It makes little or no sense to sever the adjudicatory operations of any and all agencies from their efforts to arbitrate or mediate disputes.

The judicial system itself operates under no such handicap. Virtually all trial judges from time to time attempt to effect settlements by mediating the disputes that are assigned to them for adjudication. Canon 5E does not prohibit a judge from attempting to resolve a dispute by mediation. Rather, it merely prohibits a judge from going outside his official duties to act as a mediator or arbitrator in some other forum. Even then, the prohibition is limited in its application to full-time judges. CJC, Compliance Section, Paragraph 1(A)(1).

Similarly, it makes no sense to prohibit all of an agency's adjudicatory personnel from serving as arbitrators and mediators elsewhere. If there is concern that the staff will be diverted in their work for the agency, there is no reason to think that such extracurricular activity will be difficult for the agency itself to control, should that be deemed necessary or appropriate.

What should be a key issue is the relationship of the agency to the forums in which the ALJ intends to serve as a mediator or arbitrator. If the matter is one beyond the ALJ's official duties, but likely to come back to the ALJ's agency for further adjudication or review, the ALJ should not undertake such extracurricular activities. If, in contrast, the arbitration is incident to the ALJ's official duties, then it is the agency that ordinarily should determine the circumstances under which the ALJ will serve.

Our analysis leads us to conclude that Canon 5E should not be applied to the ALJs employed by PERB. Whether any given agency should prohibit its staff from acting as mediators or arbitrators is an issue that ought to be resolved by the agency itself, consistent with substantive law and the needs of the agency.

CONCLUSION

For the reasons stated, subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.