

NEW YORK STATE BAR ASSOCIATION

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



Committee on Professional Ethics

Opinion 617 - 2/5/91 (25-89)

Topic: Administrative law judge's disqualification; prior service as staff attorney in same agency.

Digest: Administrative law judge must recuse himself or herself from hearing a matter when he or she previously served as a lawyer in the matter in controversy or in a different matter involving the same party, or when his or her impartiality might reasonably be questioned.

Code: Canon 5(E);
EC 8-8.

Code of Judicial Conduct: Canons 3(C)(1), 3(C)(1)(b); 7.

QUESTION

May an administrative law judge ("ALJ") employed in the Division of Tax Appeals ("DTA") in the Department of Taxation and Finance (the "Department") who formerly served as a staff attorney representing the Department in proceedings brought in the DTA now hear cases involving taxpayers who had cases pending in the DTA while the ALJ was serving as an attorney for the Department?

OPINION

Canon 3(C)(1) of the Code of Judicial Conduct (the "CJC") provides: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding; (b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter...." The Rules of Judicial Conduct of the Chief Administrator of the Courts, which are in effect in

New York, have identical provisions. 22 NYCRR § 100.3 (c)(2). *See also* 28 U.S.C. § 455(b)(3) (judge should recuse himself if "he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning [a] proceeding").

While the CJC is intended to apply to anyone who is an officer of a judicial system performing judicial functions, the term "judicial system" has been construed by this Committee to include administrative agencies with adjudicatory functions. N.Y. State 543 (1982); N.Y. State 365 (1974); N.Y. State 337 (1974); N.Y. State 327 (1974). As well, the section of the CJC entitled "Compliance with the Code of Judicial Conduct" provides that it applies to "[a]nyone, 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." Thus, ALJs are subject generally to the requirements of the CJC. *See also* ABA Inf. 86-1522 (1986) (holding federal ALJs subject to CJC; citing *In Re Chocallo*, 2 M.S.P.S. 23, 27, 38, 62-63 (1978)).

The question posed here is whether Canon 3(C)(1) of the CJC should be applied to ALJs serving in the Division of Tax Appeals in the Department of Taxation and Finance. In N.Y. State 327 (1974), ALJs and others in administrative agencies acting in a quasi-judicial capacity were found to be subject to the provisions of the CJC that impose limitations on engagement in political activities. *See also* N.Y. State 337 (1974) (restrictions on political activities of judges imposed by Canon 7 of CJC apply to motor vehicle referees). In N.Y. State 327 (1974) this Committee stated:

The maintenance of public confidence in the impartial administration of our system of justice requires that those charged with the duty of deciding contested issues, whether they be members of the judiciary or officials in an administrative agency having a quasi-judicial function, be independent and free of bias

Similarly, in N.Y. State 365 (1974), this Committee held that both the CJC and EC 8-8 of the Lawyer's Code of Professional Responsibility prohibit a lawyer-member of the Administrative Appeals Board of the Department of Motor Vehicles, as well as the lawyer's partners and associates, from representing private clients at a hearing conducted by a motor vehicle referee or in an administrative proceeding or other action by the Department of Motor Vehicles

This Committee also held, in N.Y. State 543 (1982), that a lawyer serving as a hearing officer in small claims real property tax assessment proceedings was barred, along with the lawyer's firm, from representing private clients in such proceedings in the same jurisdiction. Citing EC 8-8, the Committee explained: "Even if such decisions are to possess no precedential value, the integrity and impartiality of the assessment review procedures should not be clouded by such dual-role inconsistencies."

On the other hand, N.Y. State 594 (1987) held that the CJC should not be applied rigidly and without exception to adjudicatory personnel in administrative agencies, finding that Canon 5(E) should not be applied to preclude ALJs from acting as arbitrators or mediators.

In deciding whether to apply Canon 3(C)(1) to the ALJ in the present case, this Committee examined first the nature of the adjudicatory function of the DTA. The stated purpose of the DTA is to provide "a just system of resolving controversies with such department and to assure that the elements of due process are present with regard to such resolution of controversies." Tax Law § 2000. Section 2010 of the Tax Law provides for the appointment of ALJs to conduct DTA hearings and also requires that standards for appointment assure that "persons appointed ... have the ability to conduct proceedings fairly and impartially." In light of these provisions, this Committee believes that ALJs of the DTA should be subject to those provisions of the CJC that impact directly on the integrity of their adjudicatory function. Canon 3(C)(1) is such a provision.

Applying Canon 3(C)(1), the Advisory Committee on Judicial Ethics held that a judge who was previously employed as counsel for a township and county was disqualified from sitting in any matter in which he was directly involved. OCA 87-26 (1988). It is clear that an ALJ is required also to recuse himself or herself if he or she previously represented the Department as attorney of record in the same matter with the same taxpayer or was in any way involved in the prosecution of that case for the Department.

A more difficult question is whether the ALJ should recuse himself or herself where he or she previously represented the Department in a different matter concerning the same taxpayer. In *People v. Corelli*, 41 A.D.2d 939, 343 N.Y.S.2d 555 (2d Dep't 1973), a judge was disqualified from sitting in a case involving a defendant whom the judge had prosecuted on different charges in his previous capacity as a district attorney. The judge believed that he could act in an impartial manner. *Corelli* held, notwithstanding, that the judge should have disqualified himself, since the appearance of bias or prejudice that could result from the judge's prior involvement in prosecuting the defendant could damage the public's confidence in the administration of justice. Cf. *People v. Tartaglia*, 73 Misc. 2d 506, 342 N.Y.S.2d 998 (Sup. Ct. 1973) (holding that judge who prosecuted defendant in previous unrelated prosecution was not disqualified because judge in previous capacity as assistant district attorney handled thousands of cases over 24-year period and had no recollection of the defendant or the prior proceeding), *aff'd*, 44 A.D.2d 662, 354 N.Y.S.2d 126 (1st Dep't 1974).

Canon 3(C)(1) of the CJC requires a judge to recuse himself if "his impartiality might reasonably be questioned." Actual partiality or bias is not the issue, but rather whether the impartiality of the ALJ is subject to reasonable question. Because of the appearance of bias or prejudice that could reasonably result from the ALJ's prior involvement with the same taxpayer, the ALJ must recuse himself or herself if he or she previously represented the Department in a

matter involving the same taxpayer. See Arizona 76-19 (1976) (judge who is former deputy county prosecutor may not sit in cases in which defendant is someone he prosecuted in unrelated matter).

Far less clear is whether the ALJ must also recuse himself if another lawyer in the litigation bureau represented the Department in the same or a different matter concerning the same taxpayer while the ALJ was a staff attorney but where the ALJ had no role with, or participation in, the prior matter. The Commentary to Canon 3(C)(1)(b) of the CJC clarifies the status of a judge who was formerly a lawyer in a governmental agency by stating: "A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should recuse himself in a proceeding if his impartiality might reasonably be questioned because of such association." Thus, an agency is not fully equated with a private law firm, in that a former agency lawyer is not considered to have been associated with all other lawyers in the agency for all purposes.

The ALJ is disqualified, however, if the circumstances of his or her prior employment lead to the conclusion that, under the general standard of Canon 3(C)(1), his or her impartiality might reasonably be questioned. For example, the longer the ALJ serves on the bench, the less the likelihood that the general standard of Canon 3(C)(1) will require disqualification because of the former association. See E.W. Thode, *Reporter's Notes to Code of Judicial Conduct* 63 (1973). The ALJ may also consider the size of the legal office involved, whether the ALJ had substantial decision making, or supervisory responsibility in the office, and the extent to which cases were discussed with lawyers other than those formally assigned to them. See OCA 88-17(c) (1988). In deciding whether to recuse himself or herself, the ALJ must remain very mindful of the duty to conduct fair and impartial proceedings, both in appearance and in fact.

CONCLUSION

The ALJ is required to recuse himself or herself if he or she previously represented the Department as attorney of record in the same or an unrelated matter with the same taxpayer or was in any way involved in the prosecution of that case for the Department. There is no absolute prohibition against an ALJ hearing a matter where the taxpayer had the same or an unrelated matter before the DTA while the ALJ was a staff attorney provided the ALJ had no role with, or participation in, the prior matter. Nonetheless, the ALJ always has a duty to recuse himself or herself if his or her impartiality might reasonably be questioned.
