Lead Us Not into Temptation: Should Attorneys Who Contract to Provide Administrative Adjudication Services Be Insulated from Those Who Compensate Them?

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What if the League of Professional Baseball Clubs adopted a rule whereby in each game the team with the better record would select the officiating umpires and an umpire's compensation would depend on the number of games he or she officiates? Baseball would likely cease to be a national sport. Even if umpires were not influenced by the power of the selecting team, their calls would be mistrusted by the fans.

Numerous governmental bodies (federal, state, and local) use an administrative adjudication process to enforce their statutes, ordinances, and rules. The presiding official over that process is variously called an administrative law judge (ALJ) or hearing officer. These presiding officials can enter orders imposing fines, revoking licenses, and requiring parties to take action or to cease and desist from taking action. Often, these presiding officials are private attorneys who act as independent contractors, selected and paid by the government agencies, which are parties to the proceedings and have an interest in the outcome of the litigation. The number of assignments these contractors receive is at the discretion of the government agency. These adjudicators are not protected by civil service laws. At the same time, they have a pecuniary interest in maintaining a good relationship with those who write their checks. Should these contractors be insulated from a government's adverse responses to an unfavorable decision? If so, what degree of insulation is warranted?

Typically, in these administrative hearings you will find three parties—the governmental body that brought the charge, the independent contractor adjudicating the charge, and the person accused of the violation. The nature of the process is such that their interests in the manner in which the hearing is conducted do not necessarily coincide.

- It would be in the interest of the independent contractor that he or she has some form of tenure, assured compensation, and true independence.

- The government administrator who brought the charges wants a hearing officer who understands and implements the agency's policies and is sympathetic to the challenges facing the agency. The administrator is not interested in a hearing officer who will second-guess the legality of the agency's rules and policies. It is in the agency's interest that the hearing officer be kept on a short leash. The administrator believes in the merits of the government's case and might perceive an adverse decision as a sign of incompetence.

- The person charged with a violation would hope for an adjudicator who, if not sympathetic, is at least impartial and without a pecuniary interest in the outcome.

Several decisions indicate that the judicial branch is skeptical of another judge's ability to fairly adjudicate a matter where the judge has a financial interest in the outcome of the litigation. For example, due process violations were found where

- A mayor served as judge over a person accused of violating prohibition laws and received fees and costs associated with the hearing, only if the mayor found a defendant guilty.[1]

- A mayor sat as judge over a traffic court, and the mayor's village receives a substantial portion of its funds from fines.[2]
- Judges' compensation was based on the number of cases they heard, and a plaintiff was able to choose which judge would hear her/his case.[3]

- A judge sitting on a state supreme court participated in adjudication of a lawsuit against an insurer when the judge had a very similar pending lawsuit against an insurer in another court and the state supreme court's judgment served as precedent over the justice's personal lawsuit.[4]

- A judge participated in a case in which his largest judicial campaign donor was a party.

However, the Supreme Court found no due process violation where a mayor had judicial functions but only very limited executive authority.[5] The city was governed by a commission of five members, including the mayor, which exercised all legislative powers. A city manager, together with the commission, exercised all executive powers. In those circumstances, the mayor's relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge.

Are the principals annunciated in these decisions limited to adjudications conducted by the judicial branch, or do they extend to administrative adjudications conducted by the executive branch? If due process requires that the executive branch offer an administrative adjudicator with some form of security from a government's adverse reactions to an unfavorable decision, what level of insulation is required? This article primarily focuses on two decisions that grappled with this issue: *Haas v. County of San Bernardino*[6] and *Van Harken v. City of Chicago*.[7]

Haas v. County of San Bernardino

Haas v. County of San Bernardino involved the revocation of a massage technician's license. After a deputy sheriff reported that a massage technician exposed her breasts and proposed a sexual act, the county's board of supervisors revoked her license. She appealed the revocation and the board set the matter for hearing. The county hired its own hearing officer to conduct the hearing. The massage technician raised a process challenge to the manner in which the hearing officer was selected. She objected that because the county paid the hearing officer and offered her the possibility of future work, the hearing officer had an impermissible financial interest in the case. The California Supreme Court agreed with the massage technician that "a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government *unilaterally selects* and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's good will."[8]

The court suggested that, to avoid this constitutional infirmity, a local government might do several things. First, adopt a rule that no person so appointed will be eligible for a future appointment until after a predetermined period of time—long enough to eliminate any temptation to favor the county. Next, appoint a panel of attorneys to hear cases under a pre-established system of rotation and contract with the state for the services of an ALJ. Lastly, the local government should establish and staff an office of county hearing officers.

In its decision, the court explained:

The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill. We conclude the answer is yes. To summarize the governing principles, due process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.[9]

In arriving at its decision, the court made six significant points that are worthy of quotation.

1. The principals that bar judges from having a pecuniary interest in the outcome are applicable to administrative law offices.

It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. . . . It has also come to be the prevailing view that "[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators."[10]

2. Actual prejudice on the part of the hearing officer need not be shown.

Thus, while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality, adjudicators challenged for financial interest have not. Indeed, the law is emphatically to the contrary. The high court has "ma[de] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator challenged for financial interest] was influenced, but only whether sitting on the case . . . would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.[11]
The appearance of bias that has constitutional significance is not a party's *subjective*, *unilateral* perception; it is the *objective* appearance that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator. A procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias.[12]

3. Where the adjudicator has a financial interest in outcome, there is no presumption of impartiality.

Thus, while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality, adjudicators challenged for financial interest have not. . . . "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." (*Tumey* [*v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 444 (1927)].)

In *Withrow v. Larkin*, . . . 421 U.S. 35, 47 [95 S. Ct. 1456, 1464 (1975)], the high court wrote that a claim of bias based on the combination of investigative and adjudicative functions in a state medical board had to "overcome a presumption of honesty and integrity in those serving as adjudicators. . . ." But never, in the years since *Withrow*, has the high court so much as hinted that a litigant seeking to disqualify an adjudicator *for financial interest* must overcome any such

presumption. To the contrary, the high court has repeatedly and unambiguously held that courts do not, when faced with a claim of bias arising from financial interest, decide whether the adjudicator was in fact influenced.[13]

4. The possibility that the hearing officer's decision may be overturned upon review does not cure constitutional infirmity.

The County also contends that any possibility of bias on the part of a hearing officer was cured when the Board independently reviews the administrative record and decides whether to accept or reject the officer's recommendation. The short answer to the contention is that no court has relied on this argument to uphold a decision reached by an adjudicator found to have suffered from a constitutionally significant risk of bias. Indeed, several courts have expressly rejected the argument. The leading case on point is Ward [v. Village of Monroeville, Ohio], 409 U.S. 57 [(1972)], in which the high court rejected the claim that the unfairness of being subjected to trial by a mayor with a financial interest in assessing fines "can be corrected on appeal and trial *de novo*. . . . We disagree," the high court wrote. "This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication."[14]

5. A direct, personal, and substantial pecuniary interest exists when income from judging depends on the volume of cases the adjudicator hears and when frequent litigants are free to choose among adjudicators.

The County also argues that any financial interest [the hearing officer] may have had in the prospect of future employment as a hearing officer was too slight to require disqualification. To be sure, the high court has required disqualification only for financial interests that it has characterized as "direct, personal, substantial, [and] pecuniary" rather than "slight." But the precise teaching of the fee system cases is that a direct, personal, and substantial pecuniary interest does indeed exist when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions. In this context, when the danger to be avoided is that the desire for more work will offer a possible temptation to the average person to favor the frequent litigant, even fees of $10 and $15 per case have been considered direct, personal, and substantial. Certainly, the amount of money that will induce an attorney to take time away from his or her regular practice of law cannot be dismissed as slight.[15]

6. The Mathews cost-benefit analysis is not applicable where the adjudicator has a pecuniary interest in the outcome.

Next, the County contends that any benefit to the adjudicative process that might come from restricting its freedom to choose hearing officers would not justify the increased burden on the County. The County thus invokes the cost-benefit analysis of *Mathews v. Eldridge* (1976) 424 U.S. 319, 335 [96 S. Ct. 893, 903, 47 L. Ed. 2d 18], in which the high court wrote that the "identification of the specific dictates of due process generally requires consideration of three distinct factors: 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 probable 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."

The *Mathews* cost-benefit analysis appears to have no legitimate application in this context. As another court has explained, "[a] *Mathews* balancing test . . . is not the appropriate inquiry when the due process claim involves an allegation of biased decisionmakers. *Mathews* involved only allegations of insufficient procedural safeguards, not allegations of a biased decisionmaker. The *Mathews* court made no comment on the line of cases that indisputably establish the right to an impartial tribunal. Indeed, since *Mathews*, the Supreme Court has had several occasions to consider claims of due process violations based on allegations of a biased decisionmaker; in none of these cases has the Court resorted to the *Mathews* balancing test to resolve that issue."[16]

Subsequent to the *Haas* decision, courts have been asked to overturn administrative adjudication on the basis that the government body that was a party to the dispute had excessive control over the adjudicator. In some cases, using the principles set out in *Haas*, the courts found that the proceeding violated due process because the adjudicator had a potential pecuniary interest in favoring the government.[17] In other cases, the court concluded that sufficient safeguards had been put in place.[18]

Van Harken v. City of Chicago

In *Van Harken v. City of Chicago*,[19] the plaintiffs objected to the fact that the hearing officers are hired by, and can be fired at will by, the City of Chicago's Director of Revenue, who may want to maximize the city's "take" from parking tickets. The court speculated that perhaps the "plaintiffs are being too cynical about the Director of Revenue. But even if they are not, we do not think that the adjudicative reliability of the hearing officers is fatally compromised by the manner of their appointment and by their lack of secure tenure."[20]

The court maintained that the independent contractors' positions are no riskier than those of an elected judge. "If their very indirect, very tenuous stake (a fear that if a hearing officer lets off too many alleged parking violators, the Director of Revenue may get angry and fire him) were enough to disqualify them on constitutional grounds, elected judges, who face significant pressure from the electorate to be 'tough' on crime, would be disqualified from presiding at criminal trials, especially in capital cases."[21] The decision cited *Bracy v. Gramley*[22] as the basis of the court's conclusion that elected judges are at risk. In *Bracy*, the court affirmed denial of habeas corpus relief to petitioners who sought a new trial on the basis that the judge, who presided over their trial, was convicted of accepting bribes in other criminal cases. The decision does not reference any election that the bribed judge lost.

In Illinois, elected judges must run for retention every six years. In order to be retained, a judge must receive favorable votes from at least 60 percent of those who voted on his or her retention. On November 9, 2018, the *Chicago Tribune* reported that "[f]or the first time in nearly 30 years, a Cook County judge has been voted out of office. . . ."[23] According to the article, the judge's misconduct did not occur while sitting on a bench. Rather, he was politically attacked for his activities as a prosecutor before being elected as a judge.

The *Van Harken* panel distinguished the independent contractor's position from that of the mayor in *Ward v. Village of Monroeville*,[24] where "[t]he mayor did not have a direct pecuniary stake in the decisions of the mayor's court, but his indirect stake was great."[25] The relevancy of *Ward* is unclear as the *Van Harken* plaintiffs were arguing that the independent contractors could have a pecuniary interest in the outcome of the decisions, in that they could have received fewer assignments if their decisions displeased the government official responsible for making these assignments.

The panel found the city's procedures were justified under the principles laid out in *Mathews v. Eldridge*.[26] In *Mathews*, the Court held that the identification of the specific dictates of due process

generally requires consideration of three distinct factors: "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 probable 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."[27]
The *Van Harken* panel found that this formula supported the City of Chicago:

> The hearing officers are not, it is true, as well insulated from the pressures of their political superiors as administrative law judges. But they are almost certainly cheaper (they receive $35 an hour, with no benefits, and are paid only when they are working), a relevant consideration under the cost-benefit formula of the *Mathews* case; and we must not forget that the maximum penalty that they are empowered to impose is only $100. The less that is at stake, other things being equal, the less process is due; that is the teaching of *Mathews*. With the benefits of stricter procedures as slight as our earlier example suggested they are, the costs that would be incurred in maintaining a corps of "real" judges justify the City's preference for a cheaper alternative.[28]

The court offered no explanation as to why the *Mathews* principles preclude insulating the independent contractor from the city's retaliation and failed to identify the costs the city would bear if its hearing officers were given independence. For example, the city could adopt a policy whereby compensation would not be reduced except for good cause. Chances are, the costs of such a policy would not be prohibitive.

The court rejected the city's argument that the opportunity to seek judicial review was a viable means to correct deficiencies in the administrative adjudication process.

We conclude that the city's procedures for dealing with parking violations satisfy the requirements of due process. But this conclusion owes nothing to the respondent's appellate remedy. An appeal that, quite apart from the time of the appellant and any attorney's fee, costs more to file than the maximum gain that the appeal can yield the appellant is an illusory remedy.[29]

The *Van Harken* decision was handed down 22 years ago. It is possible, that the Seventh Circuit would come to a different conclusion if the same issue was raised today. The court emphasized that the hearing officers only had the authority to issue fines of $100 and that the typical fine was $50. Today, attorneys under contract with the city to provide administrative adjudication services are empowered to assess fines of up to $50,000. They also have the authority to enter orders requiring payment of taxes. The $50,000 limit does not apply to orders requiring tax payments.[30] Unless the respondent seeks judicial review within 35 days of the administrative order, the "order of the hearing officer may be enforced in the same manner as a judgment entered by a court of competent jurisdiction."[31]

The decisions of the city's ALJs are reviewable by the Circuit Court of Cook County; however, this can be a limited review. A hearing officer's factual findings are held to be prima facie true and correct and will not be overturned unless they are against the manifest weight of the evidence. A decision is against the manifest weight of the evidence only when the opposite conclusion is clearly evident. On review, the court does not weigh the evidence or substitute its judgment for that of the agency. If the record contains evidence to support the agency's decision, it will be affirmed.[32]

Absent from the *Van Harken* decision is any mention of the consequences of the fines assessed through the administrative review process. The Illinois Vehicle Code empowers a local government to request the suspension the driver's license of an individual who has accumulated 10 or more unpaid parking or compliance violation tickets.[33] The same code provides that a local government may immobilize a vehicle for unpaid parking and compliance tickets.[34]

The Chicago Municipal Code provides that the vehicle wheel clamp will be used when the owner has been found liable for two or more parking/compliance tickets that remain unpaid for more than a year, or when the owner has been found liable for three or more recent unpaid parking tickets.
In order to have the vehicle wheel clamp removed, the owner must pay all the outstanding fines, as well as the $100 fee for the removal of the boot. In addition, the vehicle will not be released unless it displays the city wheel tax decal when the owner resides in Chicago.[35]

Over the last year, ProPublica and WBEZ (a Chicago-based public radio station) reported on the consequences of Chicago's aggressive enforcement of its parking/compliance and red-light camera ordinances.

- Tickets brought in nearly $264 million in 2016, or about 7 percent of the city's $3.6 billion operating budget.[36]

- There were 21,000 license suspensions issued across the state last year to drivers with at least 10 unpaid parking tickets or five unpaid tickets from automated red-light or speed cameras. Drivers from majority black ZIP codes received about 44 percent of those suspensions, though only 14 percent of Illinois residents are black.[37]

- Chicago has seized and sold nearly 50,000 cars over tickets since 2011. In 2017 alone, Chicago booted more than 67,000 vehicles for unpaid tickets. In about a third of those cases, the driver couldn't afford to remove the boot, and the vehicle was later towed to a city impound lot. The vast majority of cars bound in these tow-and-sell operations hail from low-income and minority communities on Chicago's West and South Sides, where experts have said residents are already hard-pressed to pay for effective transportation.[38]

- Chicago dismissed some 23,000 outstanding duplicate vehicle sticker tickets and will refund motorists who have already paid for an additional 12,000 duplicates five months after a ProPublica Illinois and WBEZ investigation revealed that, on nearly 20,000 occasions since 2007, motorists had been cited more than once on the same day for violation of the municipal code.[39]

We are witnessing a trend whereby the role of adjudicator is being morphed into the role of the prosecuting authority's agent. It is a trend that erodes the image of impartiality.

For example, a 2017 Illinois case, *Stone Street Partners, LLC v. City of Chicago*,[40] involved the prosecution of an alleged city building code violation. The ALJ began the hearing with an admonishment. She warned that those who admitted liability would receive the minimum fine permitted by the ordinance—while those who proceed to a hearing, if found liable, could receive a higher fine. She explained that she was authorized by the city to make this offer. In doing so, she cloaked herself as both the adjudicator and the city's agent.

Stone Street rejected the city's offer to plead guilty. At the conclusion of the hearing, the ALJ found Stone Street liable for the ordinance violation and imposed a fine greater than the minimum. There was no oral testimony in the hearing and the ALJ was the city's sole representative. On appeal, Stone Street argued that the procedure violated due process. The appellate court rejected the argument, finding that plea bargaining is not a violation of due process. The court expressed no concern about the ALJ's dual roles. The introduction here proposed that neither major league baseball nor the fans would authorize a process whereby one team gets to pick the umpires. To do so would be to damage the industry's public image, and baseball goes to great lengths to protect that image.

The justice industry is under attack. "The system is rigged" is a common refrain within the general public. As lawyers, we should be at the forefront in taking action to improve the public's image of this industry. Advocating for reforms that ensure the impartiality of our administrative adjudication systems would be a step in that direction.

Implications of Codes of Ethics

Various codes of ethics contain provisions that address situations where there is an appearance that an ALJ employed by an agency has an economic interest in maintaining a good relationship with that agency by entering favorable judgments.

The American Bar Association's (ABA's) National Conference of Administrative Law Judges (NCALJ) adopted its own set of ethical guidelines for ALJs in 1989. Canon 3(C) of the Model ALJ Code adopted the objective test by requiring recusal whenever an ALJ's "impartiality might reasonably be questioned."[41] In 2010, the National Conference of Commissioners on Uniform State Laws adopted the *Revised Model State Administrative Procedure Act* (Model State APA). The Model State APA requires "disqualification for bias, prejudice, financial interest, ex parte communications . . . or any other factor that would cause a reasonable person to question the impartiality" of the adjudicator and allows parties to "petition for the disqualification of a presiding officer" in their own case.[42]

In 2018, the NCALJ adopted the *Model Code of Judicial Conduct for State Administrative Law Judges* (Model State ALJ Code), which provides that an "ALJ shall not permit family, social, political, financial, or other interests or relationships to influence the ALJ's judicial conduct or judgment" and calls for recusal where a state ALJ's "impartiality might reasonably be questioned."[43]

The Administrative Conference of the United States, established by the Administrative Conference Act,[44] at its Seventieth Plenary Session, held on December 13–14, 2018, adopted Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators.*[45] The recommendation urged agencies to issue procedural rules governing the recusal of adjudicators to ensure both impartiality and the appearance of impartiality in agency adjudications. Recommendation 2018-4 lists factors that should be considered in adopting recusal rules in order to preserve the appearance of impartiality among its adjudicators. Two of the listed factors involve situations where the agency is a party. Those factors are:

a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in ensuring that its adjudicators appear impartial);

b. Whether the hearing is part of enforcement proceedings (an agency's interest in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger appearance-based recusal standards)[.][46]

The justifications for the recommendations are set out in a report by Louis J. Virelli III (herein referred to as "Final Report").[47] The Final Report acknowledges that that "ALJs are *often* more insulated from agency influence than other adjudicators."[48] This is an acknowledgment that some ALJs are *not* carefully insulated from agency influence. A recusal rule is an effective tool where there is a pool of ALJs that are carefully insulated from unwarranted agency influence. How would the rule function where the future employment opportunity of each ALJ in the pool is at the sole discretion of an agency official?

The importance of the codes of ethics and rules relating to recusal should not be minimized. However, there is a missing component—one that governs the agency rather than the ALJ. That component is a set of standards for agencies to follow where the agency employs ALJs to adjudicate disputes in which the agency has a substantial interest.
The organized bar should recommend a set standard that provides safeguards that insulate ALJs from unwarranted agency influence. These standards would apply to agencies that utilize ALJs to adjudicate matters in which the agency has a material interest.

Let's assume that we wanted to reduce the number of injuries and fatalities resulting from mine accidents. We would insist that miners comply with safety standards. However, their compliance cannot be a substitute for safety standards imposed on those who own and manage the mines.

Likewise, the goal of the legal community is to reduce the number of administrative decisions influenced by the pecuniary interests of the adjudicators. Adoption of a code of ethics for the adjudicators is a good step. The next step should be the development of standards, applicable to government agencies where the agency is both a party and an employer. These standards can insulate the adjudicator from unwarranted agency influence.

This would be a significant undertaking. A review of the decisions cited in endnotes 17 and 18 of this article reveal significant disagreements as to what constitutes an unreasonable risk of interference where a government agency is a party to litigation, selects the adjudicator, and compensates the adjudicator.

Empirical evidence on the subject would be useful. For example, a university might conduct a survey of ALJs who are employees of or contractors with government agencies. The surveys could offer anonymity to those who respond. In addition to the standard questions, it would be useful to know

- The percentage of their income that is dependent on compensation for their work as ALJs.
- Their perceptions of the risks of ruling against the agency.
- Their entitlement to a hearing, should the agency choose to no longer use their services.
- If provided with the hearing, what the standards to overturn that decision would be.

A survey of the governmental bodies also would be valuable.

The Final Report sets out a pragmatic argument as to why adoption of recusal rules is in the interests of not only the litigants but also the government agency that employs the ALJ.

There is thus a gap in the recusal safety net when it comes to public perception of agency adjudication. Agencies have good reasons to try to fill that gap with agency-specific regulations designed to minimize situations in which an adjudicator's impartiality might reasonably be questioned.

First, agencies are already concerned about how their adjudications are perceived, and often take internal, unpublicized measures to project the appearance of impartiality. Recusal regulations would be more permanent and enforceable expressions of that concern.

Second, and related, is the idea that transparency and clarity amplify and broaden the message. In an increasingly polarized political environment, public statements like regulations in support of impartiality—and the appearance thereof—can be a powerful countervailing force to increasing cynicism about, and suspicion of, public institutions.

Third, promulgating recusal regulations can help preempt concerns about integrity before they arise.

Finally, a broader, appearance-focused approach to recusal would be consistent with the prevailing view of the legal profession that its recusal canons should apply to agency adjudicators, including ALJs.[49] Each of the reasons cited above is applicable to the need for adoption and implementation of standards that insulate the ALJ from unwarranted agency influence.

Endnotes

1. Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. Ed. 749 (1927).

2. Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972).

3. Brown v. Vance, 637 F.2d 272, 281 (5th Cir. 1981).

4. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

5. Dugan v. Ohio, 277 U.S. 61, 48 S. Ct. 439, 72 L. Ed. 784 (1928).

6. 27 Cal. 4th 1017, 45 P.3d 280 (2002).

7. 103 F.3d 1346 (7th Cir. 1997).

8. *Haas*, 27 Cal. 4th at 1024, 45 P.3d at 285 (emphasis added).

9. *Id.* at 1024, 45 P.3d at 285–86.

10. *Id.* at 1026, 45 P.3d at 287 [citations omitted].

11. *Id.* at 1025, 45 P.3d at 286 [citations and footnotes omitted].

12. *Id.* at 1034, 45 P.3d at 291 [citations omitted].

13. *Id.* at 1025–26, 45 P.3d at 286–87 [citations omitted].

14. *Id.* at 1035, 45 P.3d at 290 [citations omitted].

15. *Id.* at 1031–32, 45 P.3d at 290 [citations omitted].

16. *Id.* at 1035, 45 P.3d at 293 [citations omitted].

17. Stokes v. City of Visalia, No. 1:17-cv-01350-DAD-SAB, 2017 U.S. Dist. LEXIS 204477 (E.D. Cal. Dec. 11, 2017) (Due process violation where hearing officer hired for two years and contract can be renewed for another two years. Even after the two-year term has expired, the agreement contemplates renewal unless one of the parties elects to terminate the agreement. The renewable two-year terms held out to the adjudicator the possibility of future employment in exchange for favorable decisions and created a conflict.).

Lucky Dogs LLC v. City of Santa Rosa, 913 F. Supp. 2d 853 (N.D. Cal. 2012) (Apartment owner was denied due process where the city's system of unilaterally selecting hearing officers and hiring them to renewable two-year terms held out to the adjudicator the possibility of future employment in exchange for favorable decisions.).

Yaqub v. Salinas Valley Mem'l Healthcare Sys., 122 Cal. App. 4th 474, 18 Cal. Rptr. 3d 780 (2004) (The doctor argued that the presiding officer at his hearing before a fair hearing panel had a financial conflict of interest that should have disqualified him from conducting the hearing. The appeals court agreed. The hearing officer was unilaterally appointed by the hospital's medical executive committee, his fee was paid by the hospital, and he had been a member of a hospital foundation with a mission of fund-raising for the hospital.).

Absmeier v. Simi Valley Unified Sch. Dist., 196 Cal. App. 4th 311, 126 Cal. Rptr. 3d 237 (2011) (District's law firm prepared and filed a decision in favor of the district, which the commission adopted. The court found that the commission's appointment of its law firm to render the final administrative decision violated due process. The law firm wore two hats. On the one hand, it acted as a hearing officer. On the other, it acted as legal counsel for the Commission, appeared with the commissioners, and advised them to sustain the firm's decision.).

18. Score LLC v. City of Shoreline, No. 55359-3-I, 2005 Wash. App. LEXIS 1531 (Ct. App. June 27, 2005) (No due process violation where hearing officer is selected by government body, rather than attorney for government; and hearing officer's income from the City constituted only 14 to 16 percent of his consulting income, and 7 to 8 percent of his personal income. The only financial interest that hearing officer had was a remote fear of being fired and losing a small percentage of his income.).

Klein v. City of Jackson, 735 F. Supp. 2d 732 (E.D. Mich. 2010) (no due process violation where the appointment of a hearings officer is by the mayor with the approval of city council, and appointee serves a term of two years and is removable only upon reasonable cause).

Thornbrough v. W. Placer Unified Sch. Dist., 223 Cal. App. 4th 169, 167 Cal. Rptr. 3d 24 (2013) (No violation where appellant did not ask the hearing officer about *future* employment prospects with the District. District and hearing officer stated he knew of no "*potential* or actual conflicts of interest," which court interpreted as a denial of future employment prospects with the District.).

Brown v. City of Los Angeles, 102 Cal. App. 4th 155, 125 Cal. Rptr. 2d 474 (2002) (no due process violation where (a) the pool of hearing officers are selected from members of Department who have the rank of captain through deputy chief, (b) hearing officer's employment protected by the Public Safety Officers Procedural Bill of Rights, and (c) accused officer initially selects the three potential hearing officers from the pool of eligible hearing officers).

Coffman Specialties, Inc. v. Dep't of Transp., 176 Cal. App. 4th 1135, 98 Cal. Rptr. 3d 643 (2009) (No due process violation where a single party did not have the authority to select the arbitrator. Instead, the government agency and contractor had to come to an agreement on the arbitrator (or a judge selected the arbitrator), and then each party had a right to strike an arbitrator for any disclosable circumstance, including if the arbitrator had worked for the government agency in the prior five years. That system provided strong incentive for an arbitrator to be fair to both parties if he or she desired future arbitration work.).

Brutoco Eng'g & Constr., Inc. v. Super. Ct., 107 Cal. App. 4th 1326, 132 Cal. Rptr. 2d 866 (2003) (No due process violation in arbitration of a contractual dispute under conditions to which all parties agreed to. Arbitrators serve four-year terms.).

Manufactured Home Comty., Inc. v. City of San Jose, 358 F. Supp. 2d 896 (N.D. Cal. 2003) (no due process violation where agency that selects ALJ is not a party in dispute between landlord and tenants).

Mulugeta v. Regents of the Univ. of Cal., No. C-01-0332 EDL, 2002 U.S. Dist. LEXIS 17013 (N.D. Cal. July 22, 2002) (No due process violation where government agency uses a rotation system to select ALJ and official of agency had submitted an undisputed declaration attesting that agency does not remove arbitrators from the pool or decline to use certain arbitrators if they render decisions contrary to agency's interests).
In re Rental Dwelling License, 804 N.W.2d 132 (Minn. Ct. App. 2011) (No due process violation where hearing officer is hired for three years and the city delineates numerous qualifications for eligibility to become a hearing officer. One of the qualifications the city requires is that a hearing officer understand the obligation to "[f]ind a violation only if the greater weight of the evidence supports such a finding.").

Waters v. Hollywood Tow Serv., No. CV 07-7568 CAS (AJW), 2010 U.S. Dist. LEXIS 93091 (C.D. Cal. July 27, 2010) (Plaintiff did not allege any facts suggesting that any hearing examiner or other city employee or agent who administratively reviewed his parking citations had a substantial, personal pecuniary interest in upholding or collecting a parking fine.).

19. 103 F.3d 1346 (7th Cir. 1997).

20. *Id.* at 1352–53.

21. *Id.* at 1353.

22. 81 F.3d 684, 689 (7th Cir. 1996).

23. Cook County voters oust judge for 1st time in decades, while suspended DuPage County judge wins retention, CHI. TRIB., Nov. 8, 2018 (final ed.).

24. 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972).

25. *Van Harken*, 103 F.3d at 1353.

26. 424 U.S. 319, 96 S. Ct. 893, 903 (1976).

27. *Id*. at 335, 96 S. Ct. at 903.

28. *Van Harken*, 103 F.3d at 1353.

29. *Id.*

30. 65 ILL. COMP. STAT. 5/1-2.1-4(b)(5).

31. *Id.* at 5/1-2.1-8(b).

32. Glaser v. City of Chicago, 2018 Ill. App (1st) 171987, 102 N.E.3d 770 (2018).

33. 625 ILL. COMP. STAT. 5/6-306.5. *See also* CHI. MUN. CODE § 9-100-130.

34. 625 ILL. COMP. STAT. 5/6-306.3(c).

35. CHI. MUN. CODE §§ 9-92-080, 9-100-120.

36. Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA ILL. (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy.

37. Melissa Sanchez, *Some States No Longer Suspend Driver's Licenses for Unpaid Fines. Will Illinois Join Them?*, PROPUBLICA ILL. (Mar. 15, 2018), https://www.propublica.org/article/illinois-license-suspensions.

38. Elliott Ramox, *Chicago Seized and Sold Nearly 50,000 Cars over Tickets Since 2011, Sticking Owners with Debt*, WBEZ NEWS (Jan. 7, 2019), https://www.wbez.org/shows/wbez-news/chicago-seized-and-sold-nearly-50000-cars-over-tickets-since-2011-sticking-owners-with-debt/1d73d0c1-0ed2-4939-a5b2-1431c4cbf1dd.

39. Melissa Sanchez & Elliott Ramos, *Chicago Throws Out 23,000 Duplicate Tickets Issued Since 1992 to Motorists Who Didn't Have Vehicle Stickers*, PROPUBLICA ILL. (Nov. 29, 2018), https://www.propublica.org/article/chicago-vehicle-stickers-duplicate-tickets-thrown-out.

40. 2017 Ill. App. (1st) 133159, 91 N.E.3d 965 (2017).

41. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 3(C) (AM. BAR ASS'N 1989).

42. REVISED MODEL STATE ADMIN. PROCEDURE ACT § 402(c), (d) (NAT'L CONF. ON COMM'RS OF UNIFORM STATE LAWS 2010). http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf.

43. MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMIN. LAW JUDGES Canon 2, R. 2.4(B) (AM. BAR ASS'N 2018).

44. 5 U.S.C. §§ 591–596.

45. Admin. Conference of the U.S., Adoption of Recommendations, 84 Fed. Reg. 2139 (Feb. 6, 2019).

46. *Id.* at 2140–41.

47. LOUIS J. VIRELLI III, ADMIN. CONFERENCE OF THE U.S., FINAL REPORT, RECUSAL RULES FOR ADMINISTRATIVE ADJUDICATORS (Nov. 30, 2018), https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators.

48. *Id*. at 18 [emphasis added].

49. *Id.*