HOW DUE PROCESS IMPACTS ADMINISTRATIVE HEARINGS

Jim Gerl

jimgerl@yahoo.com email

© 2021 James Gerl

Written Materials to Accompany
A Presentation at the
Annual Conference of the
National Association of Hearing Officials
October 31 – November 3, 2021
Philadelphia, Pennsylvania

I. Due Process in Administrative Hearings

What does due process of law require for administrative hearings?	/	So what? How does this affect -- my hearings? ----------
1.	/	1.
2.	/	2.
3.	/	3.
4.	/	4.
5.	/	5.
6.	/	6.
7.	/	7.
8.	/	8.
9.	/	9.
10.	/	10.

II. Due Process of Law - the Caselaw

The following portions of this outline set forth some important caselaw concerning due process of law as it pertains to administrative hearings. Although I have included my interpretation of the cases cited in this outline, it is important for you to read the cases for yourself. You may then interpret the cases and decide whether how they apply to your hearings.

The Fifth and Fourteenth Amendments to the United States Constitution, and the corresponding portions of most state constitutions, provide that the federal and state governments may not deprive their citizens of "…life, liberty or property without due process of law." The due process clause likely has its roots in the Magna Carta in which the King of England promised that nobles would receive the processes guaranteed by "…the law of the land." Magna Carta, Para 39. 2014 was the **800th birthday of the Magna Carta**! You can learn more about the Magna Carta and its significance to our constitution, including the due process clause here: http://www.americanbar.org/groups/public_services/law_library_congress/magna_carta.html Here is a lecture on the Magna Carta, due process and administrative power: https://www.aei.org/events/the-magna-carta-due-process-and-administrative-power/

Due process of law does not apply to every government action. General policy decisions that affect all, or most, people do not implicate the due process clause. Rather due process is only involved where the government takes individualized

action against one or a few people. Contrast, *Londoner v. Denver* 210 U.S. 373 (1908) (a landowner who was subject to a special assessment to pay for street work was afforded due process rights) and *BiMetallic Investment v. State Board of Equalization* 239 U.S. 441 (1915) (a landowner challenging an across-the-board forty percent increase in the valuation of property was not entitled to due process). Moreover, the deprivation giving rise to due process protections must concern life, liberty or property. Contrast, *Board of Regents v. Roth* 408 U.S. 564 (1972) (a university professor with a vague claim to continued employment had no property interesting his job) and *Roth v. Sindermann* 408 U.S. 593 (1972) (a university professor who produced handbooks and other evidence of continued employment did have a property interest in his job).

The Pennsylvania Supreme Court has stated that due process is a "…flexible concept, incapable of precise definition," although its basic elements are known. *Commonwealth v. McClelland*, 233 A.3d 717 (Pa. 2020)

In the case of *Goldberg v. Kelly* 397 U.S. 254 (1970), the Supreme Court held that before a welfare recipient could be deprived of benefits she was entitled to a hearing. The Court went on to set forth a list of specific procedural safeguards to which the recipient was entitled. Subsequently in *Matthews v. Eldridge* 424 U.S. 319 (1976), the Court backed away from the Goldberg v. Kelly approach, and established three factors to be balanced to determine what process is due, that is, what procedures must be provided in an administrative hearing. The factors are:

"…first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews v. Eldridge*, supra, 424 U.S. at 334-335. In applying the three part test, the Supreme Court ruled that federal disability benefits could be terminated without a prior hearing. *Id*, 424 U.S. at 348. The *Matthews v. Eldridge* three-part balancing test remains the legal standard for what process is due to date.

Recent cases applying the *Matthews v. Eldridge* factors are instructive. See, *Nelson v Colorado* 518 U.S. _____ (4/19/2017)(decision available here.) Also the Idaho Supreme Court has stated that in the administrative hearing context, due process requires adequate notice, a statement of the evidence against a party, and the opportunity for the party to tell their side of the story. *Cantwell v. City of Boise*, 191 P.3d 205 (Idaho S.Ct. 6/17/2008). In other words, due process is not a concept to be applied rigidly, but a **flexible** concept that requires such procedures as are warranted by a particular situation. *Ghost Player, LLC v State of Iowa* __N.W.2d ___, 2015 LW 848087 (Iowa 2/27/2015); *Aberdeen- Springfield Canal Co. v. Peiper* 133 Idaho 82, 91, 982 P.2d 917, 926 (1999). In *Chase v. Neth* 269 Neb. 882, ____N.W.2d ____ (Neb. S.Ct. 5/27/2005), the court noted that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. The court went on to note that in proceedings before an

administrative agency, "…procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence … and a hearing before an impartial board." The Supreme Court of Vermont has held that a showing that the administrative procedures used were deficient in terms of ***fairness*** is a core element of proof of a procedural due process violation. *Holton v. Department of Employment and Training* _____Vt._____, _____A.2d_____ (Vt. S.Ct. No 2003-535, 4/1/2005). The court stated that the purpose of the Matthews v. Eldridge test is to ensure fairness in procedures. In *Commission on Human Rights and Opportunities v. Savin Rock Condominium Association, Inc.* 273 Conn. 373, 391, _____A.2d____ (Conn. S.Ct. 4/19/2005), the court held that due process "… is inherently fact bound because due process is ***flexible*** and calls for such procedural protections as the particular situation demands." The court noted further that the balancing process for determining what process is due cannot take place in a factual vacuum. See also, *Melton v Indiana Athletic Trainer* Bd 53 N.E.2d 1210 (Ct App Ind 4/7/16); Sandy *Beach Def. Fund v. City Council* 773 P.2d 250, 261 (Hawaii 1989) (due process is flexible and calls for such procedural practices as a particular situation demands); *Rosa v NYC, NYC Commission Human* Relations 742 F.2d 523 (2d Cir. 2/7/14); State *ex rel Bd of Regents v Lucas* 297 P. 3d 378 (Okla SCt 2013); *Adams v. HR Allen, Inc* 397 S.C**.** 652, 726 S.E.2d 9 (SC Ct Appeals 2012) (procedural due process rights are not technical); *Sawh v. City of Lino Lakes* 800 N.W.2d 663 (Ct App Minn 2011); *State of Oklahoma Bd of regents v. Lucas & George* 297 P.3d 378 (SCt Okla 2013) at n. 8 (procedural due process contemplates a fair

hearing.); *Shah v Arizona State Bd of Dental Examiners* No. 1 CA-CV 13-0488 (Ariz Ct App 2014) Denial of a continuance by HO Panel did not violate due process where there was no prejudice or harm to the grievant. (Decision available here: http://law.justia.com/cases/arizona/court-of-appeals-division-one-unpublished/2014/1-ca-cv-13-0488.html

To determine the remedy for a violation of due process, a court will undertake an individualized due process inquiry; there is no one size fits all remedy. Commonwealth of Pennsylvania v Cosby, _____A.3d_____(Pa SCt 2021)(slip op @p. 74) {available at 163038-june302021opinionwecht.pdf (pacourts.us) }.

Because of the practical nature of this session, there will be no attempt to reconcile the precedent or to make a determination as to the requirements of due process for every type of hearing. Indeed, the question facing the hearing officer is not whether there is a hearing is constitutionally mandated or whether there is a right to judicial review. Accordingly, the various components of procedural safeguards associated with due process will be examined.

A starting point is the list of procedural safeguards set forth by the Supreme Court in *Goldberg v. Kelly*, supra. Although some of the following safeguards may not apply in any given hearing, an analysis of each should give us a means of reference to compare to our own types of hearings. It should be noted that most of the safeguards are incorporated in the Administrative Procedure Acts of most states and in the procedural rules of many administrative agencies. The Pennsylvania

Hearing Officer Procedures Manual is a good example. Obviously any such A.P.A. or agency procedural rules should be consulted and followed by a hearing officer.

II. Hot Button Issue : Can the Executive Tell an Administrative Adjudicator How to Rule?

A current controversy involves whether the Executive can direct an administrative hearing officer how to rule. "Telephone justice is a Soviet-era legal term; according to a common story, the desk of the Soviet judge reportedly featured two phones, a black one for regular business and a red one for "special" calls from the Party. It occurs when the Executive intervenes directly in formal adjudication, as between particular parties, through an ex parte communication instructing the judge to rule one way or another. …Legally speaking, it raises two distinct but related issues: ex parte contacts by a third party with the judges and the so-called "directive power" of the President over the administrative state. The two issues do not necessarily overlap, but telephone justice is their intersection…."

Is this a due process issue? See discussion in Adrian Vermeule & Cass R. Sunstein, The Morality of Administrative Law, 131 Harvard L. Rev. 1924 (May 2018) Available here: https://harvardlawreview.org/wp-content/uploads/2018/05/1924-1978_Online.pdf

II. The Goldberg v. Kelly *Procedural Safeguards*

Each hearing officer should first refer to and follow any applicable state or federal Administrative Procedure Act or any agency procedural rules or regulations. Most APAs and procedural rules provide safeguards similar to the Goldberg safeguards. The discussion that follows is a general discussion of these safeguards, and is not intended to supplant other legal requirements governing any particular hearing.

- ***Notice***
- ***Opportunity to be Heard and Present Evidence***
- ***Right to Confront and Cross-Examine Witnesses***
- ***Right to Counsel***
- ***Record Only Evidence***
- ***Reasoned Decision***
- ***Neutral/Impartial Decision Maker***

IV. Particular Due Process Safeguards

1. Notice

The Court in *Goldberg* required timely and adequate notice. 397 U.S. at p. 267. Constitutionally sufficient notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust* 339 U.S. 306, 314 (1950). Notice is a key element of due process.

Due process in the administrative hearing process requires notice of the issues to be decided. *Curtis v Richardson* 131 P.2d 480, 212 Ariz 308 (**Ariz** Ct App 2006); *In re Kristy Y.* 752 A.2d 166, 169 (Me. 2000). Notice is a basic element of due process of law. *Sandy Beach Def. Fund v. City Council* 773 P.2d 250, 261 (Hawaii 1989); *Swafford v. McKune* Kansas App. 2011 (KS Ct. App. 8/26/2011). Where a party to an administrative hearing does not receive notice of the proceeding, he necessarily is denied the right to be heard. *Carter v. Review Bd., Indiana Dept. of Employment Security* 526 N.E.2d 717 (Ind. Ct. App. 1988); See, *Cantwell v. City of Boise*, 191 P.3d 205 (Idaho S.Ct. 6/17/2008); *Alvarado v. State of New York, 110 AD2d 583* (N.Y. App. 1st Dept.1985); *Adams v. HR Allen, Inc* 397 S.C. 652, 726 S.E.2d 9 (**SC** Ct Appeals 2012). The Tacoma Police violated the defendant's due process rights by not providing sufficient notice. *Tacoma Police Dep't v. $51,657.39 U.S. Currency*, 481 P.3d 1122 (Wash. App. 2021). A hearing officer violated a party's due process rights by ruling that it had committed violations that were not

contained in the complaint. *Home Warranty Adm'r of Nev., Inc. v. Nev. Dep't of Bus. & Indus.*, 481 P.3d 1242 (Nev. 2021)

It is also required that the notice be clear and provide the defending party with an opportunity to prepare its presentation. For example, in *New York Post and Local 94 IUOE* 353 NLRB 30, 31 (9/30/8), the National Labor Relations Board reversed a decision by an administrative law judge that found the employer in violation of the statute based upon an alternative theory to the one plead by the general counsel and which the employer did not have the opportunity to litigate. The Board found the due process rights of the employer to have been violated by denial of notice as to the legal theory underlying the alleged violation.

Similarly, where the NLRB sought to void a collective bargaining agreement between a union and an employer, the union was entitled to receive notice of the intended action. *Consolidated Edison Co. v. NLRB* 305 U.S. 197 (1938).

The federal Administrative Procedure Act, for example, provides as follows:

(b) Persons entitled to notice of an agency hearing shall be timely informed of —

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

5 U.S.C. Section 554(b).

A hearing officer should always consult any relevant federal or state Administrative Procedure Act and any agency procedural rules, regulations or policies as to the requirements for notice in a particular case.

2. Opportunity to be Heard and Present Evidence

The Goldberg Court noted that the "…fundamental requisite of due process of law is the opportunity to be heard." 397 U.S. at p. 267. See, Grannis v. Ordean 234 U.S. 385, 394 (1914). Because of the lack of sophisticated writing skills in many welfare recipients, in Goldberg, the Court emphasized the need to be heard orally. 397 U.S. at 267-269. The right to be heard may, however, be limited to documentary evidence where highly technical topics are in issue. See, Richardson v. Wright 405 U.S. 208 (1972).

Also central to due process is the right to present evidence in support of one's position. See, Morgan v. U.S. 304 U.S. 1, 18 (1938). In Goldberg, the Court referred to this concept as the right to present "…his own arguments and evidence." 397 U.S. at p. 268. Indeed, the right to a fair hearing in a fair tribunal is the basic requirement of due process. Withrow v. Larkin 421 U.S. 35 (1975). This requirement applies to administrative hearings as well as to courts. Gibson v. Berryhill 411 U.S. 564, 579 (1973); Withrow v. Larkin 421 U.S. 35 (1975); Schweiker v McClure 456 U.S. 188 (1982); NY City Bd of Educ 118 LRP 50576 (SEA

NY 2018) (Court ruled that ho violated parents' right to due process where HO requested security because of parents and refused father's request for medical assistance for an issue during the hearing thereby denying the parents a fair opportunity to present their evidence.)

Due process in the administrative hearing process requires that the parties be afforded the opportunity to be heard. *In re Kristy Y.* 752 A.2d 166, 169 (Me. 2000); *Adams v. HR Allen, Inc* 397 S.C. 652, 726 S.E.2d 9 (SC Ct Appeals 2012). The basic elements of due process of law include the opportunity to be heard at a meaningful time and in a meaningful manner. *Curtis v Richardson* 131 P.2d 480, 212 Ariz 308 (Ariz Ct App 2006); *Sandy Beach Def. Fund v. City Council* 773 P.2d 250, 261 (Hawaii 1989); *Baker v Employment Appeal Board* 551 N.W.2d 646 (Iowa Ct App 1996). The California Supreme Court has noted that the purpose of procedural due process is to provide affected parties with the right to be heard. *Ryan v. Calif. Interscholastic Federation* - S. D. Section 94 Cal.App.4th 1048, 1071 (Cal. App. Ct. 2001). Due process includes the right of a party to tell his side of the story at an administrative hearing. *Cantwell v. City of Boise*, 191 P.3d 205 (Idaho S.Ct. 6/17/2008). See, *Aberdeen- Springfield Canal Co. v. Peiper* 133 Idaho 82, 91, 982 P.2d 917, 926 (1999); *Swafford v. McKune* Kansas App. 2011 (KS Ct. App. 8/26/2011).. A due process challenge to HO rulings on evidence was rejected by the Court. *Erica v. New Mexico Regulation & Licensing* 184 P.3d 444 (New Mexico Ct App 3/31/2008). A Texas appellate court held that an administrative hearing session held over sixteen continuous hours in which the appellant had to present his

case late in the evening did not violate the appellant's due process rights. *Ray v. Texas State Board of Public Accountancy* No. 03-98-00557-CV (Texas Ct App/ Austin October 21, 1999). The Fifth Circuit held in a Texas case that a four year delay in finishing the administrative process for the refund of crop subsidies was not a violation of due process where there were also criminal cases pending. *United States v. Batson, et al* 782 F.2d 1307 (5th Cir. 1986).

The federal Administrative Procedure Act, for example, provides as follows:

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. Section 556(d).

A hearing officer should always consult any relevant federal or state Administrative Procedure Act and any agency procedural rules, regulations or policies as to evidence issues in a particular case.

3. Right to Confront and Cross-Examine Witnesses

Another key due process safeguard is the right to confront and cross-examine adverse witnesses. See, *ICC v. Louisville & N. R. Co.* 227 U.S. 88, 93-94 (1913). *See, Hecht v. Monaghan, 307 NY 461 (N. Y. 1954)* This safeguard is particularly important where the reasonableness of the government action depends upon factual findings. *Green v. McElroy* 360 U.S. 474 496-497 (1959).

In the context of an administrative hearing, the right to respond to claims and evidence is required by due process of law. *In re Kristy Y.* 752 A.2d 166, 169 (Me. 2000);); *Adams v. HR Allen, Inc* 397 S.C. 652, 726 S.E.2d 9 (SC Ct Appeals 2012). However, cross-examination is not an absolute right in administrative hearings. *United Cement Co. v. Safe Air for the Env't, Inc.* 558 So.2d 840, 842 (Miss. 1990). Nonetheless many courts have held that cross-examination is a key component of due process. *Curtis v Richardson* 131 P.2d 480, 212 Ariz 308 (Ariz Ct App 2006); *Abrahamson v. Illinois Department of Professional Regualtion* 153 Ill.2d 76, 95, 606 N.E.2d 1111, 1120 (1992).

There may be instances where there are limits upon the right to present evidence. For example, in a case involving loss of "good time" for a prison inmate, due process may not necessarily include the right to confront and cross-examine adverse witnesses if doing so would be unduly hazardous to institutional safety or correctional goals. *Wolff v. McDonnell* 418 U.S. 539, 563 (1974). Moreover, a California court has held that in an administrative debarment proceeding, a

contractor has no right to cross examination where the contractor had taken the depositions of adverse witnesses prior to the hearing. *Southern Calif. Underground Contractors, Inc. v. City of San Diego* 108 Cal.App.4th 533, 133 Cal.Rptr.2d 527 (Cal. App. Ct. 2003); *New Mexico v. Guthrie* (New Mexico S.Ct. 4/1/2011)(parole revocation hearing- limited right to confront)

Most administrative hearings permit hearsay evidence to be accepted into evidence at a hearing despite the right to confront and cross-examine. See, *Richardson v. Perales* 402 U.S. 389, 407 (1971). However, some states retain the residuum rule which means that hearsay evidence alone may not be used to support an agency decision. See, Cal. Govt. Code Section 11513(c)See, *James v. Dept of Corrections* 260 P.2d 1046 (SCt Alaska 2011).

In general, administrative hearings are not burdened by mechanical rules governing admissibility or weight of evidence. Evidence that is not admissible in court may well be admitted in an administrative hearing. *Western Paper Makers Chem. Co. v. U.S.* 271 U.S. 268 (1926). See the previous section for a discussion of the evidentiary procedures set forth in the federal Administrative Procedure Act. A hearing officer should always consult any relevant federal or state Administrative Procedure Act and any agency procedural rules, regulations or policies as to right to confront and cross-examination issues in a particular case.

4. Right to Counsel

The Supreme Court has noted that the right to be heard would be "… of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama* 287 U.S. 45, 68-69 (1932). Even the Goldberg Court, however, did not suggest that a lawyer must be appointed, only that a recipient-party had a right to retain and appear with counsel. 397 U.S. at p.270-271. Even counsel hired by the party may be denied the right to appear in a hearing on behalf of a prison inmate, however. *Wolff v. McDonnell* 418 U.S. 539, 570 (1974). Contrast the ruling of the Alabama Supreme Court that representation by counsel is a component of due process in hearings before administrative boards and agencies. *Katz v. Alabama State Board of Medical Examiners* 351 So.2d 890, 892 (Ala. 1972).

In criminal cases (which could result in imprisonment), the accused has a right to be represented by counsel and to have a lawyer appointed if he cannot afford one. *Gideon v. Wainwright* 372 U.S.335, 344 (1963). This rule obviously does not apply in most administrative hearings.

The federal Administrative Procedure Act, for example, provides as follows:

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. …This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

5 U.S.C. Section 555(b).

A hearing officer should always consult any relevant federal or state Administrative procedure Act and any agency procedural rules, regulations or policies as to the right to counsel in a particular case.

5. Record Only Evidence

Another due process requirement is that the decision maker's conclusion must rest solely upon the evidence adduced at the hearing. *Ohio Bell Tel. Co. v. Pub. Util. Comn.* 301 U.S. 292 (1937); *United States v. Abilene & S. R. Co.* 265 U.S. 274, 288-289 (1924). For example in *Bowles v. DC Dept of Empl Svcs* 121 A.3d 1264 (DC Ct App 8/16/15) the court found that the HO erred by considering evidence outside the record, but ruled the error harmless where there was other evidence to sustain the decision. The requirement of a written record invites scrutiny of the process, and, therefore, pressures hearing officials to act fairly. See, *Wolff v. McDonnell* 418 U.S. 539, 565 (1974). *See, e.g., Cohen v. Ambach, 112 AD2d 497 (N.Y.* 3rd Dept. 1984)(failure to inform pharmacist that agency would take official notice of standards for advertising in the "public interest" requires reversal of penalty); *James v. Dept of Corrections* 260 P.2d 1046 (SCt Alaska 2011) (failure to record a disciplinary hearing for an inmate violated his procedural due process rights.); FL by AL & RL v NY City Bd of Educ 938 F.Supp.2d 417, 61 IDELR 45 (ED NY 4/12/13) Court remanded to HO because the administrative hearing record was unacceptably sparse, Student's disability was severe and court needed more

information regarding the physical environment in the school. It is not required that the administrative decision maker hear the evidence or read the transcript or listen to the tape recording so long as the decision maker understands and considers the evidence. *Wadsworth v Bd of Trustees, Lincoln School Dist* 2014 WY 7, (Wyo S Ct 2014).

The requirement of a record also gives meaning to the appellate process in cases in which due process requires a right to judicial review of a final administrative decision. See, *Johnson v. Robinson* 415 U.S. 361 (1974). A generally recognized exception to the record only evidence concept involves official notice. In general terms a hearing officer may usually take official notice of statutes, regulations, court decisions and other well-established and readily ascertainable facts, such as the calendar or the alphabet. Where a hearing officer intends to take official notice, she should notify the parties of her intention, provide them with an opportunity to object on the record and allow them the opportunity to present evidence upon the point if they desire to do so. *JW by JEW & JAW v. Fresno Unified Sch Dist* 611 F.Supp.2d 1097, 52 IDELR 194 (E.D. Calif 4/27/9), aff'd 55 IDELR 153; *Attleboro Public Schs* 109 LRP 74987 (SEA Mass 11/18/9) (HO used **Mapquest** to take official notice of the distance between two elementary schools at issue.); *CS ex rel MS v NYC Dept of Educ* 67 IDELR 87 (SDNY 2/29/16) (HO did **not err** by taking **official notice** of information on SD website re SpEd school serves students with severe disabilities. Although not evidence in the record, HO merely used the website to confirm his findings of fact and credibility determination.)

The federal Administrative Procedure Act, for example, provides as follows:

(d) … A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. …

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. Section 556(d) and (e).

A hearing officer should always consult any relevant federal or state Administrative Procedure Act and any agency procedural rules, regulations or policies as to record only evidence issues in a particular case.

6. Reasoned Decision

Although due process does not necessarily require a formal opinion or even findings of fact and conclusions of law, See, *Goldberg*, 397 U.S. at p. 271, the decision maker must provide an explanation for his determination, including the reasons for the decision and a statement of the evidence relied upon. *Wichita R. & Light Co. v. Pub. Util. Comn.* 260 U.S. 48, 57-59 (1922).

An arbitrary and capricious decision violates due process. *In re Excelsior Energy* 782 N.W.2d 282 (Ct App Minn 2012); Where the hearing officer gave a detailed explanation of his reasoning, the fact that the agency order merely adopted

the decision did not result in a denial of due process. *In re Administrative Order Issued to Wright County* 784 N.W.2d 398 (Ct App Minn 2012); A hearing officer decision should explain how the hearing officer resolved disputed facts. *Walker v Dept of Housing* 29 A.3d 293 (Ct App Md 2011).

The requirement of a reasoned explanation of a decision helps ensure a fair and careful consideration of the evidence and provides assistance to reviewing courts. *Citizens to Preserve Overton Park v. Volpe 401 U.S. 402* (1971). The California Supreme Court has held that in an administrative proceeding against an attorney, there must be written findings of fact. *Saleeby v. State Bar* 39 Cal.3d 547, 216 Cal.Rptr. 367 (1985). A conclusion based upon evidence and reason and revelation of evidence relied upon is a component of due process in hearings before administrative boards and agencies. *Katz v. Alabama State Board of Medical Examiners* 351 So.2d 890, 892 (Ala. 1972); See *Goldberg*, 397 U.S. at p. 271; *Swafford v. McKune* Kansas App. 2011 (KS Ct. App. 8/26/2011); *See, Koelbl v. Whalen, 63 AD2d 408* (NY 3rd Dept. 1978).

The federal Administrative Procedure Act, for example, provides as follows:

…All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. Section 557(c).

A hearing officer should always consult any relevant federal or state Administrative Procedure Act and any agency procedural rules, regulations or policies as to the requirements for a reasoned decision in a particular case.

7. Neutral/Impartial Decision maker

An impartial decision maker is essential to due process of law. *Goldberg,* 397 U.S. at p. 271. See also, *Wong Yang Sun v. McGrath* 339 U.S. 33, 45 (1950). To ensure justice, a tribunal must also give the appearance of impartiality. *In re Murchison* 349 U.S. 133, 136 (1955). Due process requires an impartial and disinterested tribunal. *Marshall v. Jerrico, Inc.* 446 U.S. 238, 242 (1980). An impartial fact finder is required for due process of law in the administrative hearing process. *In re Kristy Y.* 752 A.2d 166, 169 (Me. 2000). Impartiality in ruling upon the evidence, is a key component of due process. *Abrahamson v. Illinois Department of Professional Regualtion* 153 Ill.2d 76, 95, 606 N.E.2d 1111, 1120 (1992). A due process challenge based upon HO bias because the HO worked in the same building as department employees was rejected by the Court. *Erica v. New Mexico Regulation & Licensing* 184 P.3d 444 (New Mexico Ct App 3/31/2008). A fair trial before a fair tribunal is a basic requirement of due process. *Today's Fresh Start v. los Angeles Co Office of Educ* 128 Cal.Rptr.3d 822 (Ct App Calif 2011); *Hall v Lalli* 194 Ariz 54, 977 P.2d 156 (Ariz S Ct 1999).

Thus, the decision maker must be free from bias against any party to the proceeding. *Republican Party of Minnesota v. White* 536 U.S. 765, 777 (2002). For example, a judge may not have a financial interest in ruling against one of the parties. *Tumey v. Ohio* 273 U.S. 510, 531-534 (1927); *Aetna Life Ins. Co. v. Lavoie* 475 U.S. 813, 822-825 (1986). It also violates the due process clause if a judge is inclined to rule against parties who do not bribe him. *Bracy v. Gramley* 520 U.S. 899, 905 (1997). For example, a DMV hearing denied a licensee due process where the hearing officer plead guilty to accepting bribes in DMV cases. *Brendan Lee Hall v DMV* #D068516 (Calif Ct App 9/23/2016) available at https://caselaw.findlaw.com/ca-court-of-appeal/1749478.html A strong personal bias against a person or a group of people should also be a disqualification. See, *NLRB v. Pittsburgh S. & S. Co.* 337 U.S. 656 (1949); Berger v. U. S. 255 U.S. 22 (1921); *[See, General Motors Corp. v. Rosa, 82 NY2d 183 (N. Y. 1993*)(former general counsel promoted to agency head could not review case prosecuted by her and an assistant) .

In a significant development, disqualification is now also required in cases where the appearance of unfairness is overwhelming. *Caperton et al v. Massey Coal Co, Inc, et al* 556 U.S. 868, 129 S.Ct. 2252 (USSCt 6/8/2009); http://www.supremecourtus.gov/opinions/08pdf/08-22.pdf In this case, the petitioners had won a $50M jury verdict against Massey in a 2002 fraud case. In 2004, while Massey was appealing the decision, Brent Benjamin challenged sitting Justice Warren McGraw for a seat on West Virginia's only appellate court. Don Blankenship, President of Massey Coal, formed a 527 organization and spent over

$3M campaigning against McGraw. When Massey's appeal of the verdict reached the West Virginia Supreme Court of Appeals, Benjamin refused to recuse himself and the state court ruled 3-2 to reverse the jury award.

The U. S. Supreme Court reversed the West Virginia court in a 5 to 4 decision. The majority opinion by Justice Kennedy explained that Blankenship's contributions "had a significant and disproportionate influence" upon Justice Benjamin's election and that there was a serious risk of actual bias. The opinion concludes that this risk is compelled recusal under the Due Process Clause. Although the majority gave no clear guidance for decision makers to follow in the future, it is clear that the appearance of bias may now be so extreme on a particular set of facts as to require disqualification even in the absence of actual bias.

It is not required, however, that the decision maker lack any opinions or predisposition regarding relevant legal issues that may arise in a case before her. *Republican Party of Minnesota v. White* 536 U.S. 765, 777- 778 (2002); *F.T.C.v. Cement Institute* 333 U.S. 683 (1948). The Court has noted that a lack of preconceived views as to legal issues may actually be undesirable in a decision maker. *Laird v. Tatum* 409 U.S. 824, 825 (1972); *Republican Party of Minnesota v. White* 536 U.S. 765, 777-778 (2002).

There must be a showing of bias before an administrative decision maker will be required to recuse himself (i.e., step down). Without a showing to the contrary, a decision maker is assumed to be a person of "… *conscience and intellectual*

discipline, capable of judging a particular controversy on its own circumstances." *United States v. Morgan* 313 U.S. 409, 421 (1941); *Withrow v. Larkin* 421 U.S. 35 (1975). There is a presumption that an administrative hearing officer will act honestly, properly and without bias or prejudice. *Dakession v. Hartley* 2012 U.S.Dist Lexis 78101 (E.D. Calif 2012) Court held that litigant had not overcome the presumption of ho honesty and integrity; *Iowa Farm Bureau Fed v Enviornmental Protection Commission* 850 N.W,2d 403 (Iowa 2014); AM v Dist of Columbia 933 F.Supp.2d 193, 61 IDELR 21 (DDC 3/28/13); Warrior Run Sch Dist (JG) 113 LRP 39220 (SEA Penna 9/10/13); *Gonzalez v State Election Enforcement Commission* 145 Conn.App. 458, 77 A.3d 796 (Conn App Ct 2013); *Adkins v. City of Tell City* 625 N.E.2d 1298, 1303 (Ind. Ct. App. 1993); Shaw v. Marques, et al RI Super. 2011 (R.I. Superior Court April 4, 2011); *Buchanan v. City of Minneapolis* No A10-1695; 2011 Minn. App. (Minn. Ct App July 25, 2011); MN v Rolla Public Sch Dist # 31 59 IDELR 44 (WD Missouri 6/6/12); GM by Marchese v Drycreek Joint Elementary Sch Dist 59 IDELR 223 (ED Calif 9/7/12); Nickerson-Reti v Lexington Public Schs 59 IDELR 282 (D Mass 9/27/12); v *York County District Three* 49 IDELR 178 (SEA SC 1/24/8); *WT & KT ex rel JT v. Bd of Educ Sch Dist of NY City* 716 F.Supp.2d 270, 54 IDELR 192 (SD NY 4/15/10); *CG & LG ex rel BG v. NY City Dept of Educ* 55 IDELR 157 (SD NY 10/25/10); *ES & MS ex rel BS v. Katonah-Lewisboro Sch Dist* 55 IDELR 130 (SD NY 9/30/10); *LF by Ruffin v. Houston Indep Sch Dist* 53 IDELR 116 (S.D. Tex 9/21/9); *United States v. Batson, et al* 782 F.2d 1307 (5th Cir. 1986). The fact that a contract hearing officer made a substantial amount of money as a hearing

officer ($175,000 over 2007-2009) was not enough to overcome the presumption of integrity where the decision was supported by substantial evidence and the proceedings were not arbitrary or capricious. *Buchanan v. City of Minneapolis* No A10-1695; 2011 Minn. App. (Minn. Ct App July 25, 2011); Fact that hearing officer served as watch commander at time of incident did not rise to constitutional bias. *Matter of Vega v. N. Y. State Dept of Corectional Services* 2012 NY Slip Op 00679 (NY Sup Ct, App Div Third Dept). An administrative hearing office enjoys a presumption of honesty and integrity and impartiality that can be overcome only by a showing of actual bias. *Calvert v. State* 251 P.3d 990 (SCt Alaska 2011); *Maryland Insurance Commr v Central Maryland Acceptance Corp* 33 A.3d 949 (Ct App Md 2011); *Shah v Arizona Styate Bd of Dental Examiners* No. 1 CA-CV 13-0488 (Ariz Ct App 2014) No due process violation where the oral surgeon who advised the ho panel criticized the grievant and criticized his record keeping because no showing of bias. (Decision available here: http://law.justia.com/cases/arizona/court-of-appeals-division-one-unpublished/2014/1-ca-cv-13-0488.html ; But see, Miller v. Carroll (In re Paternity B.J.M.), 392 Wis.2d 49, 944 N.W.2d 542, 2020 WI 56 (Wis. 2020)(applying Caperton, court ruled that undisclosed social media relationship with a litigant overcame the presumption of freedom from bias.)

PC & MC ex rel KC v. Oceanside Union Free Sch Dist 56 IDELR 252 (EDNY 5/24/11) Court rejected implication that SRO's credibility determinations were biased where the decision was a lucid and well reasoned opinion. HO's credibility determinations were thoroughly discussed. In n.5 to decis court notes that parent

counsel complained of the HO's "fabricated **lunacy**." Court reprimanded parent counsel for ad hominem attacks; EJ by Tom & Ruth J v. San Carlos Elementary Sch Dist 803 F.Supp.2d 1024, 56 IDELR 159 (ND Calif 3/24/11) Court rejected parent argument that HO conducted a prejudicial and inaccurate hearing. Court found instead a thoughtful and detailed analysis in the decision entitled to significant weight; Clark County Sch Dist (LB) 111 LRP 65198 (SEA NV 8/26/11) SRO ruled that HO did not err in failing to recuse himself where there was no evidence of bias.

A very interesting case related to the issue of neutrality of the hearing officer is *Harrison v. Coffman* 35 F.Supp.2d 722 (E.D. Ark. 1999) and 111 F.Supp.2d 1130 (E.D. Ark. 2000). In that case an administrative hearing officer for a state workers compensation system alleged that she had been fired because she did not sufficiently rule in favor of employers. She claimed that her discharge violated her right to decide cases independently and impartially. The court denied the agency's motion to dismiss, but the case settled before trial. Although not a due process decision, the court did find a quasi-judicial right to decisional independence to be a First Amendment right of the hearing officer.

The federal Administrative Procedure Act, for example, provides as follows:

…The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

5 U.S.C. Section 556(b).

and

(d)

(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;…

5 U.S.C. Section 557(d)(1).

A hearing officer should always consult any relevant federal or state Administrative Procedure Act and any agency procedural rules, regulations or policies as to issues of hearing officer bias in a particular case.

V. Due Process Bottom Line:

Two Cardinal Rules for All Hearing Officers

A. Rule Number One: Be Fair

The most important consideration for conducting a hearing is to be fair. Fairness in our hearings is a constitutional mandate. The United States Supreme Court has held that the right to a fair hearing in a fair tribunal is a basic requirement of due process of law. Withrow v. Larkin 421 U.S. 35 (1975). The Supreme Court has also made it clear that the requirement of fairness applies equally to both administrative hearing officers and judges. Gibson v. Berryhill 411 U.S. 564 (1973); Schweiker v McClure 456 U.S. 188 (1982). See, L.C. & K.C. on behalf of N.C. v. Utah State Board of Educ., et al 43 IDELR 29 (10th Cir. 3/21/05)(special education case.) and Madden v. U. S. Assoc. 844 S.W.2d 374, 377, 40 Ark. App. 143 (Ark.Ct.App. 12/16/92).

Due process guarantees fundamental fairness. Commonwealth of Pennsylvania v Cosby, _____A.3d_____(Pa SCt 2021) (slip op @p. 53) {available at 163038-june302021opinionwecht.pdf (pacourts.us) }; See, Santabello v NY 404 U.S, 257 (1971). The concept of fundamental fairness is at the heart of the requirement of due process of law, and fairness must be the primary principle applied by hearing officers in conducting a hearing. LTV Steel Co v. Indust. Comm 140 Ohio App.3d 688 (Ohio Ct. App. 2000); In Re; Sturtz 652 N.E.2d 41 (Ind. 6/16/93); A fair trial before a fair tribunal is a basic requirement of due process. Today's Fresh Start v. los Angeles Co Office of Educ 128 Cal.Rptr.3d 822 (Ct App Calif 2011); *State of*

Oklahoma Bd of regents v. Lucas & George 297 P.3d 378 (SCt Okla 2013) at n. 8 (procedural due process contemplates a fair hearing.); Nickerson-Reti v Lexington Public Schs 59 IDELR 282 (D Mass 9/27/12) Court noted that the hearing was **procedurally fair** in rejecting allegations of HO bias;

While considerable discretion is provided to administrative agencies in determining their procedures, they may not disregard basic precepts of fairness in structuring adjudicatory functions. One fairness principle directs that in adjudicative matters one adversary should not be permitted to bend the ear of the hearing officer in private. The court struck down a practice permitting ex parte communications. Department of Alcoholic Beverage Control v. Alcoholic Beverage control Appeals Board 145 P.2d 462 (Cal S.Ct. 11/13/06).

A reviewing court will examine the procedures utilized at an administrative hearing to ensure that fair and impartial procedures were used. Forrest Preserve District of Cook County v. ILRB 861 N.E.2d 231, 242 (Ill. App. Ct. 12/21/06). On judicial review, a court will examine the record to determine whether the procedures employed by the hearing officer afforded the parties a full and fair opportunity to litigate the issues. Ex Parte Paul Rene Serna 957 S.W.2d 598 603 (Texas Ct. App. 11/19/97). The right to a fair hearing before an administrative agency includes the opportunity to be heard, the right to cross-examine adverse witnesses and the right to impartial rulings on evidence. Comito v. Police Bd of the City of Chicago 317 Ill.App.3d 677, 739 N.E.2d 942 (Ill.Ct.App. 11/1/00) (HO has

wide discretion as to how to conduct hearing.); *Shah v Arizona Styate Bd of Dental Examiners* No. 1 CA-CV 13-0488 (Ariz Ct App 2014) Denial of a continuance by HO Panel did not violate due process where there was no prejudice or harm to the grievant. (Decision available here: http://law.justia.com/cases/arizona/court-of-appeals-division-one-unpublished/2014/1-ca-cv-13-0488.html

PR & JR ex rel JR v Shawnee Mission Unified Sch Dist No 512 58 IDELR 283 (D KS 4/30/12) Court ruled that HO did not violate parent right to **due process of law** at hearing. Ho correctly allowed parent attorney to withdraw and properly denied a continuance. HO properly advised pro se parents of their right to testify and present evidence before they choose not to do so; Nickerson-Reti v Lexington Public Schs 59 IDELR 282 (D Mass 9/27/12) Court noted that the hearing was **procedurally fair** in rejecting allegations of HO bias; DN ex rel GN v New York City Dept of Educ 112 LRP 59304 (SDNY 12/7/12) HO ruled in parent's favor on two of three issues in dpc but did not address third. SRO reversed on the two but did not rule on third issue. Court remanded; **fairness** requires that parent third issue be resolved at hearing; SH v Fairfax County Bd of Educ 59 IDELR 73 (ED VA 6/19/12) HO decision given deference where findings were regularly made and where **hearing procedures** were **fair**, both parties were fairly allowed to present evidence and make arguments.

In the spirit of fairness, it is advisable for the hearing officer to let the parties know the procedures that will be used during the hearing. Calvin C. Desmond v.

Administrative Director of the Courts, State of Hawaii 982 P.2d 346, 91 Haw. 212 (Haw.Ct.App. 5/12/98).

Thus, fairness must be the guiding principle for those who conduct hearings. Hearing officers are accorded wide discretion in conducting a hearing, and they must exercise that discretion in a fair manner. The rule that the hearing be conducted in a fair manner is by far the most important rule.

A hearing officer should make disclosures of any matters which might be construed to constitute actual bias to all parties and counsel at the earliest opportunity. In such cases, the hearing officer should only continue to serve if all parties have agreed that he should after full and complete disclosures have been made.

Motions to recuse (or disqualify) the hearing officer should be ruled upon promptly and in conformity with any state rules or procedures. Where such a motion is denied, the hearing officer should ensure that an adequate record has been created in the event of review by a court or review officer.

A good discussion of the considerations involving impartiality is set forth in Section III of the Model Code of Ethics promulgated by the National Association of Hearing Officials. See the website, https://naho.org/Model-Code-of-Ethics In addition, in some states the Judicial Code of Conduct applies to administrative hearing officers. In such states compliance with these rules is mandatory. Even in

states that do not require compliance with the ethical rules for judges, however, it is wise for administrative hearing officers to utilize these rules as guidance.

B. Rule Number Two: Appear to be Fair

Lawyers are required under their Cannons of Ethics to "avoid even the appearance of impropriety." See eg. Clinard v. Blackwood 46 S.W.3d 177 (Tenn. 2001). The philosophy underlying the rule prohibiting conduct which might have the appearance of impropriety is that public confidence in the system requires the belief that the system is fair. Respect for the rule of law cannot exist in the absence of such public confidence.

Due process requires disqualification where a hearing officer is biased or where circumstances fairly give rise to an appearance of impropriety or reasonably cast suspicion on the adjudicator's impartiality. *Liberty Dialysis Hawaii, LLC v Rainbow Dialysis, LLC* 130 Hawaii 95, 305 P.3d 140 (Hawaii SCt 2013). An administrative Hearing Officer must give the appearance of complete fairness. A due process challenge to HO rulings on evidence was rejected by the Court. Erica v. New Mexico Regulation & Licensing 184 P.3d 444 (New Mexico Ct App 3/31/2008).

Here is a bad example - a case where the hearing officer lost sight of the fairness principle: Knight ex rel JKN v. Washington Sch Dist 51 IDELR 209 (E.D. Mo. 12/22/8) Where regulations permitted HO panel chair to eliminate frivolous due process claims and ho panel chair dismissed 4 of 5 issues, and was asked by

parent attorney to recuse himself, chair then had **heated exchange** with the attorney on the record and dismissed the fifth issue in retaliation for motion to recuse. Court reversed noting that especially dismissal of the fifth claim was improper because it denied parents an opportunity to present evidence, confront and cross-examine witnesses, etc.

In a recent and very significant development, recusal or disqualification of an administrative hearing officer, is now constitutionally required in cases where the appearance of unfairness is overwhelming. Caperton et al v. Massey Coal Co, Inc, et al _____U.S._____, 129 S.Ct. 2252 (USSCt 6/8/2009); http://www.supremecourtus.gov/opinions/08pdf/08-22.pdf In this case, the petitioners had won a $50M jury verdict against Massey in a 2002 fraud case. In 2004, while Massey was appealing the decision, Brent Benjamin challenged sitting Justice Warren McGraw for a seat on West Virginia's only appellate court. Don Blankenship, President of Massey Coal, formed a 527 organization and spent over $3M campaigning against McGraw. When Massey's appeal of the verdict reached the West Virginia Supreme Court of Appeals, Benjamin refused to recuse himself and the state court ruled 3-2 to reverse the jury award.

The U. S. Supreme Court reversed the West Virginia court in a 5 to 4 decision. The majority opinion by Justice Kennedy explained that Blankenship's contributions "had a significant and disproportionate influence" upon Justice Benjamin's election and that there was a serious risk of actual bias. The opinion

concludes that this risk is compelled recusal under the Due Process Clause. Although the majority gave no clear guidance for decision makers to follow in the future, it is clear that the appearance of bias may now be so extreme on a particular set of facts as to require disqualification even in the absence of actual bias. This is a significant change for administrative hearing officers faced with motions to disqualify themselves.

For those who conduct hearings, whether or not they are lawyers, giving the appearance of being fair is almost as critical as actually being fair. Having had the fairest hearing in the world means nothing to the party who believes that he has just been to a kangaroo court. In the education context, by the time that parents and school personnel get to a due process hearing, they are often angry, if not outraged. Parents frequently believe that the schools are messing with their kid. School district employees often believe that the parents don't appreciate their efforts. Now they are being forced into a "legal" proceeding

Imagine how a party to a hearing would feel if, in addition to all the elevated emotions they have entering a hearing, they now believe that the hearing itself will be unfair. Hearing officers should remember treatment that they have received from a person in a position of authority that they feel was unfair. Parties to a hearing should never leave the hearing with that sinking feeling of unfair treatment. It is incumbent upon the hearing officer to ensure that the parties believe that the hearing process has been conducted in an absolutely fair manner.

In order to avoid even the appearance of unfairness, the hearing officer should take extraordinary steps to make it abundantly clear that the hearing officer does not favor one party or attorney over the other. In this regard, the hearing officer should never call one lawyer or party by their first name and the other by their last name. The hearing officer should never go to lunch with one party or lawyer. (If there is a court reporter at the hearing, she is the only person you can eat with.)

The hearing officer also should avoid all types of ex parte communications, i.e., communications with one attorney or party without the other side being present. Obviously, the substance of a case should never be discussed unless all parties and their lawyers are present. Even communications as to non-substantive matters, however, should be avoided unless both sides are present. The danger of ex parte communications is that the party who is not present may well fear that the merits of the case were discussed in a private meeting or conversation by the opposing party with the hearing officer. See, Chester Community Charter Sch v Hardy ex rel Philadelphia Newspaper 38 A.3d 1079 (Comm Ct Penna 2012). Such a fear in itself could vitiate the appearance of impartiality, thereby making it impossible for the party to believe that the hearing will be fairly conducted and the decision will achieve a fair result.

Avoiding the appearance of partiality or unfairness also requires the hearing officer to make appropriate disclosures of prior relationships with the parties and

their counsel at the prehearing conference or some other early interaction with the parties. I disclose all past interactions with the lawyers and parties. Although this at times may seem extreme or even absurd, I find that disclosure of even brief interactions or encounters tends to make the parties, especially pro se parties, feel more confident that the hearing process will be fair. When a hearing officer is in doubt as to whether a disclosure should be made, a good rule of thumb is to make the disclosure.

The appearance of impartiality and fairness also requires that the hearing officer maintain strict confidentiality. No matter how juicy the facts of a hearing may have been, they are not a proper topic of conversation at a cocktail party. The hearing officer's decision should avoid reference to personally identifiable information to the extent possible. Office staff, especially typists, should be made aware of, and periodically reminded of, the requirement that they also keep all matters related to a due process proceeding strictly confidential.

Where a hearing officer had an extensive ex parte communication about the substance of the case with the lawyer and party of one side only, the reviewing court reversed the decision. Madden v. U. S. Assoc. 844 S.W.2d 374, 377, 40 Ark. App. 143 (Ark.Ct.App. 12/16/92). The court criticized HO as leaving the appearance of bias where HO denied a continuance when the driver's lawyer did not appear while granting a continuance when the police officer did not appear. Alvarez v. State of Alaska (Alaksa S.Ct. 8/13/2010).

The fact that a contract hearing officer made a substantial amount of money as a hearing officer ($175,000 over 2007-2009) was not enough to overcome the presumption of integrity where the decision was supported by substantial evidence and the proceedings were not arbitrary or capricious. Buchanan v. City of Minneapolis, No A10-1695; 2011 Minn. App. (Minn. Ct App July 25, 2011).

My favorite anecdote about the appearance of unfairness involves the hearing officer who was asked by a party at a break in the hearing whether he had change for a five dollar bill. The hearing officer hands five ones to the party who pockets them and hands the hearing officer the $5 bill. Just then the other party comes around the corner and says to the hearing officer, "I don't really mind you selling my case, but I think that you should have held out for more than five bucks."

The appearance of fairness is obviously not a shortcut to avoid the cardinal requirement that the hearing truly be conducted fairly. The appearance of fairness is not meant to be a disguise for an unfair proceeding. Rather, the requirement of the appearance of fairness is an additional requirement. The hearing must itself have been fair, and the parties must have no reasonable basis to believe otherwise. The two rules work in tandem. By paying attention to both, the hearing officer follows the mandate of the due process clause.

NOTE: This document, and any discussion thereof, is intended for educational purposes only. Nothing stated or implied in this document, or in any discussion thereof, should be construed to constitute legal advice or analysis of any particular factual situation.