

Ethics: Remaining Independent & Neutral



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NAHO Ethics Code Section IV: Independence

“The administrative hearing process requires re-examination and reappraisal of determinations made by an administrative agency. Regardless of the hearing official’s employment relationship with a party agency, the hearing official should exercise independence of action and judgment to protect the due process rights of parties and to achieve the most legally correct results in a case, maintaining decisional independence from agency management and programs.”

NAHO Ethics Code Section IV: Independence

“Supervisors may provide consultation to hearing officials, except as prohibited by law, but may not alter the hearing officials’ decisions or substitute their judgment for that of the hearing officials.”

NAHO Ethics Code Section III: Impartiality

“Hearing officials should always strive to assure all persons involved that the proceedings will be conducted and decided impartially. ‘All persons involved’ includes the appealing or petitioning parties and their representatives, the agency, agency staff or representatives, witnesses, interpreters, intervenors, observers, and any other person who appears before the hearing official, whether in person, in writing, or by electronic means.”

NAHO Ethics Code Section III: Impartiality

- “Hearing officials should act in such a way that no one could reasonably believe that any person or agency could improperly influence them in the performance of their duties.”
- “Hearing officials should not conduct or participate in deciding the outcome of any proceeding in which their impartiality might reasonably be questioned.”

NAHO Ethics Code Section III: Impartiality

- “Personal knowledge of the facts in a case is an appropriate ground for disqualification of the hearing official.”
- “Hearing officials should promptly disclose to the parties any prior personal knowledge of or involvement in the matter.”
- “Hearing officials should always withdraw from any proceeding in which their impartiality becomes compromised for any reason.”

NAHO Ethics Code Section III: Impartiality

- “However, the hearing official should not withdraw from a proceeding if the hearing official’s impartiality is challenged solely on the basis that the hearing official is employed by an agency appearing in the proceeding.”
- “The parties may agree to allow the hearing official to preside after full disclosure has been made.”

NAHO Ethics Code Section III: Impartiality

“Hearing officials should preside without bias or prejudice and without discrimination on any prohibited basis against any person involved in the proceeding and should control the proceedings to prevent such discriminatory behavior by any other person involved.”

The Case of the Helpful Hearing Officer



Case of the Helpful Hearing Officer

Hearing officer for DMV conducts hearing regarding whether a driver's license is to be revoked for driving under the influence. During the hearing, the hearing officer notices the registration certificate for the breath test machine was missing from the exhibit packet. Without explanation, he calls a recess, locates the registration certificate, marks it as an exhibit, and resumes the hearing, and revokes the driver's license. On appeal, driver argues hearing officer had impermissibly acted as an advocate for the DMV violating his right to an impartial hearing official.

- How would you rule on the driver's argument?

***Griffin v. DHSMV*, 909 So. 2nd 538 (FL App. 2005)**

Hearing officer went beyond the role of impartial fact-finder by recessing the hearing to locate the registration certificate for the machine used for the driver's breath test and then entering it as evidence. Doing so violated the due process rights of the driver.

Case of the Prepared Hearing Officer

Hearing officer for DOT conducts hearing regarding whether a driver's license is to be suspended for driving with an alcohol concentration over the legal limit. Prior to the hearing, the hearing officer gathers documents about blood tests for alcohol, including approved methods, devices, operators, materials, and checklists required to be filed with the clerk of each district court and that are routinely evidence in any such administrative license suspension hearing. At the hearing, the hearing officer offered and admitted those documents. The driver argued there was a gap in the evidence because the hearing officer "chose to leave out" some current documents, including one the driver had introduced. The hearing officer rejected those arguments. On appeal, driver argues hearing officer showed actual bias by choosing before the hearing and introducing at the hearing only the documents that supported suspension.

- How would you rule on the driver's argument?

***Dittus v. NDDOT*, 502 N.W.2^d 100 (N.D. 1993)**

Hearing officer introduced the relevant memorandum corresponding to the what the blood collector used.

Hearing officer just disagreed and was legally correct.

These were “boilerplate documents.”

Hearing officer’s “marshalling” of the documents prior to a hearing is tantamount to a ministerial act.

Not performance of investigative or prosecutorial functions, but duty to admit “only relevant evidence.”

But Is This Going to Far?

Hearing officer prior to the hearing noticed the ID number on a solution used in a breath testing device was different from the number on forms from other contemporarily given tests. Hearing Officer issued a subpoena to the test operator to appear at the hearing and bring any documents relating to the test. At the hearing, over objection, the test operator explained the misidentification resulted from an error in transcription and the same solution was used in all of the tests.

Did the hearing officer go to far?

Peterson v. NDDOT, 536 N.W.2^d 367 (N.D. 1995)

Combination of adjudicative and prosecutorial functions does not, by itself, violate due process. Statute provides that at the request of any party or upon the agency's or the hearing officer's own motion, a hearing officer may subpoena a witness to testify and produce documents. Not serving as an investigator, prosecutor, or advocate in an investigatory or prehearing stage, by issuing a subpoena to receive an explanation for a discrepancy.

If evidence showed the use of an unauthorized solution, a fact unknown to the hearing officer and not immediately apparent from the record, it would have resulted in a dismissal and the return of the license.

More than the gathering of "boilerplate" documents, but authorized by statute.

"We cannot conclude that the hearing officer acted with **partiality**," as no indication she knew what the testimony would be.

***Ertelt v. NDDOT*, 491 N.W.2^d 736 (N.D. 1992)**

Hearing officer suspended Ertelt for 91 days after a hearing following an arrest for APC under the influence, with findings about a hit and run accident.

DOT later gave notice of intent to suspend for failure to file proof of financial responsibility after a hit and run.

The same hearing officer presided at the hearing, introducing her prior findings, conclusions, and decision.

The hearing officer also introduced a “motor vehicle crash report.”

***Ertelt v. NDDOT*, 491 N.W.2^d 736 (N.D. 1992)**

The issue was whether reversible error to admit the crash report.

It was not provided to Ertelt prior to the hearing and was the only evidence on the amount of damages, so held to be reversible error.

“Additional comment” that although the combination of functions is not in itself a due process violation, the hearing officer generated the notice upon personal knowledge and upon discovery of the crash report.

The Case of the Agonizing Architect



Architectural Licensing Commission

The Commission threatened to revoke the license of an architect for negligence and deceit. The architect requests a hearing. At the hearing, the architect realizes that the lawyer prosecuting him on behalf of the Commission also serves as the Commission's legal advisor in other unrelated matters. Architect argues that allowing the attorney to serve in these two roles undermines the impartiality of the process—at the very least, it creates the appearance of unfairness. He moves to disqualify Commission's lawyer from prosecuting him.

- How would you rule on the motion to disqualify the Commission's attorney from prosecuting him?

Martin v. Sizemore, 78 S.W.3d 249, 265 (Tenn. App. 2001)

To permit an advocate for one party to act as the legal advisor for the decision-maker creates a substantial risk that the advice given to the decision-maker will be skewed. But the risk of bias becomes intolerably high only when the prosecutor serves as the decision-maker's advisor *in the same or a related proceeding*. In the absence of proof of actual bias or specific conduct that would impugn fairness, the allegations against the Commission are unfounded.

The Case of the Dangerous Dentist



State Dentistry Board

Board alleged a dentist's care of 15 patients was negligent and sought to suspend his license. At the hearing, the Board used its own expertise in evaluating the evidence regarding the treatment received by the 15 patients and determined the dentist had been negligent. The dentist appealed the suspension order saying there was no evidentiary basis for the Board's expertise appearing in the record and the Board should have called an expert witness to testify regarding his competence, or the lack thereof, rather than relying on their own expertise.

- Was the Board correct in relying on their expertise?

Appeal of Schramm, 414 N.W. 2d 31 (SD 1987)

Appellate courts require expert testimony in hearings involve complex, technical evidence because (1) Not all Board members have the same level of expertise and may not have the advanced technical training related to every matter that might arise; (2) Proper judicial review can't occur without evidence in the record for the court to review; (3) Petitioner was deprived of his due process rights to cross-examine opposing witnesses and & rebut opposing evidence when the Board ruled on their own expertise. By ruling on their own expertise, the Board acted as silent witnesses. Expertise is no substitute for evidence.

Case of the Self-Promoting So and So



Case of the Self-Promoting So and So

A series of articles and editorials in the state's most prominent newspapers allege recent deaths of hotel patrons by fire was due to cost-cutting, sub-standard commercial construction by a well-known hotel builder. Chair of the local Contractors' Board is asked by the press to make a comment regarding the situation. The Chair says: "The Board will investigate and will expend its utmost efforts to do something about this matter." When hotel builder is before the Board in hearing regarding this hotel, he demands the Chair recuse.

- Is recusal really necessary?

Yes! More Self-Promoting So and Sos

Cinderella Career and Finishing Schools Inc. v. FTC, 425 F.2d 583
(US App. DC Circ., 1970)

*World Transportation Inc. v. Central Florida Regional
Transportation Authority*, 642 So.2d 913 (FL App. 5th Dist.,
1994)

Charlotte County v. IMC Phosphates Co., 824 So.2d 298 (FL
App. 1st Dist., 2002)

*Florida Department of Agriculture & Consumer Services v.
Broward County*, 810 So.2d 1056 (FL App. 1st Dist., 2002)



Case of the Busy Bureaucrat



Case of the Busy Bureaucrat

Counsel for Alcohol Beverage Control Commission (ABC) investigated complaint regarding Brew Pub, issued liquor license suspension notice and prepared for prosecution. ABC Counsel was then appointed a commissioner. When hearing for Brew Pub was held, she sat with rest of Commission over Brew Pub's objection and refused to recuse from participation in the vote regarding license status—but her vote was only one in a unanimous decision.

- Brew pub appealed arguing that she was biased. How would you rule if you heard the appeal?

Beer Garden, Inc. v. State Liquor Authority of the State of New York, 582 N.Y.S.2d 65 (1992)

Appellate court annulled the Commission's findings and remanded the matter back to the Commission for new proceedings in which this Commissioner was to recuse herself. Held: Acting as Counsel for the Commission during the investigation and the Commission's prosecutorial preparations, then sitting as a Commissioner during the hearing and voting blurred the separate and distinct functions of prosecution and adjudication.