



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

Policy of Pennsylvania Department of Education, Office of Chief Counsel, to Avoid Commingling of Functions in Administrative Proceedings

Purpose:

The purpose of this policy is to memorialize the standards and operating procedures established by the Pennsylvania Department of Education's Office of Chief Counsel ("OCC") designed to ensure due process and avoid commingling of functions in administrative proceedings.

Background:

At times, OCC lawyers are called upon to perform adjudicatory functions in the course of their assigned duties or to advise the agency head or boards and committees associated with the Department in performing adjudicatory functions. For example, OCC lawyers may be appointed as administrative hearing officers pursuant to the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II (§§ 31.1 – 35.251) ("GRAPP"). In other situations, OCC lawyers may serve as counsel to the agency head in considering appeals or other matters brought before the agency head, or to boards and committees (*e.g.*, the Private Licensed School Board and the Private Academic School Board), when such boards and committees hear matters brought before them.

In other instances, OCC lawyers are called upon to act as prosecutors, representing the Department or constituent offices, bureaus and divisions in administrative litigation before the agency head or Department boards and committees. In some instances, OCC lawyers represent these staff in administrative appeals or other actions filed with the agency head. In either scenario, these OCC lawyers might find themselves representing the Department, or a subdivision of the Department, before board counsel or administrative hearing officers who are also OCC lawyers.

Due process, which ensures a fair hearing before a fair tribunal, is a fundamental requirement in an administrative adjudication. When OCC lawyers are appointed

as hearing officers, they are required to follow the requirements of GRAPP, which among other things, imposes the duty on the hearing officer to “conduct a fair and impartial hearing.” 1 Pa. Code § 35.189. GRAPP also prohibits hearing officers from engaging in *ex parte* communications or performing any duties inconsistent with their duties as hearing officers. 1 Pa. Code § 35.188. *See also* Pa. R.P.C. 1.2 (stating that a lawyer shall not, without the consent of the parties, represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge *or other adjudicative officer*) (emphasis added).

As employees of the Commonwealth and as legal professionals, the staff of OCC is also bound by a number of state ethics laws and the Rules of Professional Conduct. However, because of the special nature of administrative proceedings, clear procedural safeguards by OCC are desirable. In order to safeguard due process and avoid the appearance of impropriety and the prohibited commingling of functions in these situations, OCC has created standards and operating procedures that serve as formal “walls of division” between those serving in an adjudicatory capacity (*e.g.*, hearing officers, legal advisors to adjudicators, and board counsel) and those serving in a prosecutorial or representative capacity (*e.g.*, advocates and counsel to bureaus, divisions, *etc.*).¹

Standards and Operating Procedures:

OCC adheres to the following standards and operating procedures:

- Lawyers performing an adjudicatory function should exercise independence of action and judgment to protect the due process rights of parties involved and to achieve the most legally correct result in a case, maintaining decisional independence from Department personnel serving in a prosecutorial or representative capacity.
- If the roles of adjudicator and advocate in a given matter are both filled by OCC lawyers, then the adjudicator and advocate shall be assigned separate supervisors for that matter, to the extent that such supervision is required. In

¹ Pennsylvania courts have held expressly that different attorneys working for the same agency may serve in an adjudicatory capacity and in a prosecutorial or representative capacity, provided that “walls of division” are maintained. *See Adams Outdoor Advertising v. Department of Transp.*, 860 A.2d 600 (Pa. Cmwlth. Ct. 2004) (holding that the fact that both attorneys were employed by the same agency “does not present the ‘potential of bias’ or ‘the appearance of non-objectivity,’ where ‘walls of division’ are maintained”).

cases where supervision is required but an OCC attorney is unable to provide supervision, an appropriate attorney will be identified by the Governor's Office of General Counsel to provide such supervision. The assignment of attorneys to adjudicative and advocate functions shall be memorialized in a written memorandum that is distributed to all staff members in OCC and, upon request, to the parties to the applicable proceeding.

- Supervising attorneys may provide consultation to adjudicators, but they may not seek to alter an adjudicator's decisions or substitute their judgment for that of the adjudicator.
- There shall be no *ex parte* communication regarding any aspect of an open administrative matter between the OCC lawyer performing the adjudicatory function and the OCC lawyer performing the representative function in that particular administrative matter. See 1 Pa. Code § 35.188 (relating to restrictions on duties and activities). See also Pa. R.P.C. 3.5 (relating to impartiality and decorum of the tribunal).
- No OCC lawyer shall serve as counsel to an administrative board or committee during the same time period he or she is representing the Department in matters within the jurisdiction of that board or committee.
- OCC attorneys shall take care not to discuss at the OCC weekly staff meeting any matter that is currently, or is reasonably likely in the future to be, the subject of an administrative proceeding where the roles of adjudicator and advocate in a given matter may be both filled by OCC lawyers.
- OCC shall maintain separate physical files for the OCC adjudicator and the OCC advocate assigned to a particular matter. To the extent practicable, OCC's internal computer network shall also be configured to restrict the sharing of files by OCC staff members that are separated under this policy.
- To the extent practicable, separate OCC support staff shall be assigned to the OCC adjudicator and OCC advocate.
- An OCC attorney performing an adjudicatory function should not conduct or participate in deciding the outcome of any proceeding in which his or her

impartiality reasonably might be questioned because of the attorney's personal knowledge of the facts in a case or involvement in the investigative and/or prosecution stage of the same case.

- OCC attorneys performing an adjudicatory function should promptly disclose to the parties any prior personal knowledge of or involvement in the investigative and/or prosecution stages of the same case.
- If, despite all of the foregoing precautions, a case comes before a board for adjudication, and the current counsel to that board had involvement in the investigative and/or prosecution stage of the same case, he or she shall recuse with respect to that case and another lawyer shall be assigned to advise the board with regard to that particular case.
- OCC attorneys serving as hearing officer shall disqualify themselves from any proceeding in which their impartiality might reasonably be questioned because of their personal knowledge of the facts in a case or involvement in the investigative and/or prosecution stage of the same case. *See* 1 Pa Code § 35.186 (“A Presiding Officer may withdraw from a proceeding when he deems himself disqualified....”).
- Any party to a proceeding may seek the disqualification of a hearing officer pursuant to GRAPP. The required procedure is for the party to file a motion pursuant to 1 Pa. Code § 35.186, including affidavits alleging personal bias or other disqualification.
- An OCC attorney serving as an adjudicator shall not be disqualified from a proceeding if the adjudicator's impartiality is challenged solely on the basis that the adjudicator is employed by the Department or within OCC, provided that the walls of division prescribed by this policy have been and continue to be maintained.
- All OCC staff shall be regularly advised by the Chief Counsel concerning this policy and the importance of avoiding commingling of functions.
- Copies of this policy shall be posted on the OCC website.
- Any OCC attorney appointed as a hearing officer shall inform all parties of this policy promptly following the hearing officer's appointment.

- To the extent practicable, the OCC website will identify any OCC attorneys who regularly serve as hearing officers.

These standards shall be construed in such manner so as to avoid any conflict or appearance of conflict. To the extent that situations are not addressed in these standards, lawyers shall observe the spirit of the standards and take reasonable precautions to avoid conflicts and appearances of conflicts.

OCC personnel who become aware of violations of this policy shall report such violations to the Governor's Office of General Counsel c/o the Executive Deputy General Counsel for Litigation.

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