

Independent Advice for Your Agency Clients: What is it?

Christopher Munns
Assistant Attorney General

The Basic Problem—One Attorney Serving Simultaneously as Advisor and Advocate

The Assistant Attorney Generals (the “AAG”) assigned to an agency are responsible for providing general legal advice and also for representing the agency in adversarial proceedings arising from its duties, such as licensing duties or administration of public funding. In these adversarial proceedings, the agency acts as the Decision-maker and must act after considering evidence and arguments provided by the AAG and the affected third-party. However, the AAG cannot operate simultaneously as an advocate in an adversarial proceeding before the agency and also as an advisor to regarding that proceeding. *Taylor v. Arizona Law Enforcement Merit System Council*, 731 P.2d 95, 101 (App. 1987) (“A conflict of interest would clearly arise if the same assistant attorney general participated as an advocate before the council and simultaneously served as an advisor to the council in the same matter.”) Although not an ethical conflict of interest, having an attorney advocate to the Decision-maker and then advise the Decision-maker about the same case raises issues of due process and fairness. *Howitt v. Superior Court of Imperial Cnty.*, 3 Cal.App.4th 1575, 1580, 1585 (Cal. Ct. App. 1992). This practice “creates a substantial risk that the advice given to the decision maker will be skewed.” *Nightlife Partners, LTD v. City of Beverly Hills*, 108 Cal.App.4th 81, 93 (Cal. Ct. App. 2003). “The mental image comes to mind of a hearing in which county counsel representing a county department raises an objection and then excuses himself from counsel table to consult with the Board members as to whether the objection should be sustained.” *Howitt*, 3 Cal.App.4th at 1582. However, another attorney from a separate division with the Attorney General’s Office can act as a legal adviser to the Decision-maker during adversarial proceedings. *Taylor*, 731 P.2d at 101; *accord Howitt*, 3 Cal.App.4th at 1586 (“Performance of both roles by the same law office is appropriate only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate.”)

During the adversarial proceeding, the AAG is a party to the case subject to certain restrictions. After the matter becomes an adversarial proceeding, a “wall” goes up between the AAG and the Decision-maker. Although the AAG usually advises the agency and may have participated in the investigative phases of the matter, the Decision-maker cannot communicate with the AAG about the legal or factual merits of the case. Additionally, the Decision-maker should avoid discussing the case with any staff member actively assisting the AA in the

prosecution of the case, such as an investigator that is a witness or a staff member coordinating litigation strategy with the AAG. "The participation in the actual decision making process by only one party to a controversy is inimical to the notions of fairness which underlie the due process of law." *Western Gillette, Inc. v. Arizona Corp. Comm'n*, 592 P.2d 375, 376 (App. 1979). Although communications about purely ministerial matters (such as scheduling issues) may be permitted, the Decision-maker should take precautions against having such communications in order to avoid the risk of inadvertent ex parte communications and any appearance of impropriety.

The Role of the Independent Advisor

When a matter before an agency becomes an adversarial proceeding, the Decision-maker can request independent legal advice from the independent advisor, an attorney in the Solicitor General's Office that provides legal advice to various state agencies when their regularly assigned AAG becomes an advocate in an adversarial proceeding. This lawyer is screened from the AAG that is prosecuting the agency's case. As a result, there are two important limitations on the independent advisor:

- The independent adviser cannot communicate with the parties regarding the adjudication of any fact or issue in dispute, or the preparation or presentation of any fact or legal issue on behalf of any party to the proceeding. Ariz. Agency Handbook § 1.9.4.5 at 1-27.
- The independent adviser provides advice on procedural matters only. This would include advice about the process and rules for conducting a hearing, considering recommended decisions from the Office of Administrative Hearings, and other similar matters. In addition, the independent adviser provides legal advice about the admission and exclusion of evidence. As to substantive legal or factual issues, the Decision-maker should obtain arguments from the parties as to the correct decision in the form of written memoranda or oral arguments. Ariz. Agency Handbook § 1.9.4.7 at 1-27. The independent adviser can assist in clarifying legal issues that are in dispute.

The independent adviser provides legal advice to the agency from the time that the matter becomes an adversarial proceeding until the time a final administrative decision issues in the case (usually after the expiration of the period for filing a motion for rehearing or after a ruling on such a motion that has been filed).

Thoughts on Handling Adversarial Proceedings

1. When does the adversarial proceeding start?

- a. Contested Case (action initiated by agency)—begins when the Complaint and Notice of Hearing is issued by the agency.
 - b. Appealable Agency Actions involving discipline or adverse action—begins when the person receiving the citation files a Request for Hearing, which they may also call an appeal.
 - c. License Denials—begins when person receiving denial letter files a Request for Hearing, which they may also call an appeal.
2. When does the adversarial process end? The adversarial process ends when the agency's decision becomes a "final administrative decision," which is "a decision by an agency that is subject to judicial review pursuant to title 12, chapter 7, article 6." A.R.S. § 41-1092(5). An administrative decision is final, and thus subject to judicial review, after one of two circumstances:
- a. The agency rules on a Motion for Rehearing or Review that has been filed by a party to the case under A.R.S. § 41-1092.09.
 - b. The expiration of the period of time for a party to file a Motion for Rehearing or Review with the agency, which is normally 30 days after service of the order. An additional five days is added to the period if the order is served by mail.
3. Staffing Cases. The process described above operates rather simply when it involves only the agency as Decision-maker, an AAG as advocate, and the independent adviser. After the adversarial proceeding begins, the Decision-maker should communicate only with the independent adviser about the case and should not communicate with the AAG about the case. The AAG should not communicate with the Decision-maker or the independent adviser about the case. The Decision-maker can communicate with the AAG again after there is a final administrative decision in the case. The situation becomes more complicated when the agency delegates decision-making power or there is communication with staff-members about the case.

To the extent that the Decision-maker seeks to rely on staff assistance with a case or to delegate decision-making authority, it would be best to conceptualize these employees as stepping into the role and limitations of the Decision-maker, the AAG, or the independent adviser.

- If the Decision-maker delegates his decision-making authority to a subordinate, then that person, like the Decision-maker, must seek legal advice from the independent adviser and not communicate with the AAG (or employees working with the AAG) about the case. If the Decision-maker

delegates final, decision-making authority to a staff member, then the decision will be binding on the agency.

- The Decision-maker should treat employees that are actively assisting with the case, such as witnesses for the AAG or staff members that are coordinating the case with the AAG, in the same fashion as he treats the AAG and avoid any communications regarding the case.
- If the Decision-maker wants a staff member to assist with reviewing and preparing the final order in the case, the staff member should meet the same role and limits as the independent adviser. The staff member should not have been involved with the preparation of the case and should have no communications with the AAG or any staff member working with the AAG regarding the case.
- If the Decision-maker regularly delegates authority, it would be best to minimize any shifting of roles among employees and staff members from case to case in order to avoid confusion or the appearance of impropriety. One person should be the designated decision-maker or assistant to the Decision-maker for all cases, and another person should operate as a case manager for the AAG for all cases.

Only in an exceptional circumstance, and only after both agencies have consented to continued representation, will the Attorney General consider authorizing Assistant Attorneys General to continue to represent multiple State agencies that are on opposite sides of a dispute in a judicial proceeding. In those situations, safeguards may be implemented, including requesting approval from the court for dual representation and providing representation through Assistant Attorneys General in different sections of the office.

1.9.4 Agency Adjudicatory Proceedings.

1.9.4.1 Scope of Section. Many agencies, boards, and department heads that the Attorney General regularly advises may also become decision makers in quasi-judicial administrative proceedings. This role is more fully discussed in Chapter 10. In such situations, the Assistant Attorney General who provides day-to-day legal advice to the agency, board, or department head often becomes an advocate on behalf of the "Agency" and must present arguments asking the decision maker to take some action. In such a situation, the same Assistant Attorney General cannot also render impartial legal advice to the decision maker regarding the proceeding. Yet, the Attorney General's Office must provide such advice if it is needed by the decision maker. This Section is designed to provide guidance on how that advice will be provided.

1.9.4.2 Advocate. An Assistant Attorney General participating as an advocate in a proceeding before an administrative tribunal cannot serve as an advisor to the tribunal respecting that proceeding. *Taylor v. Ariz. Law Enforcement Merit Sys.*, 152 Ariz. 200, 206, 731 P.2d 95, 101 (App. 1986). The Assistant Attorney General may, however, act as an advisor to the agency on matters not related to the proceeding in which the attorney is appearing as an advocate. See Section 1.9.4.10.

1.9.4.3 Selection of Advisor. If an agency decision maker requests the assistance of the Attorney General to act as advisor during the pendency of the proceeding in which an Assistant Attorney General is appearing as an advocate, the request shall be directed to the Solicitor General's Office. The Solicitor General will designate a qualified assistant from either the Solicitor General's Office or another section, except the section to which the advocate is assigned, to act as an advisor. The advisor so appointed shall, for purposes of that specific case, be under the sole and exclusive supervision of the Solicitor General. This procedure was discussed by the Arizona Court of Appeals in *Taylor*, as an appropriate method for avoiding a conflict that would "arise if the same Assistant Attorney General participated as an advocate before the council and simultaneously served as an advisor to the council in the same matter." 152 Ariz. at 206, 791 P.2d at 101.

1.9.4.4 Participation in Preliminary Matters. During the course of the Attorney General's representation of an agency, an Assistant Attorney General may advise an agency concerning investigative matters, including whether the agency has grounds to

commence a formal action. If an action is commenced, the same Assistant Attorney General who gave advice on such preliminary matters may, and usually will, act as the advocate, but shall thereafter refrain from discussing the specific matter with the decision maker in any role except that of advocate. See Section 1.9.4.6. The advisor cannot participate in such preliminary matters, except as permitted in Section 1.9.4.7.

1.9.4.5 Prohibition on Communication Between the Advocate and Advisor. No ex parte communication shall occur between the advisor appointed by the Solicitor General and the advocate regarding (a) the adjudication of any fact or issue in dispute, or (b) the discovery, preparation, or presentation of any fact or legal issue on behalf of any party participating in the proceeding.

1.9.4.6 Limitations on Advocate. The advocate shall not participate in the actual determination by the decision maker of any fact or legal issue in dispute, nor may the advocate have any ex parte communications with the decision maker regarding the merits of the case. The advocate may, however, submit written proposed findings of fact or a proposed decision to the decision maker provided that the decision maker is free to accept, modify, or reject the proposed findings or decision and copies are promptly provided to all adverse parties or their respective counsel to enable them to respond.

1.9.4.7 Limitations on Advisor. The advisor shall limit his or her participation to providing the decision maker with advice on procedural matters, including questions concerning the admission or exclusion of evidence. If the decision maker requests advice on other matters, such as the ultimate factual or legal issues presented in the case, the decision maker should obtain that advice jointly from all advocates and participating parties through written memoranda or oral arguments during the course of the proceeding. The advisor should not advise the decision maker how to resolve substantive legal or factual issues.

1.9.4.8 Disregard of Advice. If the decision maker takes action contrary to the argument presented by the parties, or to the legal advice of the advisor, the Attorney General shall respect the independent judgment of that officer or tribunal.

1.9.4.9 Judicial Review. If a party challenges an administrative decision in superior court pursuant to the Administrative Review Act, A.R.S. §§ 12-901 to -914, the Attorney General normally represents the decision maker and defends the administrative action taken. However, if the agency acted in a manner that causes the Attorney General to conclude that it cannot represent the decision maker, the Attorney General will decline to represent the agency. See Section 1.9.2.3.

1.9.4.10 Comments. State and federal courts consistently have ruled that combining investigatory, prosecutorial, and adjudicative functions within a single agency does not itself deny due process. See *Withrow v. Larkin*, 421 U.S. 35, 48-52 (1975); *Hamilton v. City of Mesa*, 185 Ariz. 420, 427, 916 P.2d 1136, 1143 (App. 1995); *Rouse v.*

Scottsdale Unified Sch. Dist., 156 Ariz. 369, 371-72, 752 P.2d 22, 24-25 (App. 1988). The Arizona Court of Appeals indicated in the *Taylor* case that an Assistant Attorney General may act as an advocate and another Assistant Attorney General from a different section may serve as advisor in a case. 152 Ariz. at 206, 731 P.2d at 101.

The courts have acknowledged, however, that such a combination possesses “the potential” for unfairness. In order to perform the required statutory duties and to ensure a fair proceeding, all Assistant Attorneys General must adhere to the guidelines in Sections 1.9.4.1 - 1.9.4.8 when participating in administrative proceedings in which the Attorney General is advising the decision maker and is also appearing before the decision maker as an advocate. These guidelines are consistent with the Attorney General's ethical restrictions and also serve to prohibit ex parte communications with judges and other officials of a tribunal. See Ariz. Sup. Ct. R. 42, ER 3.5(b).

1.9.5 Agency Representation by Outside Counsel.

1.9.5.1 Authority to Proceed. Before a non-exempt agency or individual acts to obtain outside counsel, the Attorney General will first determine whether legal authority exists to require legal representation independent of the Attorney General. If it does, the following guidelines will apply.

1.9.5.2 Available Funds. If an agency will incur an obligation to pay for legal services, it must have both the authority to expend funds for this purpose and available funds. The agency should transfer funds for the payment of outside legal counsel to the Attorney General, who will reimburse outside legal counsel on behalf of the State.

1.9.5.3 Appointment. In accordance with the State's procurement laws, the State annually receives bids from attorneys desiring to provide the State with outside counsel. If outside counsel is required by a state agency or employee that is not exempt from Attorney General representation, the choice of outside counsel must be made from the list of successful bidders. The Attorney General, or the Attorney General's designees, shall select outside counsel. In no case shall outside counsel be given a contract to perform services on behalf of the State or its non-exempt agencies without the Attorney General's approval. A.R.S. § 41-2513(B).

1.9.5.4 Control of Appointed Counsel. Once outside counsel is obtained for the cases described in this Chapter, outside counsel will exercise independent professional judgment in the handling of the case.

1.9.6 Attorney General's Membership on Quasi-Judicial Public Entities.

1.9.6.1 General Rule. The Attorney General will generally recuse himself from participation as a member of a board, commission, or other public entity that functions as

152 Ariz. 200 (1986)
731 P.2d 95

James H. TAYLOR and Barbara G. Taylor, wife, Plaintiffs-Appellees, Cross Appellants,
v.

ARIZONA LAW ENFORCEMENT MERIT SYSTEM COUNCIL, an administrative agency of the State of Arizona; Robert Stuchen, as chairman of the Arizona Law Enforcement Merit System Council; A. Bates Butler, III, as a member of the Arizona Law Enforcement Merit System Council; J.R. Carney, as a member of the Arizona Law Enforcement Merit System Council; State of Arizona; the Arizona Department of Public Safety, an agency of the State of Arizona; Ralph E. Milstead, in his official capacity of Director of the Department of Public Safety, Defendants-Appellants, Cross Appellees.

No. 1 CA-CIV 8222.

Court of Appeals of Arizona, Division 1, Department D.

August 14, 1986.

Review Denied January 6, 1987.

202 *202 McGroder, Tryon, Heller & Rayes by Douglas L. Rayes, Jane E. Evans, Phoenix, for plaintiffs-appellees, cross appellants.

Robert K. Corbin, Atty. Gen. by David Rich, Asst. Atty. Gen., Phoenix, for defendants-appellants, cross appellees.

OPINION

BROOKS, Judge.

Plaintiff-appellee James H. Taylor (Taylor) brought an action in the Maricopa County Superior Court (trial court) against the Arizona Law Enforcement Merit System Council (council) and its members, and the Arizona Department of Public Safety (DPS) seeking review of the council's determination to uphold Taylor's termination as a law enforcement officer with DPS. The trial court entered judgment finding that, although some form of punitive action against Taylor was justified, his discharge from employment with the attendant forfeiture of benefits was an excessive penalty and "shocking to the conscience of the court." The matter was remanded to the council with instructions to enter "an appropriate lesser penalty." The council and DPS appeal from this judgment, and Taylor cross-appeals from that portion of the judgment which found that a lesser form of punitive action was justified.

The issues presented by the council and DPS on appeal are as follows:

1. Whether the trial court improperly substituted its own judgment on the appropriate penalty for that of the administrative agency.
2. Whether attorney's fees were properly awarded to Taylor pursuant to A.R.S. § 12-348(A)(3).

Taylor raises the following issues in his cross-appeal:

1. Whether punitive action against him is time-barred by Administrative Rule (A.C.R.R.) R13-5-10(U).
2. Whether he was denied due process of law and a fair hearing before the council by the denial of his access to certain reports, and by the denial of his right to cross-examine and to present witnesses.
3. Whether he was denied due process of law and the right to a fair hearing before the council by reason

4. Whether the council's findings were supported by substantial evidence.

STANDARD OF REVIEW

In reviewing an administrative agency's decision on a record made before the agency pursuant to the Administrative Review Act, A.R.S. § 12-901 et seq., we review the record to determine whether there has been an unreasonable action which was taken without consideration and in disregard of the facts and circumstances. However, in conducting this review, this court does not weigh the evidence. Petras v. Arizona State Liquor Board, 129 Ariz. 449, 631 P.2d 1107 (App. 1981). We must affirm the agency's decision if there is any substantial evidence in support thereof, and if the action taken by the agency is within the range of permissible agency dispositions. Howard v. Nicholls, 127 Ariz. 383, 621 P.2d 292 (App. 1980).

FACTS

Taylor was a law enforcement officer for over sixteen years until his termination on September 10, 1983. At the time of his termination, he was a sergeant employed in the Investigative Liquor Enforcement Division of DPS, and was assigned to the district encompassing Showlow and Payson, Arizona.

203 On April 12, 1983, Taylor was in Phoenix on official business. On the same day, while returning to Showlow from Phoenix, Taylor met other law enforcement officers in Payson. He went to two restaurants which served liquor and consumed alcoholic beverages during the afternoon and early evening. Taylor left Payson during a snow *203 storm, driving a state vehicle, and began radio contact with a Phoenix radio dispatcher. Taylor was subsequently involved in two auto accidents, damaging the state vehicle in the amount of \$900.00.

Punitive action against Taylor was commenced by Lt. George Falter, who overheard Taylor's radio transmissions. Falter believed that Taylor sounded intoxicated, and that his unprofessional transmissions discredited DPS. Falter contacted Capts. Ayars and Hoffman and Lt. Bullion the night of April 12, 1983, to complain about Taylor's conduct. On April 19, 1983, Falter submitted a formal written complaint to Ayars.^[1] The complaint was forwarded to the Internal Affairs Division (IAD) of DPS for investigation, and an IAD number was assigned and entered upon it on May 2, 1983. Sgt. James Ellis and Officer Cy Gilson were assigned to investigate the incident in early May, 1983.^[2] The investigation was completed on July 5, 1983, and the report (the Ellis-Gilson report), was sent to the Complaint Review Board of DPS.^[3]

On June 1, 1983, a complaint was filed with DPS against Ellis and Gilson by Sandy Neff, a witness in the Taylor investigation. Neff alleged that the investigators threatened and harassed her, and accused her of lying. In response, IAD commenced an investigation into the conduct of Ellis and Gilson during their investigation of Taylor.^[4] Captain Euston Ray and Lt. Dan W. Daniels, Chief of the Internal Affairs Division, were assigned to investigate the Neff complaint and completed their report (the Ray-Daniels report) on July 14, 1983. They concluded that the Taylor investigation had been conducted properly.

On August 17, 1983, DPS requested a 20-day extension of A.C.R.R. R-13-5-10(U), the 120 day limitation for commencing punitive action, for all ongoing Internal Affairs investigations due to violence which had broken out at a copper miners' strike in Morenci, Bisbee and Ajo, Arizona. The request was made by DPS through a telephone call with a member of the council. On August 18, 1983, the council granted a blanket 20-day extension for *all* cases "pending investigation" on or before August 17, 1983.

The Complaint Review Board convened on August 24, 1984 to consider the complaint against Taylor. The board found that the allegations of drunkenness on duty were well-founded and these findings were forwarded to the Director of DPS, Col. Ralph Milstead. After reviewing the investigative reports, interviewing Taylor and the investigators and listening to the tape recording of Taylor's radio transmission on the day in question, Milstead terminated Taylor's employment "effective immediately" on September 10, 1983.

204 *204 3. Misfeasance, malfeasance or nonfeasance which shall include, but shall not be limited to:

* * * * *

e. Dishonesty or any breach of integrity

* * * * *

5. Drinking or drunkenness on duty.

6. Excessive intemperance at any time which would reflect discredit upon the agency.

The following facts were set forth in the Notice as the basis for the punitive action:

On April 12, 1983, while claiming duty time, you consumed an excessive amount of alcohol at two different locations in the City of Payson. You then travelled in your state vehicle while under the influence of alcohol and had two accidents while returning home. During an investigation of this matter, you did not truthfully respond to the questions posed to you by your investigators.

On September 9, 1983, Taylor filed a timely Notice of Appeal, pursuant to A.C.R.R. R-13-5-47(F), requesting a hearing before the Merit System Council regarding his termination. On November 15 and 16, 1983, a hearing was held before the council. In its December 5, 1983 decision, the council upheld Taylor's termination. Taylor's "Motion to Review or Rehear Decision of the Council" was denied, and Taylor timely filed an appeal in the trial court.

The trial court considered the pleadings, transcripts, records, memoranda and other matters of record and entered a final judgment finding that Taylor's termination was "shocking to its conscience." The court stated:

... the Court finds that under the facts of this cause, while punitive action is justified, discharge from employment with attended forfeiture of benefits is an excessive penalty and is shocking to the conscience of this Court, the further finding and conclusion of this Court that in all other respects the actions, proceedings and rulings of Defendants were proper and consistent with law, and that the Plaintiffs are entitled to judgment as a matter of law against Defendants and this cause is remanded with the direction that Defendants enter an appropriate lesser penalty, and that Plaintiffs receive their costs and attorneys' fees herein incurred.

The council appeals from this judgment, and Taylor cross-appeals from that portion of the judgment which concludes that a lesser form of punitive action is justified. We deem it appropriate to first consider Taylor's cross-appeal.

THE CROSS-APPEAL

Taylor first argues that any form of punitive action against him would be time-barred by the failure of DPS to comply with A.C.R.R. R13-5-10(U). The Rule provides:

U. Commencement of Action: Unless otherwise provided for by these rules, no action or proceeding shall be brought by any person having or claiming to have a cause of action or complaint for wrongs or grievances based on or related to these rules or the administration thereof unless such action or proceeding is commenced and served within one hundred twenty days from the date the department has probable cause or after such person discovered or with reasonable diligence should have discovered, such cause of action or complaint.

In 1980, DPS requested a statement of intent and interpretation of A.C.R.R. R13-5-10(U). In response, the council's October 8, 1980 Resolution provided:

Taylor v. ARIZ. LAW ENFORCEMENT MERIT SYSTEM, 731 P. 2d 95 - Ariz: Court of Appeals, 1st Div., Dept. D 1986 - Google Scholar
NOW, THEREFORE, BE IT HEREBY RESOLVED that the intent of A.C.R.R. R13-5-10(U) is to impose a reasonable maximum time period whereby an employee may be subjected to punitive action.

205

BE IT FURTHER RESOLVED that the one hundred and twenty day time limitation, expressed in calendar days, generally begins the day following the date an Internal Affairs or Department Report number is assigned to the investigation in question. It is further the intent of *205 the council to deviate from the afore stated limitations when substantial evidence or circumstances exist where a gross miscarriage of justice would occur through strict interpretation of this rule.

Taylor argues that DPS had probable cause to bring this action on the date of the incident, April 12, 1983, or one week later, April 19, 1983, when the formal written complaint was submitted. If either date advocated by Taylor is used, the 120 day limitation for commencing punitive action against Taylor expired well before he was served with the notice of punitive action on September 8, 1983.

Taylor's argument, which presents two alternative dates on which DPS had probable cause, evidences the difficulty in determining on what date "the department had probable cause." Apparently DPS recognized that this rule could be interpreted to indicate several different dates and therefore requested that the council issue a formal interpretation. The council's interpretation states that "generally" one specific date, the day following the date Internal Affairs assigns a number to the investigation, will trigger the running of the 120 day time limitation. We conclude that the 120 day time limitation can reasonably be measured from May 3, 1983. Even if the time is to be measured from this date, however, Taylor argues that the 120 days expired on August 30, 1983, approximately one week before the notice of punitive action was served.

On August 17, 1983, the council granted a 20-day extension of A.C.R.R. R13-5-10(U) for *all* cases "pending investigation" on or before August 17, 1983. Taylor challenges the validity and the applicability of this extension. He argues that the 20-day extension is invalid because it is not specifically authorized by R13-5-10(U). He contends that the council's grant of an extension is the equivalent of an amendment to the rule. Since the proper administrative procedures for amending the rule were admittedly not followed, Taylor argues that the extension is invalid. We disagree.

As the Resolution of October 8, 1980 indicates, under certain circumstances, the 120 day limitation will not be strictly adhered to. It is undisputed that an administrative body has broad discretion in determining whether to grant or deny a motion for a continuance. *Martin v. Industrial Commission*, 120 Ariz. 616, 587 P.2d 1193 (App. 1978). However, this discretion must be exercised judiciously, and where this discretion has been abused, with resulting prejudice, the action will not be upheld.

In the present case, the extension was granted at the request of DPS. In August, 1983, DPS was actively involved in maintaining order at the scene of a copper miner's strike in Morenci, Ajo and Bisbee. More specifically, on August 10, 1983, the Governor of Arizona declared a state of emergency, and on August 16, 1983 ordered Col. Milstead to provide all necessary support services to law enforcement agencies already in place. Under these circumstances, we find that the council did not abuse its discretion in granting an extension. Since the complaint review process is composed of a series of investigations and reviews, Taylor's case was "pending investigation" on or before August 17, 1983 and was therefore covered by the extension. Furthermore, Taylor has not shown that any prejudice resulted from the grant of the extension.

Taylor next argues that the council improperly denied him access to certain investigative reports and improperly limited his right to cross-examine and present witnesses.

Prior to the administrative hearing before the council, Taylor filed a motion requesting that DPS allow him to inspect the file relating to the internal investigation into allegations made by the witness Neff against DPS investigators Ellis and Gilson. The council instructed its business manager to review the file to determine whether it contained any discoverable material. The business manager concluded that the file did not contain relevant discoverable material that was not otherwise available and Taylor was advised of this decision.

206 *206 Taylor filed a request for review of this decision pursuant to A.C.R.R. R13-5-10V. The file was then reviewed by a member of the council and the decision not to disclose the contents of the file was affirmed. This ruling was subsequently upheld by the trial court.

We first note that we need not determine whether the council improperly delegated this matter to its business manager, ⁵¹ since the final decision not to allow inspection of the file was ultimately made by the council. On the merits, we find that the council's decision on the discovery issue did not rise to the level of a denial of due process of law, nor do we find any substantial prejudice to Taylor. At the hearing before the council, Neff herself testified as to the DPS investigators' alleged misconduct during their interrogation and Neff's feelings of coercion and intimidation which resulted therefrom. Further, it is not alleged that Taylor was in any way deterred in his attempts to interview or depose Neff, or any of the other witnesses, prior to the council hearing.

Taylor next argues that the council improperly restricted his cross-examination of Neff by not allowing her to testify from a letter which had been written by her attorney, detailing her complaint regarding the conduct of the investigating officers. We find no abuse of discretion since the letter was not written by Neff nor was it signed by her. She was not restricted in utilizing her own independent recollection in testifying as to the events referred to in the letter.

Taylor next contends that he was denied a fair hearing by not being allowed to present the testimony of DPS officer Herbert Brigham as to his opinion of how an investigation should be conducted. Brigham had reviewed the same evidence that was presented to the director, and was prepared to testify that the investigation had not been conducted objectively and that the director's decision was therefore inappropriate. We summarily dispose of this issue by concluding that the council clearly did not abuse its discretion by excluding this testimony. Brigham was permitted to testify as to his working relationship with Taylor and as to Taylor's good character. However, Brigham's testimony as to how he would have conducted the investigation was irrelevant.

As his final issue in the cross-appeal, Taylor argues that he was denied the right to a fair hearing by the attorney general's dual representation of both DPS and the council. Prior to the hearing, Taylor filed a motion to disqualify the attorney general's office from representing DPS since the attorney general also serves as legal advisor to the council. This motion was denied. In effect, Taylor argues that DPS should have been required to engage a private attorney. We disagree.

The attorney general is compelled by statute to represent all state agencies. A.R.S. § 41-192.A(1) provides that the attorney general is required to "be the legal advisor of the departments of this state and render such legal services as the departments require." Therefore, it is the intent of the legislature that the attorney general represent both DPS and the council in appropriate circumstances.

A conflict of interest would clearly arise if the same assistant attorney general participated as an advocate before the council and simultaneously served as an advisor to the council in the same matter. If the council had requested the advice of the attorney general during the pendency of this action, it appears to be conceded by the parties that the request would have been directed to the solicitor general who would designate an assistant attorney general from a division other than that to which the advocate is assigned to act as an advisor to the council. In the present case, 207 however, the council did not ask the attorney general for the services of a legal *207 advisor. The Assistant Attorney General, Aileen Lee, was appearing as an advocate for DPS and not as a legal advisor.

Taylor argues, however, that Lee in fact acted as an advisor to the council during these proceedings. He refers to an alleged *ex parte* communication between Lee and a member of the council concerning the standard to be applied by the council in weighing the evidence. We believe that sufficient evidence was presented from which it can be concluded that no *ex parte* communications transpired and that Lee was acting as an advocate, not an advisor. In that regard, before closing arguments, a council member requested that *both* parties address the issue of "burden of proof." Lee offered to provide the council with case law after research on the subject. Taylor's attorney offered to submit a brief, but the council member indicated that he did not necessarily want a brief. Several weeks later, Lee provided a memorandum to the council members, with a copy to Taylor's attorney.

On these facts, we do not conclude that Lee's legal memorandum constituted an "ex parte communication" with the council member nor do we find that, in presenting this memorandum, Lee was acting as a legal advisor to the council rather than an advocate for DPS. We note that Taylor's attorney later filed a legal memorandum in response to that filed by Lee.

SUFFICIENCY OF THE EVIDENCE

In its appeal, the council contends that the trial court improperly substituted its judgment for that of the council when it concluded that termination of Taylor's employment by DPS was so disproportionate to Taylor's misconduct as to be "shocking to the conscience." We agree.

Arizona Revised Statute § 28-235 and the rules enacted pursuant thereto, vest wide discretion in the council to determine when violation of its rules is sufficient to justify termination, as opposed to some lesser disciplinary action. Ariz. Dept. of Public Safety v. Dowd, 117 Ariz. 423, 573 P.2d 497 (App. 1977). The determination of the penalty imposed by an administrative body will not be disturbed unless there has been a clear abuse of discretion. Bishop v. Law Enforcement Merit System Council, 119 Ariz. 417, 581 P.2d 262 (App. 1978).

In *Bishop*, the court reviewed the charges against the appellant, and concluded that the continuance of his employment could have been detrimental to the discipline and efficiency of DPS in satisfying its statutory law enforcement obligations. Bishop, a former undercover police officer, was dismissed for smoking marijuana with narcotics suspects and failing to report the same. The court found that there was a rational basis for the council's conclusion that termination was justified by the violations of the council's rules, and that the punishment was not so disproportionate to the offense as to be shocking to one's sense of fairness. The court in *Bishop* rejected appellant's attempt to show that similar acts had not been disciplined in the past, or if they had, that the punishment was much less severe, noting that the council is not bound to deal with all cases at all times in the same manner as it had dealt with some past cases that might seem comparable.

So too in the present case, the council as the trier of fact, concluded that Taylor's actions constituted cause for discipline or discharge pursuant to A.C.R.R. R13-5-47(C). Considering the evidence in the light most favorable to upholding the council's decision, there was evidence that Taylor had consumed up to sixteen mixed drinks the afternoon and evening of April 12, 1983, and that he was too intoxicated to drive. He had two accidents in a stateowned vehicle, made radio transmissions with noticeably slurred speech and did not know which road he was driving on.

DPS Director Milstead testified as to how and why this particular punitive action was taken against Taylor:

Q. Could you explain to the Council why you decided to terminate Sergeant Taylor based on your review of the package?

208 *208 A. [Col. Milstead] Simply stated, I was convinced, after going through a review of the package, the reports, of listening to the tape, of talking to the investigators, of talking to Sergeant Taylor, that when he was operating the vehicle that evening that he was, in fact, drunk.

* * * * *

In listening to the tape — and I listened to it several times — and as I listened to it I could hear a man whose faculties were, in fact, severely impaired as far as speech. Not only speech patterns, but what he said specifically, the conduct on the tape, and then not knowing where he was when, in fact, that was his area.

* * * * *

Q.... One of the allegations in the punitive action related to dishonesty or breach of integrity. What was it in the package, the information that you received, that led you to believe that he had been dishonest or breached his integrity?

A. The issue was whether or not he was on duty the afternoon that he was drinking, in fact, was spending State money to drink with, had claimed overtime for that day when it did not appear that he had any reason to legitimately be in that particular bar drinking with those people who knew who he was.

Q. Could you outline more clearly why you felt he had no reason to be there?

A. Well, if he is, in fact, undercover, he's ineffective if the people there know who he is, and you cannot drink on duty unless it facilitates the case you are working. And there would be absolutely no reason for him to drink on duty to facilitate a case when the people knew who he was.

Now, he had made a comment that he was ready to take action if the juveniles were to come in. Well, that was no reason for him to drink; and, in fact, there wasn't — you know, he could have been there if — he could have said if robbers had come in or something like that. That wasn't a reason to be drinking.

* * * * *

Q.... did you also have some concern with regard to potential liability?

A. Well, there were a lot of reasons why I chose dismissal as the appropriate form of punishment, and liability was one of them.

There is a serious liability question for the department, for myself, if, after I have information that a person has, in fact, been involved in drinking and driving, that if they are retained in the position where that could happen again, and I can foresee that, and if that would have been shown that I could have foreseen what it could do, then I do have that problem.

Taylor contends that punitive actions taken against other officers who had been driving while under the influence is strong evidence that termination in his case was excessive and disproportionate to the offense charged. Taylor cites several instances in which officers charged with misconduct similar to Taylor's were not terminated and the punishments imposed were significantly less severe. As this court noted in *Bishop*, the council is not obligated to deal with all cases that might seem comparable in the same manner. *Bishop*, 119 Ariz. at 422, 581 P.2d at 267. As Milstead testified, DPS has taken a strong stand against drinking and driving. Therefore, if Taylor's conduct warranted dismissal, the fact that other officers might have received less severe sanctions in the past would not necessarily render Taylor's termination "shocking to the conscience."

A.C.R.R. R13-5-47(C) sets forth the "causes" justifying discipline or discharge of an employee. As this court has recognized,

[I]n a police employment setting, there is a substantial relationship to the end sought to be accomplished, and a rule stating cause for dismissal is thus not arbitrary, when the proscribed conduct constitutes a substantial shortcoming which renders the continuance of the officer in his position detrimental to the discipline or efficiency of the service.

Dowd, 117 Ariz. at 429, 573 P.2d at 503.

209 The council, as the trier of fact, concluded that the violations alleged *209 against Taylor and his continued employment could have been detrimental to the discipline or efficiency of DPS. The council's decision was supported by substantial evidence, and the trial court should have affirmed that decision on review.

ATTORNEY'S FEES

Since the judgment of the trial court is reversed to the extent that it held that Taylor's termination was an excessive penalty, Taylor is not a prevailing party entitled to attorney's fees pursuant to A.R.S. § 12-348(A)(3). Accordingly, we reverse the award of attorney's fees.

CONCLUSION

We hold that the punitive action taken against Taylor is supported by substantial evidence, and that the trial court improperly substituted its judgment for that of the council. We affirm the trial court's findings that the punitive action was timely taken, and that Taylor's due process rights were not violated. We otherwise reverse the judgment of the trial court and the order of remand to the council is vacated.

This matter is remanded to the trial court with directions to enter judgment affirming the council's decision.

GRANT, P.J., and FROEB, J., concur.

[1] DPS General Order No. 21.01 provides that an employee with firsthand knowledge of misconduct involving a peer or subordinate employee is to verbally notify his supervisor and then initiate an internal complaint by preparing a detailed written report.

[2] The types of investigations, the methods of investigation and the files and reports to be maintained are detailed in DPS General Order No. 21.02. The investigation is to include, but is not limited to, interviews with the employee and any witnesses, and the examination of pertinent documents.

[3] The complaint review process is outlined in DPS General Order No. 21.03. Following completion of the investigation, the complaint is reviewed by the employee's supervisor. If disciplinary action is recommended, the employee may request a hearing before the complaint review board.

The complaint review board consists of two employees from supervisory levels, and one employee from the accused employee's peer group. The complaint review board reviews the investigative reports and written statements, hears witness testimony and considers other appropriate evidence. The board renders findings on each allegation, and submits a report to the director of DPS.

[4] DPS General Order No. 21.01 also provides a procedure for dealing with complaints made by any person outside the department. All written and any substantial verbal complaints are to be forwarded to IAD for investigation.

[5] See A.C.R.R. R13-5-104(C) which provides for the delegation of certain board functions to the business manager.

Save trees - read court opinions online on Google Scholar.

185 Ariz. 420 (1995)

916 P.2d 1136

William R. HAMILTON, Plaintiff-Appellant,**v.****CITY OF MESA, a Municipal corporation; C.K. Luster, Manager of the City of Mesa; Guy Meeks, Chief of Police; Roy B. Skaggs, II, Outside counsel for Mesa Police Department, Defendants-Appellees.**No. 1 CA-CV94-0468.

Court of Appeals of Arizona, Division 1, Department B.

December 5, 1995.

Redesignated as Opinion and Publication Ordered January 12, 1996.

Review Denied May 21, 1996.

422 *422 Yen & Pilch, P.L.C. by Caroline Pilch, Phoenix, Hobson & Ringler by William R. Hobson, Tempe, for Plaintiff-Appellant.

Step toe & Johnson by David A. Selden, Lisa M. Bickel, Phoenix, for Defendants-Appellees.

OPINION

CONTRERAS, Judge.

This is an appeal from the trial court's order granting Appellees' ("City of Mesa") motion to dismiss William R. Hamilton's ("Appellant") complaint in which he alleged that the City of Mesa's merit system was invalid and that he was wrongfully terminated from employment.

Appellant raises three issues for our review:

1. Whether the City of Mesa has a facially valid law enforcement merit system;
2. Whether the City of Mesa's merit system as applied to Appellant violated his due process rights; and
3. Whether the City Manager acted arbitrarily and capriciously in terminating Appellant's employment.

We conclude that the City of Mesa has a valid merit system and that its application to Appellant did not violate his due process rights. In addition, we conclude that the City Manager did not act arbitrarily, capriciously, or in an abuse of discretion in terminating Appellant's employment with the City of Mesa. We therefore affirm the order of the trial court granting the City of Mesa's motion to dismiss.

FACTUAL AND PROCEDURAL HISTORY

Appellant is a former employee of the City of Mesa police department. The City of Mesa terminated his employment of seventeen years with the police department for conduct unbecoming a member of the police department and for untruthfulness. The complaints against Appellant arose out of a criminal investigation of Mesa Police Officer Richard Elliget and his wife Laurie Elliget. During the course of that criminal investigation, a series of note cards maintained by Richard Elliget were discovered describing the sexual conduct of Laurie Elliget with Appellant and others. This discovery precipitated an extensive internal investigation into Appellant's conduct with Mrs. Elliget by the Mesa Police Department. As a result of the internal affairs investigation, the investigator recommended that the charges against Appellant be sustained. Appellant's superior officers agreed and recommended to the Chief of Police, Guy Meeks, that

his employment be terminated.^[1]

423 *423 Chief Meeks informed Appellant of the recommendation to terminate his employment and informed him of his right to a pre-termination hearing. Chief Meeks set a hearing date for the pre-termination hearing. Appellant, represented by counsel, attended and participated in the pre-termination hearing. Following the hearing, Chief Meeks notified Appellant that the recommendation to dismiss him was sustained and that Appellant was entitled to appeal his termination.

In accordance with the City of Mesa's personnel rules, section 930^[2], Appellant appealed his dismissal to the City Manager who referred the appeal to the Personnel Appeals Board ("the Board") for consideration and an *advisory* opinion. Prior to the post-termination hearing, Appellant filed a special action complaint in superior court seeking a temporary restraining order to preclude the City from going forward with post-termination proceedings. In his special action, Appellant asked the trial court to determine whether the post-termination procedures of the City of Mesa qualified as a merit system pursuant to Ariz. Rev. Stat. Ann. ("A.R.S.") section 38-1001 et seq. (1985), which sets forth standards for law enforcement merit council for public entities. Maricopa County Superior Court Judge Schwartz determined that the City of Mesa's post-termination procedures qualified as a merit system and dismissed Appellant's complaint by minute entry.

The Board conducted a post-termination hearing which took place over the course of three days. Both the City of Mesa and Appellant had the opportunity to and did present witnesses and evidence at the hearing.

Following the hearing, the Board issued a unanimous advisory opinion stating that Appellant's termination should not be sustained. The Board found the evidence insufficient to substantiate the charge of "untruthfulness." After receiving the advisory opinion, the City Manager sent the matter back to the Board to consider the issue of "conduct unbecoming a member." The Board issued a second advisory opinion (3-1), again advising the City Manager to reinstate Appellant.

The City Manager issued his three page written decision after reviewing all the written evidence presented to the Board and listening to the audio taped testimony. The City Manager stated that he could not concur with the Board's two advisory opinions. After listing all of the evidence that the City Manager found to be compelling, he upheld Appellant's termination.

Appellant filed the present special action complaint in superior court appealing his dismissal.^[3] In his complaint, Appellant alleged four counts: Count I due process (the evidence did not support the City Manager's decision to terminate); Count II facially invalid merit system; Count III merit system invalid as applied; Count IV open meeting law violation. The City of Mesa filed a motion *424 to dismiss Counts I, II, and III. The City argued in its motion to dismiss that the decision to terminate Appellant's employment was not arbitrary or capricious and that Counts II and III restated claims raised and decided in Appellant's first special action.

Judge Jarrett decided the case on its merits and granted the City's motion to dismiss. She concluded that the City Manager did not abuse his discretion in rejecting the Board's advisory opinion. She also adopted the findings and conclusions of Judge Schwartz, and held as a matter of law that the City's Personnel System was facially valid or valid as applied. The case was then transferred to Judge Hendrix who, on stipulation, dismissed Count IV of the complaint without prejudice and entered final judgment on all counts, from which Appellant brings this appeal.

DISCUSSION

I. Is the City of Mesa's Merit System Facially Valid?

We first address the question of whether the City of Mesa's merit system satisfies constitutional and statutory requirements. Our review extends to the merits of the claim since Appellant's action was dismissed on the merits, and because the trial court's finding was one of law, our review is *de novo*. *Ayala v. Hill*, 136 Ariz. 88, 90, 664 P.2d 238, 240 (App. 1983).

A.R.S. section 38-1001 et seq. sets forth the standards for law enforcement merit councils for those public entities that

are required or choose to adopt the provisions of that Article. Public entities that qualify for exemption are not subject to the provisions of the Article. These exemptions are set forth at A.R.S. section 38-1007 (1985), which provides in part:

The provisions of this article *shall not apply* to:

* * * * *

3. A city or town in which there is maintained a merit system or civil service plan for its employees.

(Emphasis added).

Based on the plain language of the statute, the City of Mesa is exempt from the provisions of the Article because it maintains its own merit system or civil service plan. However, Appellant argues that a City's merit system must meet the procedural due process requirements of A.R.S. section 38-1001 et seq. In particular, Appellant argues that A.R.S. section 38-1003 (1985) which requires "a plan for fair and impartial selection, appointment, retention and separation or removal from service by resignation or dismissal" must apply to the City of Mesa and that the City Manager cannot be fair minded since he approved the termination in the first place. We agree that Appellant is entitled to a fair and impartial merit system, but we do not agree that the City of Mesa's merit system must mirror the requirement of A.R.S. section 38-1001 et seq.

The intent of the legislature was to establish for law enforcement officers and law enforcement agencies in counties, cities and towns of the state of Arizona, a mutually beneficial system of personnel administration based on merit principles governing the appointment, promotion, lay off and removal of law enforcement officers within the counties, cities and towns of the state.

Laws 1969, Ch. 102, § 1. A merit system has long since been defined to include the following:

the appointment of all employees who come under the system should be made on the basis, and as the result, of open and competitive examinations arranged to determine which of the applicants for the position is best fitted to perform its duties, regardless of political affiliations or past record, and that once an appointment is made, removal from the position should be based only on unfitness for the work for one reason or another, and not upon personal considerations. It necessarily follows that any system which conforms to these principles, no matter what its details may be, is a non-partisan merit system, and one which does not so conform, is not a system coming within the definition.

425 Taylor v. McSwain, 54 Ariz. 295, 308-09, 95 P.2d 415, 421 (1939). In addition a fair and impartial system for removal from office necessarily includes "(a) specific reasons for removal, *425 and (b) a reasonable hearing before some designated and proper authority as to whether the party whose removal was sought fell within the reasons for removal set forth in the regulations established by the board." Welch v. The State Bd. of Social Security and Welfare, 53 Ariz. 167, 173-74, 87 P.2d 109, 112 (1939).

We start by noting that municipal corporations have no inherent police power, and that their powers are delegated to them by the constitution or laws of the state. State v. Jacobson, 121 Ariz. 65, 68, 588 P.2d 358, 361 (App. 1978), *overruled on other grounds* Levitz v. State, 126 Ariz. 203, 613 P.2d 1259 (1980). A city may adopt a city charter as its organic law. *Id.* As a charter city, the city may exercise "all the powers authorized by its charter, provided those powers are not inconsistent with the Arizona Constitution or the general laws of the state." *Id.* (citations omitted).

The City of Mesa charter establishes a personnel system that provides for the appointment and removal of employees based upon merit, and requires the City Manager to appoint and remove employees "pursuant to the merit system regulations." Mesa, Ariz., City Charter, art. III, § 303, art. IV, § 403 (Sept. 4, 1992). The charter further establishes a merit system board and a separate personnel board that holds post-termination hearings and renders advisory opinions to the City Manager. The City's charter is supplemented and implemented by its personnel rules. These rules set out the process for examinations, limit the types of discipline which may be imposed, and authorize dismissal by the City Manager or a department head only if an employee violates standards of conduct. Mesa, Ariz., Personnel Rules, Ch. 2, §

240, Ch. 8, § 810-30 (July 1, 1992).

The pre- and post-termination procedures are further enhanced by the police department's general orders which ensure that the complaints against a police officer are investigated fully and fairly before any discipline is imposed. If an internal investigation results in recommendation of dismissal and the chief of police agrees, a pre-termination hearing is scheduled. If the chief concludes that the complaint should be sustained, the decision is sent to the city manager for approval. The employee is then notified in writing of the decision and may appeal the decision to the personnel board. The personnel board gives the employee an opportunity to confront and cross-examine adverse witnesses as well as the opportunity to present evidence and be represented by counsel. The personnel board makes a written recommendation to the city manager who then reviews the recommendation and makes a final decision. These procedures certainly meet the requirements of a fair and impartial merit system set out in *Taylor and Welch*.

Finally, our supreme court has addressed a similar issue in *Kendall v. Malcolm*, 98 Ariz. 329, 404 P.2d 414 (1965). That case involved the issue of whether a personnel board had the power to revoke a dismissal ordered by the city manager. The City of Scottsdale's charter provided that the city manager had the power to "[a]ppoint and when necessary for the good of the service remove all officers and employees of the city except as otherwise provided by this Charter...." *Id.*, 98 Ariz. at 331, 404 P.2d at 416. The city ordinance provided that the personnel board hear appeals submitted by any person relative to any disciplinary action and that the board certify its finding and recommendations. *Id.* The ordinance further provided that the finding and decision of the board be final and certified to the official from whose order the appeal was taken and enforced by that official. *Id.* Thus, there was a conflict between the city charter giving the power to hire and fire to the city manager and the city ordinance which made the decision of the board final. The court concluded that the board had no recognized common law powers and therefore it could not be assumed "from the authority alone to create such a board that it could in any of its functions supersede any of the powers granted specifically in the charter." *Id.*, 98 Ariz. at 334, 404 P.2d at 418. The court also concluded that the board could do no more than make recommendations for the appointment and removal of employees. *Id.* Here, the City of Mesa charter provides that the city manager also has the power to appoint and remove employees. It provides that the city manager "pursuant to the merit system regulations appoint, and when necessary remove, all employees of the City, except as he may authorize heads of departments and offices to appoint and remove their own subordinates." Mesa, Ariz., City Charter, art. III, § 303(C). Mesa's city ordinance, section 930, then provides that appeals from dismissal may be taken to an appeals board that renders a written advisory opinion to the city manager. This is identical to the City of Scottsdale's merit system, which our supreme court found to be valid.

426

We conclude that the City of Mesa's merit system meets constitutional and statutory requirements. The merit system provides specific reasons for removal, and allows for a reasonable hearing before some designated and proper authority as to whether the party whose removal was sought fell within the reasons for removal set forth in the regulations established by the merit system council.

II. Does Mesa's Merit System as Applied to Appellant Violate his Due Process Rights?

Appellant contends that even if Mesa's merit system complies with Arizona law, it is invalid as applied to Appellant because the City Manager cannot act as a fair and impartial tribunal. In particular, Appellant argues that the City Manager did not fully and fairly apprise himself of the record; that he did not review the demeanor of the witnesses presenting evidence; that he had predecided the case in a manner which was prejudicial to Appellant's continued employment; and that he had the Mesa Police Department's attorney advise him. Despite Appellant's allegations that the City Manager could not be fair and impartial in making the final decision to terminate Appellant, we conclude that Appellant did receive a hearing before a fair and impartial tribunal and his due process rights were not violated.

As stated above, we conclude that the City of Mesa's merit system meets constitutional and statutory requirements. Removal from employment can occur only upon a showing of unfitness for the work, and not upon personal considerations. See *Taylor*, 54 Ariz. at 308-09, 95 P.2d at 421 (any system which requires removal from a position based only on unfitness for the work is a non-partisan merit system). An employee of the City of Mesa can only be disciplined or dismissed according to the standards of conduct in section 510 of the city personnel rules. Mesa, Ariz.,

Personnel Rule, Ch. 5, § 510 (July 1, 1992). Section 510(B)(7) specifically provides that an employee may be dismissed for "[c]onduct of a type which will bring discredit or embarrassment to the City." The City Manager reviewed the evidence presented at the post-termination hearing, listened to the audio taped testimony of the witnesses, and determined that Appellant's conduct was unbecoming to a member of the police department. Appellant was terminated from employment based on specific reasons articulated by the City Manager in his three page letter of December 1, 1992, directed to Appellant. This meets the requirement of a fair and impartial tribunal.

We agree with the City of Mesa that the Board's role is similar to that in Evans v. State ex rel. Arizona Corp. Comm'n, 131 Ariz. 569, 643 P.2d 14 (App. 1982), cert. denied 459 U.S. 808, 103 S.Ct. 33, 74 L.Ed.2d 46 (1982). In *Evans*, the personnel board enlisted a hearing officer to hold post-termination hearings and then recommend a decision to the board. *Id.*, 131 Ariz. at 571, 643 P.2d at 16. The hearing officer was authorized to take any action other than making the final decision. *Id.* The board rejected the decision of the hearing officer and sustained the termination decision. This Court found "nothing constitutionally infirm" in allowing the hearing officer to function in an advisory capacity and upheld the board's decision to terminate the employee. *Id.*, 131 Ariz. at 572, 643 P.2d at 17. Similarly, the City of Mesa's Personnel Board acts in an advisory capacity to the City Manager and assists the City Manager by holding post-termination hearings. By assigning some of his duties to the Board, the City Manager "is freed of the time consuming evidence gathering tasks which can be performed adequately by [the Board]. This process has been found to comport with due process standards especially *427 where the [City Manager's] decision is based upon the official record before the [Board]." *Id.*^[4]

Appellant also contends that his due process rights were violated because the City Manager sought advice from Roy Skaggs, an attorney working for the Mesa Police Department, implying that this communication constituted an *ex parte* communication with an advocate in the case and created impartiality. We find no merit in Appellant's argument.

A conflict would arise if Skaggs participated as advocate on behalf of the City of Mesa against Appellant and simultaneously served as advisor to the City Manager. Taylor v. Arizona Law Enforcement Merit System, 152 Ariz. 200, 206, 731 P.2d 95, 101 (App. 1986). However, Skaggs did not participate as an advocate at any time. Further, although one of the fundamental procedural requirements of an administrative hearing is an impartial decision maker, "simply joining investigative/prosecutorial and adjudicative functions" does not result in a partial decision maker. Rouse v. Scottsdale Unified Sch. Dist., 156 Ariz. 369, 371, 752 P.2d 22, 24 (App. 1987); Arizona Dept. of Pub. Safety v. Dowd, 117 Ariz. 423, 427, 573 P.2d 497, 501 (App. 1977) (citations omitted). Without a showing of actual bias or partiality, Appellant's due process rights are not violated. Rouse, 156 Ariz. at 374, 752 P.2d at 27. The City Manager listed his findings of fact and conclusions of law on the record. Appellant has failed to come forward with any evidence indicating actual bias or partiality. Thus, we conclude Appellant's due process rights were not violated.

III. Did the City Manager act Arbitrarily, Capriciously, or In an Abuse of Discretion by Upholding the Decision to Terminate Appellant?

With regard to the standard of review, Appellant and the City of Mesa argue whether this is an appeal from a motion to dismiss or motion for summary judgment. This argument confuses the standards of review in appeals from motions to dismiss and summary judgment as contrasted to appeals from administrative decisions. See Havasu Heights v. Desert Valley Wood, 167 Ariz. 383, 386, 807 P.2d 1119, 1122 (App. 1990). "There was no trial *de novo* in the superior court, and the superior court judge did not act as the trier of fact. The court based its decision on a review of the record in the administrative proceeding and on the parties' legal arguments." *Id.*, 167 Ariz. at 386-87, 807 P.2d at 1122-23.^[5] Where this Court reviews trial court decisions regarding appeals from administrative agency decisions, our sole inquiry is whether the record contains evidence of a substantial nature to support the trial court's judgment. Maricopa County v. Gottsponer, 150 Ariz. 367, 370, 723 P.2d 716, 719 (App. 1986) (citation omitted); see *Havasu* *428 Heights^[6], 167 Ariz. at 387, 807 P.2d at 1123 ("In reviewing factual determinations, our respective roles begin and end with determining whether there was substantial evidence to support the administrative decision.") (citations omitted).

In determining whether the trial court abused its discretion, we examine the record to see whether the administrative action was arbitrary, capricious or an abuse of discretion. *Id.*; Justice v. City of Casa Grande, 116 Ariz. 66, 67, 567 P.2d

1195, 1196 (App. 1977).

[W]e review the record to determine whether there has been `unreasonable action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.'

Petras v. Arizona State Liquor Bd., 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981) (quoting Tucson Pub. Sch., Dist. No. 1 of Pima County v. Green, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972)).

Appellant argues that the City Manager acted arbitrarily and capriciously in upholding Appellant's dismissal. Specifically, Appellant argues that the City Manager's decision was contrary to the decision of the Personnel Board which heard the evidence and had an opportunity to judge the credibility of the witnesses. Appellant further alleges that off-duty conduct cannot be a reason for dismissal, and that Appellant's dismissal was not proportionate to the charge. We disagree and find that the City Manager did not act arbitrarily or capriciously in upholding Appellant's dismissal.

Despite Appellant's claims that the City Manager did not participate in the post-termination hearing, he did have an opportunity to review the written evidence and listen to the audio taped testimony of the hearing. The City Manager hesitated in rejecting the recommendation of the Personnel Appeals Board but specifically articulated his reasons for not agreeing with the Board.^[7]

After reviewing the City Manager's reasons for terminating Appellant's employment, we cannot say there was unreasonable action, without consideration and in disregard for facts and circumstances. The City Manager carefully explained his reasons and gave support from the record for his decision. The City Manager did not act arbitrarily or capriciously in reaching his decision.

Appellant further maintains that because the conduct complained of occurred off-duty, dismissal was inappropriate. The test for determining whether the punishment imposed was inappropriate is whether the punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's conscience. Gottspomer, 150 Ariz. at 372, 723 P.2d at 721; Taylor, 152 Ariz. at 207, 731 P.2d at 102. First, we conclude that off-duty conduct can be a reason for dismissal, and second that dismissal was not disproportionate to the charges.

The City of Mesa's Personnel rules provide that an employee may be dismissed for conduct that will bring discredit or embarrassment to the City. The complaints against Appellant came about because of an internal affairs investigation revealing Appellant's name in a graphic, detailed diary describing off-duty sexual conduct. The sexual conduct involving Appellant described acts with Laurie Elliget. Appellant was the supervisor and superior officer of Richard Elliget, the husband of Laurie Elliget. Appellant's sexual conduct with his subordinate's wife clearly had the effect of bringing discredit or embarrassment to the City. See Civil Service Comm'n v. Livingston, 22 Ariz. App. 183, 187, 525 P.2d 949 (1974), cert. denied, 421 U.S. 951, 95 S.Ct. 1685, 44 L.Ed.2d 105 (1975) (off-duty sexual conduct *429 of a police officer was sufficient grounds to terminate the officer); Barlow v. Blackburn, 165 Ariz. 351, 357, 798 P.2d 1360, 1366 (App. 1990) (the conduct of an officer, on or off-duty, reflects upon the Department, and an officer must conduct himself in a manner which does not bring discredit to himself, the Department, or the City).

In addition, we will not disturb the penalty imposed by the City Manager absent a clear abuse of discretion. Taylor, 152 Ariz. at 207, 731 P.2d at 101. Prior to the investigation of the Elliget matter, Appellant had told one of the lieutenants that he had had sexual interactions with Laurie Elliget, but later denied this allegation. We find nothing shocking to one's sense of fairness in terminating Appellant's employment for untruthfulness and conduct unbecoming a member of the police department when that conduct involves sexual conduct with a subordinate's wife. See Livingston, 22 Ariz. App. at 187, 525 P.2d at 949. We cannot say that the City Manager abused his discretion in upholding the termination. We conclude that the City Manager's decision to terminate Appellant was not arbitrary or capricious and was proportionate to the charges against Appellant.

CONCLUSION

For the reasons stated above, we hold that the City of Mesa has a valid merit system and that its application to Appellant did not violate his due process rights. We further conclude that the City Manager did not act arbitrarily, capriciously, or in an abuse of discretion in terminating Appellant's employment with the City of Mesa. We therefore affirm the order of the trial court dismissing Appellant's special action complaint.

NOYES, P.J., and GERBER, J., concur.

APPENDIX

The City Manager gave the following reasons for sustaining Appellant's termination with the Mesa Police Department:

1. Experienced police internal affairs investigators interviewed all the witnesses in depth and reached the conclusion that you were untruthful and had engaged in conduct unbecoming a member and recommended both charges be sustained.

The entire investigation was sent to the Maricopa County Attorney's Office for review by Deputy County Attorney Paul Ahler and County Attorney Rick Romley. The Maricopa County Attorney's Office agreed with the findings and recommendations of Mesa Police Internal Affairs.

The entire investigative file, together with your rebuttal, was given to Assistant Chief Mike Whalen for review and recommendation. He found both charges to be sustained and recommended termination.

The entire file, together with your rebuttal, and all findings and recommendations were forwarded to Chief Meeks. Chief Meeks held a hearing for the purpose of allowing you and your attorneys to present any matters they so desired and to address all issues in this case. They did so. After deliberation, Chief Meeks reached the conclusion that you had been untruthful and had conducted yourself in a manner unbecoming a member and found both charges sustained.

To find a charge sustained, according to Mesa P.D. Rules, it must be found that the charges are proved by a preponderance of the evidence. The investigators, the Maricopa County Attorney's Office, Assistant Chief Whalen, and Chief Meeks all found sufficient evidence, a preponderance of the evidence, to prove you were untruthful and conducted yourself in a manner unbecoming a member.

2. The information given by Laurie Elliget concerning Mesa Police officers during this investigation has been shown to be extremely accurate. All officers except you have conceded that her information was correct. I find this fact highly corroborative of her information concerning you. I find no credible motive for her to be truthful regarding all officers except you.

430 *430 3. The statements of Lt. Zielonka are also highly corroborative of Laurie Elliget's information. Laurie Elliget claims there were three incidences [sic] of sexual contact. You insist there was no sexual contact at any time. Yet, Lt. Zielonka states that approximately three years ago you told him that you had had sex with Laurie Elliget. This is very damaging testimony against you and there is no evidence that shows any possible reason why Lt. Zielonka would offer this information unless it were true.

4. Laurie Elliget's information is also corroborated by her husband, Richard Elliget. It is admitted he is a convicted felon in prison, however, this doesn't prove he is not being truthful. I find no credible reason to explain why he would not be telling the truth.

5. Laurie Elliget's information is also corroborated by the polygraph examinations. The polygraphs administered by the Mesa Police Department were monitored by Paul K. Minor, a nationally known expert. These tests indicated that Laurie Elliget was being truthful and that you were not. You were determined to be truthful on another polygraph examination give [sic] by Mr. Glen Whiteside, however, Mr. Minor was critical of this examination, and Mr. Whiteside did not testify in support of his examination at the

Personnel Appeals Board Hearing. Dr. Saxe testified, in substance, that a polygraph examination is not capable of determining truth or falsity, and questioned the validity of the Mesa Police Department and Whiteside polygraphs. After giving Dr. Saxe's testimony considerations, I feel that overall some corroboration of Laurie Elliget's information is present.

6. There are important parts of Laurie Elliget's information that is also corroborated by B.J. Elliget, by Mary Laurie (Hamilton), by your lack of recall, and by several others.

Although the corroboration I am referring to here is certainly not conclusive, it does add additional support for Laurie Elliget's testimony.

Accordingly, I am of the opinion that Laurie Elliget's information has been corroborated to the extent that sufficient evidence does exist to prove that she is being truthful and that you are not being truthful when you claim that you have never engaged in any sexual conduct with Laurie Elliget.

Although I have been hesitant not to adopt the recommendation of the Personnel Appeals Board, I find that I cannot agree with their conclusions and must, therefore, uphold your termination for Untruthfulness and for Conduct Unbecoming a Member.

[1] The City of Mesa also referred this investigation to the Maricopa County Attorney's Office for an independent review. The County Attorney's office also found that the charges against Appellant should be sustained.

[2] Mesa, Ariz., Personnel Rules, Ch. 9, § 930 (July 1, 1992) provides in part:

D. *Appeal*: Any regular classified employee may appeal their dismissal in writing within ten (10) days to the City Manager. Within fifteen (15) days of the receipt of the appeal, the City Manager will either render a written decision to the employee or refer the appeal to the Personnel Appeals Board. If the employee is not satisfied with the decision of the City Manager, the employee may request a Personnel Appeals Board hearing. Such a request must be forwarded to the City Manager in writing within three (3) days of the receipt by the employee of the City Manager's decision. The Personnel Appeals Board will take action on the appeal within thirty (30) days of the receipt by the City Manager. The Personnel Appeals Board will render a written advisory opinion to the City Manager within five (5) days of the hearing.

[3] The City of Mesa contends that the issues of whether it has a facially valid merit system and whether its application to Appellant violated his due process rights are *res judicata* because these issues were raised in Appellant's first special action complaint seeking a temporary restraining order. In order for the doctrine of *res judicata* to apply there must have been a final judgment. *Focal Point, Inc. v. Court of Appeals*, 149 Ariz. 128, 129, 717 P.2d 432, 433 (1986). Arizona Rules of Civil Procedure 58(a) (Supp. 1995) requires that in order for a judgment to be final it must be written, signed by a judge, and filed with the clerk of the court. *Id.*, 149 Ariz. at 129, 717 P.2d at 433. Appellant's first special action complaint was dismissed by an unsigned minute entry which does not constitute a final appealable order. Therefore, the doctrine of *res judicata* does not apply.

[4] Appellant relies on *Ohlmaier v. Industrial Comm'n*, 161 Ariz. 113, 776 P.2d 791 (1989) to support his position that his due process rights were violated by the City Manager not hearing all the evidence in person. We find *Ohlmaier* distinguishable. *Ohlmaier* involved an industrial commission decision by a judicial officer who renders a final judgment, where a commission or hearing officer normally does not. *Id.*, 161 Ariz. at 117, 776 P.2d at 795. In addition, although this Court noted in *Ohlmaier* that "a party has a right to a decision upon the facts of his case from a judge who hears the evidence," it is not necessary that the testimony be heard live. *Id.*, 161 Ariz. at 118, 776 P.2d at 796.

[5] Because this case comes before us in the posture of a special action complaint seeking review of an administrative decision, it is unlike a motion to dismiss or motion for summary judgment under the Arizona Rules of Civil Procedure. Ariz.R.Civ.P. 12(b) (Supp. 1995) and 56 (Supp. 1995). We recognize that where the trial court considers matters outside the pleadings presented and not excluded, it must treat the motion as one for summary judgment and give the parties a reasonable opportunity to present material pertinent to a motion for summary judgment, *Allison v. State*, 101 Ariz. 418, 421, 420 P.2d 289, 292 (1966). However, that rule is applicable to cases involving civil complaints where there is a trial *de novo* and the trial court or jury acts as the trier of fact. See, e.g., *Havasu Heights*, 167 Ariz. at 386, 807 P.2d at 1122. This case involves a special action complaint where the trial court based its decision on review of the record in the administrative proceeding, and the trial court did not weigh the evidence. Thus, we conclude that the Arizona Rules of Civil Procedure are inapplicable.

[6] We recognize that *Havasu Heights* involves review under the Administrative Review Act. However, the language contained in the

Administrative Review Act and regulations regarding review of departmental action closely parallel each other. See, e.g., *Pima County Sheriff's Dept. v. Smith*, 158 Ariz. 46, 49, 760 P.2d 1095, 1098 (App. 1988).

[7] The text setting forth the City Manager's reasons is appended to this decision.

Save trees - read court opinions online on Google Scholar.

160 Ariz. 241 (1989)

772 P.2d 595

TURF PARADISE, INC., an Arizona corporation, Plaintiff/Appellant,

v.

ARIZONA RACING COMMISSION, an agency of the State of Arizona, Arizona Department of Racing, an agency of the State of Arizona, and the State of Arizona, Defendants/Appellees.

No. 2 CA-CV 89-0011.

Court of Appeals of Arizona, Division 2, Department B.

April 13, 1989.

Jennings, Strouss & Salmon by David L. White and Jefferson L. Lankford, Phoenix, for plaintiff/appellant.

Robert K. Corbin, Atty. Gen. by Michael N. Harrison, Keith R. Ricker and Katherine L. Mead, Phoenix, for defendants/appellees.

OPINION

FERNANDEZ, Judge.

Appellant Turf Paradise, Inc. appeals from a superior court judgment affirming a decision of appellee Arizona Racing Commission. Turf Paradise contends the Commission had no authority to issue its horse racing permit subject to the condition that Turf Paradise not require any person entering the restricted area of its grounds to sign a waiver of liability agreement. Turf Paradise also contends the Commission acted arbitrarily and capriciously in granting it a one-year permit rather than a three-year permit. In addition, it argues that the Commission's hearing procedures were unfair and violated due process. We affirm.

242 In December 1986, Turf Paradise filed an application to renew its then three-year *242 permit that was due to expire in mid-1987. In April 1987, the Commission voted to hold a hearing on the application. That hearing was held before a Department of Racing hearing officer on May 1, 1987. The hearing officer recommended that Turf Paradise be issued a permit once it met the statutory requirements. The hearing officer's findings noted that Turf Paradise did not then have a liability insurance policy in effect but that Turf Paradise had indicated it would require a waiver agreement from all persons seeking to enter the backside of the track when it did obtain a policy. The hearing officer recommended that the waiver agreement proposal be studied further and that its effect on the state's liability exposure be examined. The Acting Director of the Department then recommended that Turf Paradise be granted a one-year permit conditioned on the requirement that no one sign a waiver agreement. That recommendation was adopted by the Commission at its meeting on May 12, 1987.

After Turf Paradise requested a rehearing, a new hearing was held before a different hearing officer on July 30, 1987. That hearing officer recommended that the Department and the Commission consider the best interests of racing in Arizona and that the permit include a condition of no waivers. The hearing officer also stated: "Without specifically recommending that a three year permit be granted, IT IS RECOMMENDED that the Director and the Commission consider the consensus of the witnesses called by Counsel for Turf Paradise, Inc., testifying that a longer permit is helpful to them in preparing for racing meets in Arizona." The Acting Director again recommended that the Commission issue a one-year permit conditioned upon the absence of a waiver requirement. The Commission voted to issue just such a permit on August 25, 1987.

Turf Paradise sought judicial review in superior court shortly thereafter. This appeal followed the trial court's affirmance of the Commission's decision. We note, pursuant to a motion to supplement the record, that in June 1988, the

Commission voted to renew Turf Paradise's permit for a period of three years and that no conditions were imposed upon that permit. Despite the fact that the permit upon which this appeal is brought has expired, however, we exercise our discretion to determine the issues raised. Seeley v. State, 134 Ariz. 263, 655 P.2d 803 (App. 1982). The questions are such that they are likely to recur. Fraternal Order of Police Lodge 2 v. Phoenix Employee Relations Board, 133 Ariz. 126, 650 P.2d 428 (1982). In addition, a one-year permit is of such relatively short duration that appellate review may be thwarted, as in this case, by expiration of the permit if the doctrine of mootness is applied. Maricopa County Health Department v. Harmon, 156 Ariz. 161, 750 P.2d 1364 (App. 1987).

ONE-YEAR PERMIT

Turf Paradise contends the Commission abused its discretion in granting it a one-year permit rather than the three-year permit it requested. It argues initially that the decision was inconsistent with the past practice of granting three-year permits and that the Commission acted arbitrarily by failing to articulate a substantial reason for the change. A.R.S. § 5-108(D) provides that "permits shall be renewed for successive periods of not more than three years...." From 1949 until the current statute was amended in 1982, horse racing permits were issued for periods of one year. 1949 Ariz. Sess. Laws, ch. 61, § 6; 1982 Ariz. Sess. Laws, ch. 310, § 7. Turf Paradise was previously issued a three-year permit in mid-1984 that expired in mid-1987. Because the 1982 amendment permitting three-year permits did not become effective until September 30, 1982, Turf Paradise could not have had a three-year permit before it obtained its 1984-87 permit. Thus, the record does not support its claim that the Commission's decision was a departure from its own past practices.

243 Turf Paradise next contends that the Commission, in voting to issue a one-year permit, relied upon "post hoc rationales" which were arbitrary and not supported *243 by substantial evidence. A.R.S. § 5-108(D) provides that permits may be renewed for a period "of not more than three years" (emphasis added). That language indicates a legislative intent that the Racing Commission determine whether it will grant a one-year, two-year or three-year permit. We must, therefore, determine whether there was substantial evidence to support the Commission's decision to issue a one-year permit to Turf Paradise. DeGroot v. Arizona Racing Commission, 141 Ariz. 331, 686 P.2d 1301 (App. 1984).

The record shows that the Commission was concerned both about its communications with Turf Paradise as well as Turf Paradise's claims of difficulty in obtaining insurance coverage that had resulted in its proposal to require waivers. The Commission was also concerned about the state's exposure to liability because of testimony at the original hearing that the state is always joined as a party whenever Turf Paradise is sued for negligence. In addition, the record indicates that one of the commissioners who voted at the August meeting was newly appointed, and comments were made at the time of the Commission's first vote that one or more of the commissioners were new to the job. We find substantial evidence to support the Commission's decision to issue a one-year permit.

CONDITIONAL PERMIT

Turf Paradise also contends that the Commission had no authority to issue a permit conditioned upon its not requiring everyone entering the backside of its track to sign a waiver of liability agreement. As Turf Paradise notes, A.R.S. § 5-104, which authorizes the Commission to approve permits, does not specifically authorize the imposition of conditions upon a permit. As a result, it argues that the Commission has authority only to grant or deny a permit and that it cannot impose conditions upon its permits requiring a permittee to perform an act unless a statute or regulation specifically requires the permittee to perform it. We note that the condition imposed by the Commission does not require Turf Paradise to perform an act. Instead, it prohibits it from utilizing waivers.

Turf Paradise contends it was improper for the Commission to make the permit conditional absent an express statutory or regulatory authorization for such a condition. In support of that contention, Turf Paradise has cited Arizona Downs v. Turf Paradise, Inc., 140 Ariz. 438, 682 P.2d 443 (App. 1984). In that case, Turf Paradise argued that the Commission had properly imposed, as a condition on a permit issued to Arizona Downs, a requirement that it pay Turf Paradise a specific percentage of the annual maintenance expenses for Turf Paradise's premises. Because that requirement ignored an existing contract between Arizona Downs and Turf Paradise that required Arizona Downs to pay a smaller sum to cover maintenance expenses and because there was no indication that the track was not being adequately

maintained as required by the applicable regulation, the court held that the Commission's order was arbitrary and capricious and that it violated Arizona Downs' contractual rights.

Although no regulation is involved in this case, a statutory authorization does apply. The Commission is authorized, inter alia, to refuse to renew a permit upon a showing that the applicant "[h]as entered into any contract or contracts which will not further the best interests of racing or be in the public interest..." A.R.S. § 5-108(A)(1)(i). Although Turf Paradise had not yet procured its liability insurance policy at the time of the proceedings at issue,¹¹ it informed the hearing officer and the Commission that any policy it purchased would require that persons entering the backside sign a waiver. The pertinent portions of the proposed waiver, which was admitted into evidence at the rehearing, read as follows:

244

FOR VALUABLE CONSIDERATION, including but not limited to permission by Turf Paradise, Inc. for the undersigned to use the Turf Paradise track *244 and facilities and the waiver by Turf Paradise, Inc. of a surcharge against the undersigned for the increased cost of liability insurance, ... the undersigned hereby releases, waives and forever discharges any claim or indebtedness, direct or indirect, current or contingent, past, present or future, which the undersigned might otherwise assert against Turf Paradise, Inc.... arising out of any past, present or future transaction, occurrence, act or omission preceding and succeeding execution and delivery of this Release and Indemnity Agreement . . . for the undersigned's use of any facility provided to the undersigned by Turf Paradise.

The undersigned acknowledges and understands that this Agreement covers claims arising out of or connected with not only past or present matters described herein, and of occurrences which the undersigned may not know or suspect to exist in his favor at the time this Agreement is executed and which, if known by the undersigned, might have affected this Agreement, but also covers any future claims which the undersigned does not know or suspect to exist at this time, and which may occur or arise in the future.

The undersigned further agrees to indemnify and hold harmless Turf Paradise from any and all liability, costs, damage, expense, and attorneys' fees whatsoever that may be sustained or incurred by Turf Paradise as a result of permitting the undersigned to use the Turf Paradise facilities.

Turf Paradise's president testified at the original hearing that the waiver would be required of all persons coming to the backside of the track, including visitors, trainers, horseshoers, veterinarians, owners, purveyors of goods to the track and jockeys. Yet, at both the rehearing and the subsequent Commission meeting when lengthy discussions were held with regard to Turf Paradise's difficulty in obtaining insurance, the evidence was that Turf Paradise was unable to obtain coverage unless participants were excluded from coverage. An insurance agent explained that the term "participants" meant jockeys. Thus, Turf Paradise proposed to require waivers far beyond that required by any of the carriers from which it had sought coverage.

Pursuant to A.R.S. § 5-104, the Racing Commission is authorized to "protect and promote public health, safety and the proper conduct of racing and pari-mutuel wagering and any other matter pertaining to the proper conduct of racing within this state." At the Commission meeting held in August 1987 after the rehearing, a commissioner inquired of Turf Paradise's president what insurance coverage there could be in light of such an extremely broad waiver. After some discussion, the president stated it would protect Turf Paradise's assets. There were also statements that neither the waivers nor the insurance coverage would apply to the state.

"The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval." Southern Pacific Co. v. Olympian Dredging Co., 260 U.S. 205, 208, 43 S.Ct. 26, 27, 67 L.Ed. 213, 216 (1922).

[A]s a general rule, the state, having power to deny a privilege altogether, may grant it upon such

conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.

245 Frost v. Railroad Commission, 271 U.S. 583, 593-94, 46 S.Ct. 605, 607, 70 L.Ed. 1101, 1104-05 (1926). In light of the Commission's specific statutory authorization to deny a permit because the applicant has entered into a contract which will not further the best interests of racing, the sweeping nature and proposed application of the contemplated waiver and the fact that the condition was imposed in connection with a one-year permit, we find that the Commission had authority to impose a condition on Turf Paradise's permit that no person entering the backside of the track be required to sign a waiver agreement. We also find, *245 under the facts of this case, that the Commission's order was neither arbitrary nor capricious.

UNFAIR HEARING PROCEDURES

Turf Paradise contends that the rehearing before the hearing officer was unfair, arguing that the hearing officer was not impartial. Turf Paradise contends that the impartiality of the tribunal was impugned by extensive or adversarial questioning by the hearing officer, claiming that he actually engaged in cross-examination of the witnesses rather than questioning them in order to elicit the truth. In Kosik v. Industrial Commission, 125 Ariz. 535, 611 P.2d 122 (App. 1980), the tribunal's impartiality was found to be suspect because the hearing officer asked nearly half the questions asked in the entire hearing and because his questions were confusing and misleading as well. No such facts exist in this case. The transcript of the rehearing covers 225 pages. The questions asked by the hearing officer cover only 16 pages of that transcript. The hearing officer questioned only three of the seven witnesses who testified. We find no lack of impartiality by the hearing officer.

Additionally, Turf Paradise contends that the rehearing violated due process, claiming that it was not given notice and an opportunity to address matters on which the director and the Commission ultimately based their decisions. Turf Paradise specifically points to the issue of the statutory requirement for Arizona-bred horse races, about which the assistant attorney general asked three questions during cross-examination of one of Turf Paradise's witnesses. One of the questions asked was a hypothetical question. Turf Paradise contends the issue was improperly raised because it was not mentioned in the Commission's rehearing order. After a lengthy redirect examination on that issue alone, Turf Paradise's counsel then objected to injection of the issue in the rehearing. The hearing officer responded that he was aware it was not an issue in the proceedings. However, because of a subsequent exchange with the assistant attorney general, Turf Paradise then questioned its witnesses at length about the issue, despite several offers by the assistant attorney general to stipulate to their testimony on the issue. In his findings and recommendation, the hearing officer noted that it was not an issue in the rehearing and he made no finding on the issue. In the director's modification of the findings, he noted that the issue involved a statutory requirement that the Commission was authorized to waive under certain circumstances. The issue had also been before the Commission for a number of months, having appeared on the agenda along with Turf Paradise's permit application in both the April and May Commission meetings. The April agenda indicated the issue had been continued from the Commission's December 1986 meeting. The Commission is not required to consider an issue in a vacuum. Contemporaneous matters involving the same permittee are pertinent to a determination of an application for a permit renewal. We find no merit to Turf Paradise's argument that it had no notice and no opportunity to address the issue. Substantial evidence on the issue was presented both to the rehearing officer and to the Commission by Turf Paradise itself.

Additionally, Turf Paradise contends the rehearing was unfair because the lawyer who represented the Department and the Commission at the rehearing assumed an adversarial role, cross-examined Turf Paradise's witnesses and filed an adversarial memorandum prior to the rehearing. We note that during the final Commission meeting in these proceedings, the assistant attorney general indicated that he was the legal advisor to the Commission. In the memorandum he filed, he indicated he was the attorney for the Department of Racing. Yet, in the hearing before the superior court, he stated as follows:

The brief which I filed was not filed by the Department, it was filed by the Arizona Attorney General's Office

Turf Paradise, Inc. v. RACING COM'N, 772 P. 2d 595 - Ariz: Court of Appeals, 2nd Div., Dept. B 1989 - Google Scholar
as adversaries [sic] to the Department and to the Commission; it was filed in an attempt to get the
hearing officer and get the Department and the Commission that law which would allow them to make
an informed decision, and, your honor, I *246 would submit and argue forcibly that is my job.

246

I am not a representative of the Commission or the Department, unless I tell them what the law is, and
on the particular administrative hearings I chose to file briefs so you could have a look, in front of this, at
the case law and statutes.

In Taylor v. Arizona Law Enforcement Merit System Council, 152 Ariz. 200, 731 P.2d 95 (App. 1986), a case neither party
cited in connection with this issue, Division One of this court observed that "[a] conflict of interest would clearly arise if
the same assistant attorney general participated as an advocate before the council and simultaneously served as an
advisor to the council in the same matter." 152 Ariz. at 206, 731 P.2d at 101. We note that the assistant attorney general
appeared as an adversary at the rehearing and as an advisor during the Commission meeting. We are concerned,
however, with the lawyer's inconsistent representations as to his role in the matter.

Because of the conclusions we have previously reached and because of the layers of administrative proceedings that
existed in this case, we find no prejudice to Turf Paradise in the attorney's conduct. We are concerned, however, that
such inconsistent representations as to the attorney's role raise the potential for either a conflict of interest or the
appearance of impropriety and suggest that the procedures be reviewed.

The judgment upholding the Commission's decision is affirmed.

ROLL, P.J., and LACAGNINA, C.J., concur.

[1] Turf Paradise normally purchases an insurance policy shortly before the start of the racing season. In 1987, the season was
scheduled to begin October 2.

Save trees - read court opinions online on Google Scholar.

3 Cal.App.4th 1575 (1992)

5 Cal. Rptr.2d 196

JOHN R. HOWITT, Petitioner,

v.

THE SUPERIOR COURT OF IMPERIAL COUNTY, Respondent; COUNTY OF IMPERIAL et al., Real Parties in Interest.

Docket No. D013700.

Court of Appeals of California, Fourth District, Division One.

February 28, 1992.

1577 *1577 COUNSEL

Daniel J. Sullivan for Petitioner.

Thomas M. Fries, County Counsel, and Carolyn S. Janzen, Deputy County Counsel, for Respondent and for Real Parties in Interest.

1578 *1578 OPINION

WIENER, Acting P.J.

This petition for extraordinary relief presents another facet of attorney disqualification in the public sector. For the reasons set forth we will deny the petition without prejudice to further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner John R. Howitt, an Imperial County deputy sheriff, became embroiled in a dispute with the sheriff's department regarding Howitt's transfer from the Winterhaven station to the El Centro jail and summary suspension without pay. Howitt contended the retransfer and suspension were punitive in nature and sought an administrative hearing before the Imperial County Employment Appeals Board (Board). (See Gov. Code, § 3304, subd. (b).) The Board is a quasi-independent administrative tribunal established by county ordinance and charged with adjudicating certain disputes between the county and county employees.

After first rejecting Howitt's request for a hearing, the county, represented by the county counsel's office, eventually conceded the point and a hearing was scheduled. Howitt then discovered that not only was the sheriff's department to be represented at the hearing by a deputy county counsel; in addition, the county counsel Thomas Fries would advise the Board at the hearing and throughout the decisionmaking process as well as prepare the Board's written decision.

Possessed of this information, Howitt requested the county counsel's office disqualify itself from advising the Board with regard to his administrative hearing. When county counsel refused, Howitt unsuccessfully petitioned for writ of mandate in the superior court.

DISCUSSION

In *Civil Service Com. v. Superior Court* (1984) 163 Cal. App.3d 70 [209 Cal. Rptr. 159], a case involving employees of the County of San Diego, we recognized the problem presented by this case. The civil service commission in San Diego County performs a function analogous to the employment appeals board in Imperial County. In a footnote, we

explained:

1579 "The attorney who represents a client with interests adverse to another current client encounters the very real danger that he will be tempted, perhaps unconsciously, to favor the interests of a particularly important *1579 client over the adverse or potentially adverse interests of a less favored client.' (*Developments in the Law—Conflicts of Interest in the Legal Profession* (1981) 94 Harv. L.Rev. 1244, 1296.) Here, there is every reason to believe that county counsel would be tempted to favor the interests of the County in giving advice to the Commission. The Commission's primary, if not sole function, is to pass judgment on the conduct of the County toward its employees. Every Commission decision has the potential of being adverse to one of the County's constituent agencies. Because county counsel is directly responsible to the board of supervisors, it is difficult to conceive how any member of the county counsel's office can render independent advice to the Commission. The structure of the system would appear necessarily to skew such advice in favor of the County and against the county employees. And even in those circumstances where county counsel renders advice to the Commission favoring the employee, such advice places him in a position adverse to his client, the County." (163 Cal. App.3d at pp. 78-79, fn. 1.)

Needless to say we had no occasion there to consider the broad context of the problem we recognized or to suggest a possible solution. *Civil Service Commission* was a case in which the county challenged a commission decision by filing a mandate petition in the superior court. Having previously advised the Commission, county counsel sought to represent the county against the Commission in court. Relying on the Rules of Professional Conduct which prevent a lawyer from representing interests adverse to a former client in a matter substantially related to the former representation, we held the Commission was entitled to request the disqualification of county counsel. (1) Referring to our earlier footnote commentary, we concluded, "To the extent that county counsel is ever permitted to place himself in such a position in the first place (see *ante*, fn. 1), it is clear if the situation escalates to litigation, he cannot remain as counsel for one of his clients in opposition to the other." (163 Cal. App.3d at p. 81.)

(2a) This case presents the foundational question left open in *Civil Service Commission* whether a county counsel's office "is ever permitted to place [it]self in [the] position" of acting as an advocate for one party in a contested hearing while at the same time serving as the legal adviser for the decision maker.

As we shall explain, we answer the question "yes" provided there is compliance with the guidelines set forth in this opinion.

1580 Unlike the issue in *Civil Service Commission*, the answer to the question in this case is not provided by rules of ethics and professional responsibility for *1580 lawyers.^[1] Although the California Rules of Professional Conduct, rule 3-310(B) provides that a lawyer "shall not concurrently represent clients whose interests conflict," the conflict may be waived by the clients' "informed written consent." As we noted in *Civil Service Commission*, there is every reason for the decision maker to be concerned with the independence of the advice it is receiving under such circumstances and the record here does not reflect that the Board has waived the conflict. Nonetheless, the rule is obviously not designed to deal with the situation in which one of the clients is a party to a dispute and one is the decision maker. The fact that the represented party and the decision maker are willing to waive a conflict does precious little for the remaining party who must face an adversary with unequal access to the tribunal.

Accordingly, we must pursue other avenues of assistance in resolving this issue. The parties have directed us to various cases which have addressed contentions that the overlapping functions of members of or lawyers for an administrative agency violated the due process rights of a party appearing before the agency. As a general proposition these cases recognize a due process entitlement to an impartial decision maker but conclude that overlapping functions do not amount to a constitutional violation absent specific evidence of bias.

Chief among these cases is the United States Supreme Court's decision in *Withrow v. Larkin* (1975) 421 U.S. 35 [43 L.Ed.2d 712, 95 S.Ct. 1456], involving the suspension of a doctor's license by an examining board of practicing

physicians. The board was empowered to review complaints against doctors by conducting an "investigative hearing" at which the doctor had limited ability to participate. If the investigative hearing yielded significant evidence of wrongdoing, the board would notice a "contested hearing" to decide whether the doctor's license should be suspended. A doctor under investigation challenged the board's procedure as violative of due process because the combination of investigative and adjudicatory functions deprived him of an impartial tribunal. Characterizing the issue as a "substantial" one (*id.* at p. 51 [43 L.Ed.2d at p. 726]), the court nonetheless refused *1581 to adopt a blanket rule "that agency members who participate in an investigation are disqualified from adjudicating." (*id.* at p. 52 [43 L.Ed.2d at p. 726].) "No specific foundation has been presented for suspecting that the Board has been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." (*id.* at p. 55 [43 L.Ed.2d at p. 728].)

The California Supreme Court employed a similar analysis in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826 [264 Cal. Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235], rejecting a judge's argument that the commission's combination of investigative and adjudicatory functions constituted a denial of due process. The *Kloepfer* court emphasized that the commission's functions involve considerably less overlap than the examining board's in *Withrow*. Specifically, while the commission's staff initially investigates complaints against judges, the prosecutorial responsibility shifts to the Attorney General's office once formal proceedings are instituted. In addition, the evidence is initially presented to a panel of special masters appointed by the Supreme Court and only then reviewed by the commission. (*id.* at pp. 834-835.)

Both *Withrow* and *Kloepfer* exemplify administrative procedures which depart to some extent from the *pure* adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates. The departure is perhaps more dramatic in *Withrow*, where the functions of investigation and adjudication are effectively merged in the same persons, than in *Kloepfer*, where the commission's staff conducted an initial investigation. Nonetheless, these decisions and numerous others stand for the proposition that the pure adversary model is not entitled to constitutionally enshrined exclusivity as the means for resolving disputes in "[t]he incredible variety of administrative mechanisms [utilized] in this country...." (*Withrow, supra*, 421 U.S. at p. 52 [43 L.Ed.2d at pp. 726-727].) (3a) The mere fact that the decision maker or its staff is a more active participant in the factfinding process — similar to the judge in European civil law systems — will not render an administrative procedure unconstitutional.

A more difficult question is presented where the administrative agency chooses to utilize the adversary model in large part but modifies it in a way which raises questions about the fairness of the resulting procedure. Here, for instance, we 1582 assume the county constitutionally could have allowed the *1582 sheriff or the board of supervisors to review personnel complaints by employees in the sheriff's department. Instead, it created an independent and disinterested administrative board to adjudicate disputes between the county and its employees. The board of employment appeals cannot be overruled by another county agency or even by the board of supervisors. The Board does not have its own investigative arm but instead relies on adversary presentations by the employee and affected county agency to illuminate the facts and relevant legal authority. Each party is entitled to be represented by counsel at a formal hearing.

It is in the midst of this seemingly adversary system that we discover the same lawyers who represent the various county departments as advocates also advise the Board with regard to its decision affecting those county departments. The mental image comes to mind of a hearing in which county counsel representing a county department raises an objection and then excuses himself from counsel table to consult with the Board members as to whether the objection should be sustained. (See *Midstate Theatres, Inc. v. County of Stanislaus* (1976) 55 Cal. App.3d 864, 870-871 [128 Cal. Rptr. 54].)

(2b) It is true the record in this case does not indicate that the same lawyer will both represent the sheriff's department and advise the Board at the hearing. Letters which are part of the record suggest that one of four deputies in the county counsel's office will represent the sheriff while the county counsel himself, Thomas Fries, will advise the Board.^[2] Perhaps because the issues were not as focused below, there is no evidence to indicate whether or the extent to which Fries is screened from information about the case during prehearing investigation and preparation. In this regard,

however, we note that Fries is the administrative supervisor of the office. Indeed, a preliminary letter to Howitt's counsel about a discovery matter refers to the sheriff as "my client" and includes Fries's signature block with the actual signature by a deputy county counsel. (Cf. American General Ins. Co. v. F.T.C. (9th Cir.1979) 589 F.2d 462, 465.)

II

Most of the cases which have considered a due process challenge to the overlapping functions of an administrative agency focus on the agency, commission or board itself and not on a lawyer's representation of conflicting interests. A few, however, have considered the overlapping functions of *1583 lawyers in the administrative context but, sometimes in dicta, have reached inconsistent conclusions.

The authority supporting a lawyer's participation in a proceeding as both an advocate and adviser to the decision maker stems largely from two cases decided long before *Withrow's* due process principles were announced. In Chosick v. Reilly (1954) 125 Cal. App.2d 334 [270 P.2d 547], the court rejected a licensee's complaint that the State Board of Equalization improperly "ask[ed] staff assistants connected with the prosecution of the case for recommendation and assistance." (*Id.* at p. 337.) The *Chosick* court concluded: "In general, the fact that an administrative agency is both accuser and judge is not considered to deprive the accused of due process of law. [Citation.] We see no good reason why, this being so, the same trained personnel cannot legally advise and assist the agency in both functions if such assistance does not violate any statutory provisions and if the agency itself makes the actual decision." (*Id.* at p. 338.)

In Ford v. Civil Service Commission (1958) 161 Cal. App.2d 692 [327 P.2d 148], the court summarily disposed of a discharged county employee's contention that an adverse commission decision should be reversed because of county counsel's overlapping roles.

"Appellant now insists that because the civil service commission is advised by a member of the staff from the county counsel's office, and the department is also represented by another member of the county counsel's staff, that such presents 'a cozy situation' and is reversible error. Whether it was cozy or dismal and cheerless makes little difference if it was entirely fair and proper. Under our law, an administrative agency can even be both the prosecutor and judge in the same manner. [Citation.] There is no evidence that the deputy county counsel who advised the commission did anything other than that which was wholly proper." (161 Cal. App.2d at p. 697.)

Ford provided the linchpin for the court's decision in Greer v. Board of Education (1975) 47 Cal. App.3d 98 [121 Cal. Rptr. 542], rejecting a challenge to the arguably more troublesome situation in which the same lawyer represented the school district administration in a personnel hearing before a hearing officer and then advised the school board reviewing the hearing officer's decision. Apart from quoting *Ford*, the *Greer* court simply commented, "By the very nature of the administrative process the agency or *1584 one of its agents or representatives is bound to be involved in the initiation and prosecution of charges." (*Id.* at p. 119.)^[3]

One year later the court in Midstate Theatres, Inc. v. County of Stanislaus, *supra*, 55 Cal. App.3d 864 considered a situation similar to that presented in *Greer* but reached a diametrically opposite conclusion. Relying on both due process principles and an applicable statute (Gov. Code, § 31000.7), the court explained that the same lawyer could not represent the county assessor and advise the county board of equalization in the same proceeding. (55 Cal. App.3d at p. 875.) The court's discussion of the statute is of particular interest here because section 31000.7 prohibits members of the same law firm from "advis[ing] or represent[ing] both the assessor and the county board of equalization on any matters relating to hearings before the county board of equalization." (55 Cal. App.3d at p. 874.) The statute also provides, however, that "[t]his prohibition shall not apply to the county counsel's office." Commenting on the county counsel exception, the court termed it a "legerdemain g[iving] birth to a solution of dubious validity." (*Id.* at p. 875.)

One more recent decision has touched on the issues presented in this case but its analysis in dicta is inconclusive. In Rowen v. Workers' Comp. Appeals Bd. (1981) 119 Cal. App.3d 633 [174 Cal. Rptr. 185], the court concluded that the conflict issue framed by the petitioner was not in reality presented because there was no showing the advocate in question ever advised the administrative board. (*Id.* at p. 641.) Discussing the issue generally, the *Rowen* court did not

discuss *Withrow* or *Kloepfer*. It did, however, cite both *Chosick* and *Ford* in suggesting that while the same lawyer might be precluded from simultaneously acting as advocate and adviser, different lawyers from the same office could assume the separate roles. (*Ibid.*) It did not indicate whether there were particular requirements to be met if this was to occur.

1585 It bears noting that the procedural posture of most of the cases, particularly *Chosick*, *Ford* and *Greer*, differ from this case. Each involved challenges to an administrative decision on the ground that the decision maker *1585 was biased because it received advice from a partisan advocate. This case, in contrast, involves a request to disqualify county counsel and does not seek invalidation of an already rendered administrative decision. In holding that a showing of actual bias or prejudice is necessary to justify reversal of a decision, *Chosick*, *Ford* and *Greer* do not address the question whether a similar showing is necessary where disqualification of counsel is sought before the administrative hearing takes place.

More importantly, the reliance in those decisions on the premise that an administrative agency can be both the prosecutor and judge overstates the applicable law as clarified in *Withrow v. Larkin*. As we have noted, the courts that have addressed due process challenges of the sort presented here appropriately recognize the need for flexibility in the area of administrative procedure. (3b) Some agencies allow the decision maker to play an active role in the investigation and development of the relevant facts rather than rely on the adversary presentations of interested parties. In other contexts such as the State Bar disciplinary system, the prosecutorial and adjudicatory functions are nominally combined under the same aegis but are in reality sealed off from one another to prevent the tribunal's impartiality from being tainted. (See generally Bus. & Prof. Code, §§ 6079.5, 6086.5; State Bar Rules of Proc., rules 101, 210, 211.) Neither of these situations necessarily violates procedural due process.

A different issue is presented, however, where *advocacy* and decisionmaking roles are combined. (4) By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator. (See *Applebaum v. Board of Directors* (1980) 104 Cal. App.3d 648, 658 [163 Cal. Rptr. 831]; see also *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242 [64 L.Ed.2d 182, 188, 100 S.Ct. 1610].) Here, as part of an adversary process, the county counsel will be asked to advise the Board about legal issues which Board members feel are relevant in deciding whether one of his subordinates wins or loses the case. To allow an advocate for one party to also act as counsel to the decision maker creates the substantial risk that the advice given to the decision maker, "perhaps unconsciously" as we recognized in *Civil Service Commission* (163 Cal. App.3d at p. 78, fn. 1), will be skewed.

1586 The State Bar of New Mexico's Advisory Opinions Committee reached similar conclusions in its Opinion 1990-1 regarding an inquiry about a city whose general governing board or commission also sits as a personnel board to review hiring and firing decisions of the city manager. The municipal attorney generally advises the city manager as to personnel decisions and *1586 also advises the commission when acting other than as a personnel board. The advisory opinion concludes that the municipal attorney should not advise the commission in its capacity as a personnel board:

"We do not perceive the ... issue to be as much of an ethical problem as a legal problem. What we mean by this is that we do not believe any ethical prohibition would be violated if the municipal attorney both advised management to fire a particular employee, for example, and then advised the commission/board to the same effect. This situation may present due process problems concerning the fairness of the employee's hearing before a supposedly neutral decision maker and, to that extent, we believe it is a wise choice to advise the city to arrange for outside counsel for the commission/board in grievance hearings. *We believe it is particularly appropriate for the personnel board to be advised by outside counsel when the municipal attorney appears before it as an advocate for management.* This will avoid any potential for conflict as well as any appearance of impropriety that might otherwise attach due to the role as advisor to management." (Italics added.)

The county seeks to distinguish the New Mexico Bar opinion on the ground that the commission has numerous other functions whereas the employment appeals board's sole responsibility is to resolve disputes between the county and its employees. While the distinction exists, it is not relevant for the purposes of deciding this case. As the New Mexico

opinion makes clear, the commission is cast as a "supposedly neutral decision maker" just as the employment appeals board is here. It is the attorney's dual role as both advocate for a party and adviser to the tribunal which does violence to that constitutional ideal.

III

As we have noted, many of the cases which raise due process concerns about these dual representation issues focus on the more obvious problem of the same lawyer acting as both advocate and adviser to the decision maker. (See, e.g., Midstate Theatres, supra, 55 Cal. App.3d at pp. 871, 875; Rowen v. Workers' Comp. Appeals Bd., supra, 119 Cal. App.3d at p. 641.) (5) As the court recognized in Midstate Theatres, however, the concerns do not disappear simply because different lawyers in the same office perform the two functions. (See *ante*, p. 1584.) Performance of both roles by the same law office is appropriate only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate.

1587 Notwithstanding comments in some of the earlier cases (see, e.g., Ford v. Civil Service Commission, supra, 161 Cal. App.2d at p. 697), the burden of *1587 providing such assurances must rest with the law office performing the dual roles, here the county counsel's office. Generally, where a "Chinese wall" defense has been allowed in attorney disqualification cases, the burden is always on the party relying on the wall to demonstrate its existence and effectiveness. (See, e.g., Higdon v. Superior Court (1991) 227 Cal. App.3d 1667, 1680 [278 Cal. Rptr. 588]; Castro v. Los Angeles County Bd. of Supervisors (1991) 232 Cal. App.3d 1432, 1440 [284 Cal. Rptr. 154]; see also People v. Lopez (1984) 155 Cal. App.3d 813, 827 [202 Cal. Rptr. 333].) As a practical matter, were the burden allocated otherwise, it would seldom if ever be possible for the opposing party to demonstrate that the lawyer in question had not been adequately screened. Similar pragmatic considerations are applicable here. If the adviser has been screened, it should be relatively easy for county counsel to explain the screening procedures in effect. On the other hand, if there has been improper contact, it would likely be known only to the lawyers involved and perhaps to the board members. A party challenging the dual representation would have virtually no way of obtaining evidence to demonstrate any impropriety.

(2c) The record in this case contains no evidence of any procedure in the county counsel's office to screen lawyers who advise the appeals board from the advocacy functions of the office. We are nonetheless reticent to rely on this record in concluding that the county counsel's office has failed to meet its burden where the screening issue was not raised below and has only been highlighted as part of the process of appellate review. Under these circumstances, we believe it only fair to deny Howitt's petition without prejudice to his renewing his petition in the superior court guided by the dictates of this opinion. This will give county counsel's office the opportunity to make any showing it can to demonstrate that the Board's adviser has been adequately screened.^[4] Needless to say, if county counsel cannot demonstrate an effective screening procedure in this case, the renewed petition should be granted.

DISPOSITION

The petition for writ of mandate is denied without prejudice to a renewal of the petition in the superior court and further proceedings consistent with this opinion.

Nares, J., concurred.

BENKE, J., Concurring.

I concur in the result reached by the majority only insofar as it denies petitioner's writ.

1588 *1588 |

As the majority notes, this case presents the following question: Is the county counsel's office ever permitted to place

itself in the position of acting in a dual capacity as an advocate for one party in a contested administrative hearing while at the same time serving as legal adviser to the decision maker at that hearing?

In response to this question the majority opinion states "'yes' provided there is compliance with the guidelines set forth in this opinion." (Maj. opn., *ante*, p. 1579.)

The majority's answer, however, is but a judicial wink which I find remarkable in its ambiguity.

Superficially, this immediate and direct response by the majority appears to accept the premise that as a general matter it does not offend established principles of due process for a county counsel's office to act in a dual role of adviser and advocate.

To the contrary the majority actually adopts the opposite premise, i.e., that such dual capacity offends due process and is unacceptable unless certain conditions are met by the county counsel's office. This premise is apparent throughout the majority's opinion, where for example, it concludes: "The role [of advocate] is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator. [Citations.] Here, as part of an adversary process, the county counsel will be asked to advise the Board about legal issues which Board members feel are relevant in deciding whether one of his subordinates wins or loses the case. *To allow an advocate for one party to also act as counsel to the decision maker creates the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' as we recognized in Civil Service Commission (163 Cal. App.3d at p. 78, fn. 1), will be skewed.*" (Maj. opn., *ante*, p. 1585, italics added.)

Likewise, in citing with approval Advisory Opinion 1990-1 of the State Bar of New Mexico (which concludes due process principles are violated when a government entity acts as both advocate for a party and adviser to the adjudicatory body) the majority states: "It is the attorney's dual role as both advocate for a party and adviser to the tribunal which does violence to [the] constitutional ideal [of a neutral decision maker]." (Maj. opn., *ante*, p. 1586.)

1589 I do not perceive my quarrel with the majority's premise as trivial. Respectfully, the premise in fact adopted by the majority turns firmly *1589 established principles of administrative law on their heads and creates irreconcilable conflict with existing case law.

II

As noted, the premise of the majority is that the county counsel's dual representation, standing alone, offends petitioner's due process rights. This view, however, runs counter to the established principles which underlie the law of administrative hearing process.

The principles which govern the propriety of dual representation in the setting of administrative hearings emerge clearly in Withrow v. Larkin (1975) 421 U.S. 35, 46 [43 L.Ed.2d 712, 723, 95 S.Ct. 1456] (*Withrow*). There, the Wisconsin Medical Examining Board had served as both investigator of petitioner doctor's alleged wrongdoing and as the adjudicatory body which temporarily suspended his license because of that wrongdoing.

In concluding the dual function permissible, the Supreme Court observed that in pursuit of the goal of preventing even the probability of unfairness, "various situations have been identified in which experience teaches that the probability of actual bias *on the part of the judge or decisionmaker* is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

"The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and *it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of*

due process is to be adequately implemented." (Withrow, supra, 421 U.S. at p. 47 [43 L.Ed.2d at pp. 723-724], fns. omitted, italics added.)

"That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely....

1590 *1590 "It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process...." [Citation.] Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition ... that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle." (Withrow, supra, 421 U.S. at pp. 51-52 [43 L.Ed.2d at pp. 726-727], fns. omitted.)

"Here, the Board stayed within the accepted bounds of due process. Having investigated, it issued findings and conclusions asserting the commission of certain acts and ultimately concluding that there was probable cause to believe that appellee had violated the statutes.

"The risk of bias or prejudice in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." (Withrow, supra, 421 U.S. at p. 57 [43 L.Ed.2d at p. 729].)

Having rejected the general proposition that the dual capacity of investigator and adjudicator standing alone violates due process, the court noted that on a case-by-case basis, a judge *in a given situation* might deem the risk of bias or conflict constitutionally impermissible: "That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present *in the case before it* that the risk of unfairness is intolerably high. Findings of that kind made by judges with special insights into local realities are entitled to respect." (Withrow, supra, 421 U.S. at p. 58 [43 L.Ed.2d at p. 730], italics added.)

In Kloepfer v. Commission on Judicial Performance (1989) 49 Cal.3d 826, 827-828 [264 Cal. Rptr. 100, 782 P.2d 239, 89 A.L.R.4th 235] (Kloepfer), the California Supreme Court joined in Withrow's conclusion that combined investigative and adjudicative functions of the Commission on Judicial Performance does not, alone, create a constitutionally unacceptable risk of bias. There, the court rejected a judge's general argument that the commission's combined investigative and adjudicatory functions constituted a denial of due process. The court further noted the commission's functions involved even less overlap than the examining board's in Withrow because while the commission's staff initially investigates complaints against judges, the prosecutorial responsibility shifts to the Attorney General's office

1591 once formal *1591 proceedings are instituted, ultimately with the Supreme Court acting as the final decision maker charged with reviewing the evidence and independently assessing its weight and relevance.

Although Withrow and Kloepfer concern a dual capacity argument where one governmental entity is acting as investigator and adjudicator, I find in those cases guidance necessary to resolve the issue before us.

The conduct of governmental entities, including both the Employment Appeals Board (the Board) and the county counsel here, are entitled to a strong presumption of honesty and integrity. (Withrow, supra, 421 U.S. at p. 47 [43 L.Ed.2d at pp. 723-724]; Hortonville Dist. v. Hortonville Ed. Assn. (1976) 426 U.S. 482, 492, 497 [49 L.Ed.2d 1, 9, 96 S.Ct. 2308]; Kloepfer, supra, 49 Cal.3d at p. 834.) In this regard, it is important at the outset to keep in mind the posture of petitioner's argument. It is not that the county counsel's office or anyone in it has, or will, act improperly. Nor has petitioner ever argued the Board here, or any of its members, has or will act improperly.

Given this posture of the case, it cannot be said that petitioner has overcome the presumption of propriety, integrity and honesty which attaches to the Board. Contrary to the majority view, this presumption has not been rebutted merely because the county counsel's office represents one party and serves as legal adviser to the Board. Said another way, dual representation by the county counsel's office has not been shown to carry with it the unacceptable risk of *actual* bias on the part of the Board such that that office must be precluded from the dual representation.

Focusing upon the dual function of the county counsel's office vis-a-vis the Board, it is apparent that the county counsel's office is not a direct participant in the decisionmaking function of the Board and assumes none of the independent authority of that Board on procedural or substantive issues. That office acts as legal adviser to the Board, in such capacity advising on matters of county policies and procedure, ordinances and hearing procedures. While it advises the Board in such matters, the chairman of the board makes all final adjudications of such procedural issues. Moreover, the county counsel's legal adviser to the Board does not participate in the decisionmaking process of the Board members but remains "on call" for legal advice. Once the Board makes its decision, it may direct the legal adviser to prepare the Board's written decision and findings for Board signature. I cannot conclude this relationship between the county counsel's office and the Board poses *actual* risk of bias or prejudgment such that the relationship must be forbidden.

1592 *1592 Given the county counsel's minimal intrusion into the autonomy of Board decisions and the failure of petitioner to demonstrate or even allege specific impropriety on the part of the county counsel's office or the Board, I would decline to adopt the blanket rule petitioner urges here and which the majority adopts. Indeed, in adopting the rule petitioner suggests, the majority rejects the settled legal presumptions of propriety explicit in *Withrow* and *Kloepfer* and utilizes instead a presumption of impropriety which is ameliorated by establishing a prophylactic rule to guarantee fairness.

Consistent with the analysis in *Withrow, supra*, 421 U.S. at page 58 [43 L.Ed.2d at pages 729-730], I would approach issues of the propriety of dual representation in administration hearings by allowing judges on a case by case basis to examine the particularities of local governmental agencies to assure fairness.

Here, in a letter to petitioner's counsel, the county counsel stated: "In practice, we endeavor to insulate the legal advisor of the Board from information and discussion with the attorneys acting in a representative capacity before the board. In fact, but for your inquiry and the necessity to respond to your request for recusal, I would not have become involved in this hearing matter until the date of the hearing." Although the possibility of raising this specific issue was known to him, petitioner's broad constitutional challenge did not allege inadequate screening procedures led to an unconstitutional risk of bias or conflict on the part of the Board. In the absence of such a challenge, I would assume adequate screening provisions are provided within the office of county counsel.

III

I would respectfully suggest the premise adopted by the majority runs contrary to direct authority which concludes principles of fairness and due process are not necessarily violated when the county counsel's office represents a party before an administrative tribunal and also acts as the legal advisor to the tribunal. (*Rowen v. Workers' Comp. Appeals Bd.* (1981) 119 Cal. App.3d 633, 640-641 [174 Cal. Rptr. 185]; *Greer v. Board of Education* (1975) 47 Cal. App.3d 98, 119-120 [121 Cal. Rptr. 542]; *Ford v. Civil Service Commission* (1958) 161 Cal. App.2d 692, 697 [327 P.2d 148]; *Chosick v. Reilly* (1954) 125 Cal. App.2d 334, 337-338 [270 P.2d 547].) (Compare *Midstate Theatres, Inc. v. County of Stanislaus* (1976) 55 Cal. App.3d 864, 870-871 [128 Cal. Rptr. 54] [impropriety exists where the same *individual* acts as adviser and advocate].) It is apparent existing authority is consistent with the *Withrow-Kloepfer* analysis: dual

1593 representation is permissible until in a given case *actual* bias or conflict is so intolerably high as to make such *1593 dual representation impermissible. I find unpersuasive the majority's attempt to distinguish these authorities.

IV

Because I conclude there is no inherent denial of due process in dual representation of the type at issue here, I agree

the petition should be denied.

If petitioner again objects to the county counsel's dual role, the question before the lower court is whether *in this specific case* dual representation denies due process.

While the county counsel may be required *by the trial court* as part of a due process inquiry, to explain how it insulates its advisory function from its advocating function, once it has done so, the burden is then on petitioner to demonstrate the insulation is inadequate. Unlike the majority, I would not require the trial court presume that the dual representation is violative of due process.

[1] For similar reasons this court's recent decision in *In re Lee G.* (1991) 1 Cal. App.4th 17 [1 Cal. Rptr.2d 375] provides little guidance on the question before us. In *Lee G.*, county counsel represented the public conservator seeking to establish an LPS conservatorship over a mother. At the same time, county counsel also represented the department of social services (DSS) which sought to prevent the mother from obtaining custody of her son who had been previously determined to be a dependent child of the juvenile court. County counsel did not advise any decisionmaker. Relying on traditional principles developed in the context of professional ethics, we rejected the mother's argument that county counsel should be disqualified from representing the DSS. We reasoned that in both situations, county counsel represented interests adverse to the mother and that in both, the mother was represented by independent counsel. (*Id.* at p. 32.)

[2] Contrary to the county's claim, we do not view it as critical that Fries will advise the Board only as to "legal issues" and not as to the ultimate disposition of the hearing. Any lawyer knows that a legal question may become the determinative issue in a given case. Fries would have to be aware how his advice on a particular issue might affect the substantive position being argued by one of his deputies. (See *Walker v. City of Berkeley* (9th Cir.1991) 951 F.2d 182, 185.)

[3] The county suggests the Supreme Court's *Kloepfer* case also addresses and approves of a lawyer's dual role in the administrative context. It is true the judge in *Kloepfer* asserted that the commission's chief counsel participated in the initial investigation and then later advised the commission during adjudicatory proceedings. (49 Cal.3d at p. 833.) Counsel's role, however, was never referred to again by the court in resolving the due process contention. In any event, the chief counsel's involvement is no different than that of other administrative agency members who participate in both investigative and adjudicatory phases of a proceeding. More significant, in our view, is the fact that the procedures utilized by the Commission on Judicial Performance and approved in *Kloepfer* do not result in lawyers acting as both advocates before the commission and advisers to the commission.

[4] Without commenting extensively on or deciding an issue yet to be fully developed by the presentation of evidence, we do not envision that an adequate screening procedure for due process purposes requires the creation of functionally separate offices to advocate and advise. It should be sufficient if the lawyer advising the Board has no potential involvement in or responsibility for the preparation or presentation of the case.

Save trees - read court opinions online on Google Scholar.

133 Cal.Rptr.2d 234 (2003)

108 Cal.App.4th 81

NIGHTLIFE PARTNERS, LTD., et al., Plaintiffs and Respondents,**v.****CITY OF BEVERLY HILLS, Defendant and Appellant.**No. B161436.

Court of Appeal, Second District, Division Three.

April 24, 2003.

237 *237 Laurence S. Wiener, City Attorney; Richards, Watson & Gershon, Mitchell E. Abbott and Patrick L. Bobko, Los Angeles, for Defendant and Appellant.

Roger Jon Diamond, Santa Monica, for Plaintiffs and Respondents.

CROSKEY, J.

The City of Beverly Hills (City) appeals from an order granting Nightlife Partners, Ltd.; Entertainment Associates of L.A., Inc.; Déjà Vu Showgirls of Beverly Hills, LLC and Deja Vu Consulting, Inc. (collectively, Petitioners) a new administrative hearing. There is substantial evidence to support the trial court's determination that Petitioners are entitled to a new hearing, and we therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND^[1]

Petitioners operate a cabaret in the City of Beverly Hills, pursuant to the adult entertainment regulatory permit (permit) required by City's municipal code. At all times relevant to this appeal, Petitioners and City were engaged in federal litigation, *Nightlife Partners, Ltd., et al. v. City of Beverly Hills*, U.S. District Court Case No. CV 98-10266 RAP, related to City's regulation of adult entertainment. Assistant City Attorney Terence Boga (Boga) was one of the city attorneys litigating the federal lawsuit.^[2]

238 *238 City's municipal code required Petitioners to renew their permit every two years, and also required that a renewal application be submitted at least 30 days before the initial permit was to expire. In early 2001, Petitioners attempted to obtain from City an application form for renewal of their permit, but ran into difficulties obtaining the applicable form. City finally gave Petitioners an application form used for renewal of permits for "private clubs/public dancing"; City did not have a separate application form for renewal of adult entertainment permits.

On February 22, 2001, Petitioners submitted an application for renewal of their permit. Petitioners and City then engaged in a debate over whether, in fact, the application was complete. City, through Assistant City Attorney Boga, took the position in letters to Petitioners that, for a renewal, Petitioners were required to submit exactly the same documents required for an application for a *new* permit (e.g., site plans and letters of justification). Petitioners took the position that neither the municipal code nor the application form required them to submit new copies of the same documents required by the initial application.

City refused to consider the application for renewal to be complete, and, on April 26, 2001, Donald Oblander, City's Finance Director, sent Petitioners a letter denying their renewal application, assertedly because the application was incomplete because of missing documents. The letter also advised Petitioners that, even if the application had been complete, it would have been denied because the cabaret did not comply with certain design and performance standards set by the municipal code. Therefore, as provided for by the municipal code, Petitioners filed an

administrative appeal of the denial of their renewal application.

On June 28, 2001, Petitioners' administrative appeal was heard by David R. Holmquist (Holmquist), an attorney and City's Risk Manager. At the beginning of the hearing, Holmquist stated that he had never presided over such a hearing before, and then announced that "Seated next to me is Assistant City Attorney, Terence Boga, [who] will be advising me and assisting me as necessary in these proceedings." Boga being otherwise occupied as Holmquist's advisor, City's advocate at the hearing was William Litvak, an attorney hired for that purpose.

Boga sat next to Holmquist throughout the hearing, and the two men conferred from time to time, apparently in connection with evidentiary rulings and legal issues. Such communications were not transcribed by the reporter. Petitioners unsuccessfully objected both to the fact that the hearing officer was a city employee, and to Boga's role as the hearing officer's advisor.

During the hearing, Holmquist ruled, among other things, that (1) it was irrelevant that the form City provided to Petitioners did not require the documents that City subsequently held were required so as to conclude that their absence rendered the application incomplete, and (2) Petitioners were not allowed to present evidence of deliberate discrimination against adult entertainment businesses by showing that, of all the permitted businesses in City, only such adult entertainment businesses (of which Petitioner's cabaret was allegedly the only one) were required to go through the same process to renew a permit as to obtain an initial permit.

239 *239 Holmquist rendered a decision denying Petitioners' appeal on September 5, 2001. Under City's municipal code, Petitioners could not appeal Holmquist's decision to any further administrative body. Therefore, on November 21, 2001, Petitioners filed a petition in the superior court for a writ of administrative mandate directing City to set aside the denial of the permit and to issue the required permit. The petition alleged, in relevant part, that the hearing was unfair, the hearing officer made improper evidentiary rulings, and that the procedures followed were unfair and violated Petitioners' rights to procedural due process.

In a declaration submitted in opposition to the petition, Holmquist declared that the opinion he rendered was his alone, and had been made without consulting with any other city employee. He also denied that he was prejudiced or biased because of his status as a City employee. *Notably, however, his declaration entirely failed to respond to Petitioners' claim that Boga had advised and assisted him during the hearing in connection with making evidentiary rulings or determining legal issues.*^[3]

After reviewing the administrative record and listening to argument, the trial court granted the petition, concluding that Petitioners' due process rights had been violated. It found that Boga had taken an "active and significant" part in Petitioners' unsuccessful application renewal process, and that when Petitioners sought administrative review of that process, Boga also appeared and participated in the administrative hearing by advising and assisting Holmquist, the hearing officer. It concluded that Boga's participation as the hearing officer's advisor during the administrative review process constituted "actual bias." Rather than ordering City to issue a renewal permit, as prayed for in the petition, it simply ordered City to provide Petitioners with a new hearing.

City filed a timely notice of appeal.

CONTENTIONS ON APPEAL

City contends the trial court erred by setting aside its administrative decision because there were no "concrete facts" showing actual bias. It contends Boga's "advisory role" was legally permissible, and that Petitioners received a fair hearing that met due process requirements. Petitioners contend that there were "concrete facts" showing a risk of bias, that Boga's participation rendered the proceedings unfair, and that, in fact, they did not receive a fair hearing. We conclude that the issue is not whether there was actual bias, but whether the hearing met minimum constitutional standards of due process, and further conclude that it did not.

DISCUSSION

1. Standard of Review

240 In the trial court, the standard of review depends on the nature of the right *240 affected by the administrative decision. (See Code Civ. Proc., § 1094.5, subd. (c).)¹⁴¹ In the appellate court, the appropriate standard of review is substantial evidence, regardless of the nature of the right involved. Thus, even in those cases where the trial court was required to review an administrative decision under the independent judgment standard of review, the standard of review on appeal of the trial court's determination is the substantial evidence test. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824, 85 Cal.Rptr.2d 696, 977 P.2d 693.)

Here, the trial court did not review the facts and findings that supported Holmquist's decision to uphold City's denial of Petitioners' permit renewal application. Instead, it reviewed the facts related to how the hearing before Holmquist was conducted. Thus, on appeal it is the trial court's findings of fact related to that issue which we review. We apply the substantial evidence test to the evidence and findings that support the trial court's determination that the hearing process was fundamentally unfair.

The trial court's determination involves a mixed question of fact and law. To the extent there are conflicts in the evidence of what occurred at the hearing before Holmquist, we view the evidence in the light most favorable to the trial court's decision. We then apply a de novo review as to whether such facts support the trial court's conclusion of law that the hearing was unfair. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1442, 282 Cal. Rptr. 819; *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 387, 146 Cal.Rptr. 892.)

2. There Is the Record Demonstrated That Substantial Evidence Supported the TC's Conclusion that Boga Had Acted as Holmquist's Advisor During the Hearing

As noted above, we view any conflicts in the evidence in the light most favorable to the trial court's factual determinations. The only factual dispute here was whether, in fact, Boga actually advised and assisted Holmquist during the hearing. City points out that the administrative record does not show that Boga actually gave Holmquist any advice or assistance during the hearing. However, we take judicial notice of the fact (Evid.Code, § 452, subd. (g)) that communications between bench officers and their staff on matters of law and procedure are normally not reported. Thus, the absence of any reported communications is not conclusive evidence that such advice and assistance did not take place.

In contrast, at the beginning of the hearing, Holmquist announced on the record that he was inexperienced, and would be advised and assisted during the hearing by Boga. This announcement, in and of itself, was sufficient evidence to support the trial court's conclusion that Boga did, in fact, advise and assist Holmquist. In addition, Holmquist's otherwise detailed declaration in opposition to the petition entirely failed to respond to Petitioners' allegations that Boga had counseled and advised him during the hearing. This omission in the face of such allegations created an inference that, in fact, Boga actually *did* advise and assist Holmquist during the hearing. (Evid.Code, § 1221 [evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other *241 conduct manifested his adoption or his belief in its truth]; see also *Alicia R. v. Timothy M.* (1994) 29 Cal.App.4th 1232, 1239, 34 Cal.Rptr.2d 868 [party failed to respond to an assertion of any obviously relevant fact, for example, a representation of the party's annual income offered in connection with appropriate child support, is made, despite an opportunity and motive to do so].) "This rule of evidence rests on that universal principle of human conduct, which leads us to repel an unfounded imputation, or claim'[:] ... the weight to be given the evidence depending upon how provocative the situation is to speech and how significant is the silence. [Citations.]" (*Baldarachi v. Leach* (1919) 44 Cal.App. 603, 606-607, 186 P. 1060, citations omitted; see also

Nungaray v. Pleasant Vol. Lima Bean Growers & Warehouse Ass'n (1956) 142 Cal.App.2d 653, 666-667, 300 P.2d 285 and cases cited there [failure to deny the truth of a statement may constitute an admission by silence].)

While it is true that normally "the review of administrative proceedings ... is confined to the issues appearing in the record of that body as made out by the parties to the proceedings" (Green v. Board of Dental Examiners (1996) 47 Cal. App.4th 786, 792, 55 Cal.Rptr.2d 140; § 1094.5, subd. (a)), it is also true that "additional evidence, in a proper case, may be received." (Green v. Board of Dental Examiners, supra, 47 Cal.App.4th at p. 792, 55 Cal.Rptr.2d 140; § 1094.5, subd. (e).) As the United States Supreme Court in Citizens to Preserve Overton Park v. Volpe (1971) 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L.Ed.2d 136 (Overton), noted when it refused to limit review to the administrative record, "since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence ... the [trial] court may require the administrative officials who participated in the decision to give testimony explaining their action." While the particular factor favoring the admission of such extrinsic evidence in Overton was that the administrative officers failed to render any formal findings, so that the court concluded that "it may be that the only way there can be effective judicial review is by examining the decision-makers themselves," (*ibid.*) the rationale applies equally well to a situation such as the one here, in which the issue is what off-the-record, ex parte communications, if any, the administrative decision maker him- or herself engaged in with an interested party during the hearing. (See also City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, 777, 122 Cal.Rptr. 543, 537 P.2d 375 [citing Overton with approval].)

That this admission of such extrinsic evidence is permissible when the issue is whether the hearing was fair or not is manifested by section 1094.5, subdivision (e), which provides that the trial court may admit evidence that could not have been produced at the administrative hearing, and may itself take such evidence into consideration, rather than remanding the matter to the administrative tribunal, in cases in which it is authorized by law to exercise its independent judgment on the evidence. Where, as here, the issue is whether a fair administrative hearing was conducted, the independent judgment test does apply (City of Fairfield v. Superior Court, supra, 14 Cal.3d at p. 776, 122 Cal.Rptr. 543, 537 P.2d 375), and the court is empowered to render its independent judgment on the basis of the administrative record plus such additional evidence as may be admitted under section 1094.5, subdivision (e). (City of Fairfield v. Superior Court, supra, 14 Cal.3d at p. 776, 122 Cal.Rptr. 543, 537 P.2d 375; Toyota of Visalia, Inc. v. New Motor Vehicle Bd., *242 (1987) 188 Cal.App.3d 872, 881, 233 Cal. Rptr. 708.)

242

While it is error, in the absence of a proper preliminary foundation showing that one of the exceptions noted in section 1094.5, subdivision (e) applies, for a trial court to permit the administrative record to be augmented with extrinsic evidence (Toyota of Visalia, Inc. v. New Motor Vehicle Bd., supra, 188 Cal.App.3d at p. 881, 233 Cal.Rptr. 708), on the other hand, if one of the exceptions clearly applies, then it may be an abuse of discretion to refuse to admit relevant evidence. (Pomona Valley Hospital Medical Center v. Superior Court (1997) 55 Cal.App.4th 93, 101, 63 Cal.Rptr.2d 743; Armondo v. Department of Motor Vehicles (1993) 15 Cal. App.4th 1174, 1180, 19 Cal.Rptr.2d 399.) The test is whether there has been a manifest abuse of discretion. (Armondo v. Department of Motor Vehicles, supra, 15 Cal. App.4th at p. 1180, 19 Cal.Rptr.2d 399.)

Here, the issue was whether there had been procedural fairness during the hearing, specifically, whether Holmquist was biased and/or advised and assisted by Boga during the hearing. In such cases of administrative mandamus, the trial court may consider evidence not presented at the administrative hearing if the evidence addresses the petitioner's claim that he or she was denied due process or a fair hearing at that hearing. (See, e.g., Clark v. City of Hermosa Beach (1996) 48 Cal. App.4th 1152, 1170, fn. 17, 56 Cal.Rptr.2d 223; Tiholiz v. Northridge Hospital Foundation (1984) 151 Cal.App.3d 1197, 1204-1205, 199 Cal.Rptr. 338. See generally Western States Petroleum Assn. v. Superior Court (1995) 9 Cal.4th 559, 578-579, 38 Cal.Rptr.2d 139, 888 P.2d 1268.)

Holmquist's declaration was directly related to whether the hearing was fair. Furthermore, the trial court was required to exercise its independent judgment to decide such issue, and, under section 1094.5, subdivision (e), was empowered to admit relevant and admissible evidence on such issue. We therefore conclude that the trial court abused its discretion by refusing to admit Holmquist's declaration.

Accordingly, there is substantial evidence to support the trial court's conclusion that, in addition to taking an active and

significant part in the renewal application process, Boga also appeared and participated in the administrative review of the denial of that application by advising and assisting Holmquist, the hearing officer.

3. *The Hearing Violated Petitioners' Procedural Due Process Rights*

The protections of procedural due process apply to administrative proceedings (*Richardson v. Perales* (1971) 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842); the question is simply what process is due in a given circumstance. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; see *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 428-429, 102 S.Ct. 1148, 1153-1154, 71 L.Ed.2d 265.) Due process, however, *always* requires a relatively level playing field, the "constitutional floor" of a "fair trial in a fair tribunal," in other words, a fair hearing before a neutral or unbiased decision-maker. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97; *Withrow v. Larkin* (1975) 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (*Withrow*.)

a. *Due Process In Administrative Proceedings*

243 Just as in a judicial proceeding, due process in an administrative hearing also demands an *appearance* of fairness *243 and the absence of even a *probability* of outside influence on the adjudication. In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor of assuring that such hearings are fair. As one commentator recently noted, "[i]nescapably, administrative law and the administrative state impinge upon the public more and more often[.] When driver's licenses, house remodeling, vacations at the beach or the mountains, clean air and water, and cigarettes are all impacted by administrative regulations, the high likelihood is that ... [the] administrative law judge ... [is] going to be the person who is conducting that pivotal, first level of judicial review[.]" (Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes*, 20 J. Nat'l Ass'n Admin. L. Judges (2000) 95, 113, as quoted by Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, 11 Widener J. Pub.L. (2002) 7, 8, fn 3.)

While the thrust of such commentary appears to be related to state-wide administrative agencies, administrative hearings at the local level, for example, before municipal and county boards, commissions and hearing officers, also have the same potential of impacting significant rights and of being the first level of adjudicatory review. (See, e.g., Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Judicial Conduct for the Administrative Judiciary*, *supra*, 11 Widener J. Pub.L. at p. 10 and fn. 10, noting that during the 2001 Annual Meeting of the American Bar Association (ABA), the ABA's House of Delegates passed Resolution 101B. That resolution urged state and local governments to require that administrative judiciary members be accountable under provisions similar to the ABA Model Code of Judicial Conduct.)

b. *Impact of The Administrative Procedure Act*

Thus, although California's Administrative Procedure Act (APA) (Gov. Code, §§ 11340-11529) does not apply to hearings before local, as opposed to state, administrative agencies (see, e.g., *Tucker v. San Francisco Unified School Dist.* (1952) 111 Cal.App.2d 875, 883, 245 P.2d 597), to the extent citizens generally are entitled to due process in the form of a fair trial before a fair tribunal, the provisions of the APA are helpful as indicating what the Legislature believes are the elements of a fair and carefully thought out system of procedure for use in administrative hearings. (*Tucker v. San Francisco Unified School Dist.*, *supra*, 111 Cal.App.2d at p. 883, 245 P.2d 597.)

One of the basic tenets of the California APA, as well as the Model State Administrative Procedure Act, various state administrative procedure acts, and the federal Administrative Procedure Act is that, to promote both the appearance of fairness and the absence of even a probability of outside influence on administrative hearings, the *prosecutory* and, to a lesser extent, *investigatory*, aspects of administrative matters must be adequately separated from the *adjudicatory* function. (2 Am. Jur.2d Administrative Law, § 313, "Separation of Prosecutorial and Adjudicatory Functions.") While the

244 combination of *investigative* and adjudicative functions standing alone *generally* does not create a due process violation in the absence of some showing of bias (*id.*, and cases cited at fn. 59), the same cannot be *244 so readily said when prosecutory and adjudicative functions are too closely combined.

Thus, when, as here, "counsel [] performs as an *advocate* in a given case [he or she] is generally precluded from *advising a decision-making body* in the same case." (2 Am.Jur.2d Administrative Law, § 313, "Separation of Prosecutorial and Adjudicatory Functions," italics added, and cases cited at fn. 58.) This is because "[t]he due process rule of overlapping functions in administrative disciplinary proceedings applies to prevent the participant from being in the position of reviewing his or her own decision or adjudging a person whom he or she has either charged or investigated." (*Id.* at fn. 58, citing *Rhee v. El Camino Hospital Dist.* (1988) 201 Cal.App.3d 477, 499, 247 Cal.Rptr. 244.)

This concern over too close a connection between an advocate and the decisionmaker is reflected in various administrative procedure acts. Thus, the Model State Administrative Procedure Act and various state administrative procedure acts, including California's APA, provide for the separation of administrative functions by specifying that an employee engaged in prosecuting functions for an agency in a case may not, in the same or a factually related case, *participate or advise* in either the decision, or the agency *review's* of that decision, the only exception being that such employee may participate as a witness or counsel in public proceedings. (*Id.* and authorities cited at fn. 60; Model State Administrative Procedure Act, 1981 Act (U.L.A.) § 4-214; Gov. Code, §§ 11425.10, subd. (a)(4), 11425.30, subd. (a)(2).) [5] And the federal Administrative Procedure Act (5 U.S.C. §§ 551-559; §§ 701-706) provides that a hearing officer cannot be subject to the *supervision or direction* of an employee of the agency who is engaged in the performance of
245 investigative or prosecuting tasks. (5 U.S.C. § 554, subd. (d)(2); 2 Am.Jur.2d *245 Administrative Law, *supra*, § 313 and text at fn. 62.)

c. *Howitt v. Superior Court*

California courts, too, recognize that the combination of prosecutorial and adjudicative functions is the most problematic combination for procedural due process purposes. (See, e.g., *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585, 5 Cal.Rptr.2d 196 (*Howitt*).) As the court in *Howitt*, noted, a prosecutor, by definition, is a partisan advocate for a particular position or point of view. (*Ibid*) Such a role is inconsistent with the objectivity expected of administrative decision-makers. (*Ibid*) Accordingly, 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 (*ibid.*), particularly when the prosecutor serves as the decision-maker's advisor in the same or a related proceeding. Then, "[t]o allow an advocate for one party to also act as counsel to the decision-maker creates the substantial risk that the advice given to the decision-maker, 'perhaps unconsciously' as we recognized in *Civil Service Commission v. Superior Court* [(1984)] 163 Cal.App.3d [70,] 78, fn. 1 [209 Cal.Rptr. 159], will be skewed." (*Ibid*) Thus, an agency's staff counsel may prosecute a case before the agency when an independent hearing officer presides over the contested case hearing, if the prosecutor plays no role in the agency's deliberations. (*Id.* at p. 1586, 5 Cal. Rptr.2d 196.) So, too, two lawyers from the same office could serve in dual capacities—one as prosecutor and one as legal advisor to the administrative agency—as long as they were effectively screened from each other. (*Ibid.*) However, it is improper for the same attorney who prosecutes the case to also serve as an advisor to the decision maker. (*Ibid.*)

The *Howitt* court did recognize that administrative procedures may depart, to some extent, "from the pure adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates," and yet still comply with constitutionally mandated due process when used as the means for resolving disputes in "[t]he incredible variety of administrative mechanisms [utilized] in this country..." (*Howitt, supra*, 3 Cal.App.4th at p. 1581, 5 Cal. Rptr.2d 196, quoting *Withrow, supra*, 421 U.S. at p. 52, 95 S.Ct. at p. 1467.) As it noted, "[t]he mere fact that the decisionmaker or its staff is a more active participant in the factfinding process—similar to the judge in European civil law systems— will not render an administrative procedure unconstitutional." (*Ibid.*)

However, a problem arises once an administrative agency "chooses to utilize the adversary model in large part but modifies it in a way which raises questions about the fairness of the resulting procedure." (*Ibid.*) Thus, when both the

agency and the citizen are represented by counsel at a formal hearing before a supposedly neutral decision-maker who has not participated in the initial fact-finding process of the agency's investigation and prosecution of a matter, and then, "in the midst of this seemingly adversary system," the same lawyer who represented the agency as advocate also advises the hearing officer with regard to its decision affecting that agency, "[t]he mental image comes to mind of a hearing in which [the agency's lawyer, while representing the agency,] raises an objection and then excuses himself from counsel table to consult with the [hearing officer] as to whether the objection should be sustained." (*Id.* at p. 1582, 246 5 Cal. Rptr.2d 196.) What makes this scenario *246 objectionable is that the "advocacy and decision-making roles are combined." (*Id.* at p. 1585, 5 Cal.Rptr.2d 196.)

Here, this same objectionable overlapping of the role of advocate and decision-maker occurred when Boga acted as both an advocate of City's position and as advisor to the supposedly neutral decisionmaker. It is true that the official role of City's advocate during the review of City's decision to deny the application was filled by Litvak, not Boga. However, Boga had been City's advocate in connection with the decision to deny the application. Thus, Boga's presence as Holmquist's advisor was the equivalent of trial counsel acting as an appellate court's advisor during the appellate court's review of the propriety of a lower court's judgment in favor of that counsel's client. It requires no citation of authority exactly on all fours with this fact pattern in order to justify the conclusion that Boga's role as advisor to the decisionmaker violated petitioners' right to due process. There was a clear *appearance* of unfairness and bias. This was sufficient to support the trial court's ruling.

d. Authorities Cited By City Are Distinguishable

The cases cited by City for the proposition that Boga's dual roles comported with due process are distinguishable, because they do not involve this same objectionable overlapping of *advocacy* and decisionmaking roles. In those cases, 12319 Corporation v. Business License Com. (1982) 137 Cal.App.3d 54, 186 Cal.Rptr. 726, BreakZone Billiards v. City of Torrance (2000) 81 Cal.App.4th 1205, 97 Cal.Rptr.2d 467, and Kloepfer v. Commission on Judicial Performance (1989) 49 Cal.3d 826, 264 Cal.Rptr. 100, 782 P.2d 239, the same attorney did not act as both a partisan advocate and as an advisor to the neutral decision-maker.

In 12319 Corporation v. Business License Com., *supra*, 137 Cal.App.3d 54, 186 Cal.Rptr. 726, Los Angeles County required businesses to obtain a permit as a condition to offering entertainment of any sort. The plaintiff operated a nightclub, and under the ordinance, was required to obtain a permit from the business license commission. After numerous citizen complaints, the County Sheriff filed an accusation against plaintiff with the commission, and sought revocation of its business license. The Sheriff's department was represented in legal matters by the Office of the County Counsel.

The revocation hearing was held before the business license commission, which was advised as to legal matters by Deputy County Counsel Tolnai. Tolnai did not act as an advocate for plaintiff or the Sheriff. However, he did assist the commission at one point by making sure that there was an adequate foundation for admission of a piece of documentary evidence that supported revocation. Plaintiff's license was revoked, so plaintiff appealed the revocation to County's license appeals board, one member of which appeals board was required to have been designated by the Office of the County Counsel. The appeals board affirmed the revocation, and plaintiff filed a petition for a writ of administrative mandamus, contending, among other things, that the facts made out a prima facie case of bias and conflict of interest against the Office of the County Counsel.

After losing at the trial court, plaintiff appealed that decision, and the appellate court affirmed, concluding that plaintiff had failed to offer any facts supporting its assertion of bias and prejudice or its suggestion that the various functions performed by the County Counsel's Office were not properly insulated from one another. (12319 Corporation v. Business License *247 *Com.*, *supra*, 137 Cal.App.3d at p. 61, 186 Cal.Rptr. 726.) Tolnai had represented the commission in a neutral role as its legal advisor while the commission considered evidence from plaintiff as well as from the Sheriff. Then, after the commission determined to revoke plaintiff's license, Tolnai appeared before the appeals board to seek to uphold the *commission's* decision—something he would have done regardless of whether that

decision was for or against the plaintiff. (*Id.* at pp. 61-62, 186 Cal.Rptr. 726.) The appellate court held that fact that Tolnai assisted with the examination of a witness did not effect a forfeiture of the neutral position he held as counsel to the commission, because the total extent of such assistance consisted of inquiring whether the witness was familiar with the author's signature and, if so, whether the witness would recognize that signature. (*Id.* at p. 64, 186 Cal.Rptr. 726.) The appellate court held that this assistance was not inconsistent with the role of a neutral advisor taking action to ensure that the evidence was properly before the commission, and did not amount to adoption of the prosecutorial role. (*Ibid.*)

The fact that different members of the county counsel's office each had a role in representing the prosecution before the commission, another role as legal advisor to the commission, or a third role as designator of a member of the board did not, in the absence of any facts to support the nightclub's assertion of bias or prejudice or lack of insulation of the various functions performed by the county counsel's office, constitute a prima facie case of bias or conflict of interest on the part of that office. Moreover, the appearance of a deputy county counsel before the board as an advocate against the nightclub after representing the commission in a neutral role did not establish a conflict of interest, in view of the fact that Tolnai's duty was to render neutral legal assistance to the commission and then to seek to uphold its decision before the board, regardless of whether that decision was for or against the nightclub.

Here, the roles of advocate for the agency and advisor to the decision-maker were not insulated by being performed by different attorneys from a large office. Boga acted as both advocate for the initial denial of the renewal application, and then as advisor to the decision-maker on the appeal of the decision for which he had advocated.

In *BreakZone Billiards v. City of Torrance, supra*, 81 Cal.App.4th 1205, 97 Cal. Rptr.2d 467, the plaintiff sought a conditional use permit (CUP) to change the nature of its business from a youth-oriented billiard parlor to a much larger, adult-oriented facility that would sell alcoholic beverages. (*Id.* at pp. 1219-1220, 1248, 97 Cal.Rptr.2d 467.) The city's planning commission approved the CUP, but one member of the city council appealed the commission's decision to the entire council as a whole, which considered the application de novo, and denied it. The plaintiff filed a petition for a writ of administrative mandamus, contending, among other things, that campaign contributions to the council members from his lessor (who had an interest in disapproval of his permit application) triggered a Government Code section 1090 violation. The trial court denied the petition (*id.* at p. 1220, 97 Cal.Rptr.2d 467), and plaintiff appealed. On appeal, among its other contentions, plaintiff urged that the city attorney had improperly advocated on behalf of the city council member who had filed the appeal from the planning commission's grant of the CUP.

248 The reviewing court affirmed the trial court's decision to deny the petition. As to plaintiff's claim that the city attorney had *248 acted improperly advocated on behalf of the appeal and against the application for a CUP, thus adding to an appearance of bias and unfairness, the appellate court held that the record showed that the city attorney did not advocate any particular position, but merely acted as attorney for the counsel as a whole, making sure that evidence in support of the application, as well as against it, was presented. (*BreakZone Billiards v. City of Torrance, supra*, 81 Cal.App.4th at pp. 1241-1242, 97 Cal. Rptr.2d 467.) In contrast, the record before us *does* show that Boga did not merely act as a neutral presenter of both sides of a question, because it shows that, in connection with the initial denial of the renewal application, he took the position that Petitioners' application was incomplete.

In *Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d 826, 833, 264 Cal.Rptr. 100, 782 P.2d 239, the California Supreme Court held that the Commission's combination of *investigative* and adjudicatory functions did not constitute a denial of due process. The Commission's *staff* conducted the initial investigation, but once formal proceedings were instituted, the prosecutorial function shifted to examiners from the Office of the Attorney General. Members of the Commission then considered the evidence presented by both sides before making a decision.

Thus, in *Kloepfer*, there was no allegation or evidence that there had been *any* combination of the functions of *advocacy* and adjudication in the same agency, let alone in the same attorney. Furthermore, additional insulation between the Commission's investigatory and adjudicatory roles is provided by the mandated procedure whereby the Commission is never the final decision-maker, even if the judge fails to take any steps to appeal the Commission's decision. Under this procedure, not only does the Commission hear the recommendation of special masters appointed by the

California Supreme Court before it makes its own decision, but then the commission itself simply *recommends* appropriate discipline to the Supreme Court. It is the California Supreme Court which is the final decision-maker; it is required to independently review the evidence and assess its weight and relevance before pronouncing the final decision. As the court in *Kloepfer* pointed out, such a procedure avoids an unacceptable risk of bias either on the part of the Commission, or on the part of the court as ultimate decision-maker. (*Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at pp. 834-835, 264 Cal.Rptr. 100, 782 P.2d 239.)

Here, in contrast, there was a confounding of the functions of *advocacy* and adjudication—a situation always fraught with more problems than when there is some combination of *investigatory* and adjudicatory functions. Furthermore, these dual functions were not held by different sections of a single office, but by a *single individual*. And, unlike the situation in *Kloepfer*, there was no procedure here that automatically prevented the hearing officer's decision from being the final decision, absent some action (and expense) on the part of the Petitioners.

CONCLUSION

The hearing here, at which Boga, City's advocate for the initial denial of the renewal application, acted as legal advisor to the hearing officer reviewing that denial, violated Petitioners' rights to due process. Accordingly the trial court did not err by ordering that City grant petitioners a new hearing.

249 However, to adequately protect Petitioners' due process rights, the trial court's order for a new trial should be modified to direct that the new hearing must be conducted *249 by someone other than Holmquist, given that his role as a neutral arbitrator has been compromised in a manner which, practically speaking, cannot be undone. In addition, the order should also provide that the new hearing must be conducted in a manner consistent with the views expressed in this opinion—for example, the hearing officer should not be, nor be advised by, anyone who has served as City's advocate in this or any related case (e.g., *Nightlife Partners, Ltd., et al. v. City of Beverly Hills*, U.S. District Court Case No. CV 98-10266 RAP).

DISPOSITION

The order appealed from is modified as follows. At the end of the second full paragraph on page two of the order, the following language shall be inserted:

Such new hearing shall not be conducted by David R. Holmquist, nor by any person who has served as City's advocate in this or any related case (e.g., *Nightlife Partners, Ltd., et al. v. City of Beverly Hills*, U.S. District Court Case No. CV 98-10266 RAP). Moreover, the hearing officer shall not be advised by any person who has served as City's advocate in this or any related case (e.g., *Nightlife Partners, Ltd., et al. v. City of Beverly Hills*, U.S. District Court Case No. CV 98-10266 RAP).

As so modified, the order is affirmed. Petitioners are awarded their costs on appeal.

We concur: KLEIN, P.J., and ALDRICH, J.

[1] We recite those facts, taken from the Joint Appendix (which includes the administrative record) that support the trial court's factual determinations. (See Discussion, Section 1, *post*.) Because the issue on appeal primarily involves those facts related to the conduct of the administrative hearing, rather than to the circumstances leading up to that hearing, we do not detail the problems Petitioners allegedly suffered at the hands of local officials while attempting to renew their business permit, but simply summarize those claims.

[2] Boga is an attorney with Richards, Watson & Gershon (RWG). City's answer to Petitioner's federal complaint, dated March 8, 2001, listed Boga, Mitchell E. Abbott and Patrick K. Bobko as the RWG attorneys representing City.

[3] The trial court did not admit this declaration, concluding that matters not before the administrative hearing officer were not admissible in a proceeding to review such administrative hearing pursuant to Code of Civil Procedure section 1094.5. However, the ultimate issue before the trial court here was not whether the administrative record supported the administrative decision, but whether

the hearing was held before a neutral, unbiased and impartial hearing officer, that is, whether the hearing was fair.

As to such issue, Holmquist's declaration was relevant and admissible, under Code of Civil Procedure section 1094.5, subdivision (e), for the reasons discussed in Discussion section 2, *post*. We therefore treat the declaration as admissible evidence in connection with the appeal of the trial court's decision that the procedure used violated Petitioners' right to due process.

[4] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[5] California's APA is found at Government Code sections 11340 through 11529. Section 11425.10, subdivision (a)(4) specifically provides that the adjudicative function shall be separated from the investigative, prosecutorial and advocacy functions within the agency as provided in Government Code, section 11425.30. Section 11425.30, subdivision (a)(2) also prohibits an adjudicatory hearing officer from being "subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.

Notably, given the facts here, Government Code section 11430.10, subdivision (a) also provides that while a proceeding is pending, there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party, without notice and opportunity for all parties to participate in the communication. A communication from an employee or representative of an agency that is a party is not prohibited *if* it is made on the record at the hearing. (Gov.Code, § 11430.10, subd. (b).)

Here, not only was Holmquist subject to the direction of Boga, a person who had served as City's advocate in the proceeding's preadjudicative stage, and thus not a suitable hearing officer, at least under the California APA, but the communications between Boga and Holmquist were not reported on the record, and thus would also have been prohibited under the APA.

This is not to say that the APA applies to local boards or municipalities. In fact, the APA does not apply to such entities (*Stewart v. San Mateo County* (1966) 246 Cal.App.2d 273, 289, 54 Cal.Rptr. 599.) However, when local boards act as judicial bodies of limited jurisdiction, even though they are not bound by technical rules of judicial procedure, they must afford the parties appearing before them a reasonably fair hearing. (*Corcoran v. S.F. etc. Retirement System* (1952) 114 Cal.App.2d 738, 745, 251 P.2d 59; *Rogers v. Retirement Bd. of San Francisco City Emp. Retirement Board* (1952) 109 Cal.App.2d 751, 758, 241 P.2d 611.)

Save trees - read court opinions online on Google Scholar.