

Memorandum 96-78

Ethical Standards for Administrative Law Judges: Political Activities

BACKGROUND

The Commission has approved its recommendation to the Legislature on ethical standards for administrative law judges, reserving for further consideration the question of political activities by administrative law judges. Further consideration is being given at the request of administrative law judges of the California Unemployment Insurance Appeals Board. A copy of their letter is attached as Exhibit pp. 1-2.

The Commission's recommendation basically adopts the judicial branch code of ethics for administrative law judges. The judicial branch code of ethics provides:

CANON 5

A Judge Or Judicial Candidate Shall Refrain From Inappropriate Political Activity

Judges are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens. They shall, however, avoid political activity which may create the appearance of political bias or impropriety. Judicial independence and impartiality should dictate the conduct of judges and candidates for judicial office.

A. Political Organizations. Judges and candidates for judicial office shall not:

- (1) Act as leaders or hold any office in a political organization;
- (2) Make speeches for a political organization or candidate for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office;
- (3) Personally solicit funds for a political organization or nonjudicial candidate; make contributions to a political party or political organization or to a nonjudicial candidate in excess of five hundred dollars in any calendar year per political party or political organization or candidate, or in excess of an aggregate of one

thousand dollars in any calendar year for all political parties or political organizations or nonjudicial candidates.

B. Conduct During Judicial Campaigns. A candidate for election or appointment to judicial office shall not (1) make statements to the electorate or the appointing authority that commit or appear to commit the candidate with respect to cases, controversies, or issues that could come before the courts, or (2) knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent.

C. Speaking at Political Gatherings. Candidates for judicial office may speak to political gatherings only on their own behalf or on behalf of another candidate for judicial office.

D. Measures to Improve the Law. Except as otherwise permitted in this Code, judges shall not engage in any political activity, other than in relation to measures concerning the improvement of the law, the legal system, or the administration of justice.

Canons 5B and 5C, relating to candidates for judicial office are not relevant to administrative law judges, since the position of administrative law judge is not an elective office; the Commission's recommendation excepts those two canons from application to administrative law judges. The Commission's recommendation also recognizes the right of administrative law judges to engage in political activities relating to their own personal and economic interests (as judicial branch judges do), and to engage in public employee collective bargaining activities.

SUMMARY OF CUIAB ALJs' LETTER

The letter from five administrative law judges of the California Unemployment Insurance Appeals Board expresses concern that the political activities ban "unnecessarily restricts the first amendment rights" of administrative law judges and "harms the body politic" by limiting their involvement. They make the following points:

(1) The ban is unnecessary and overbroad. Unlike judicial branch judges, ALJs do not hear issues involving elections. Nor do they have authority to declare a statute unconstitutional or invalidate an election.

(2) The ban hurts the community by costing it the active participation of some of its most interested and informed members.

(3) The ban requires ALJs to give up their fundamental civil liberty to voice an opinion regarding political issues as a member of a neighborhood, religious, or ethnic group.

“In short, Canon 5 is too broad and too restrictive to apply to administrative law judges. Any such restriction should be narrowly drawn taking into account the different roles administrative law judges play and the narrow range of issues decided. Otherwise, in an effort to assure the appearance of propriety, the community’s right to the participation of some of its most caring members is denied.”

STAFF ASSESSMENT

The staff believes it is important first to understand just what Canon 5 does and does not do. The ALJs’ letter, for example, asserts that because Canon 5 precludes leadership in a political organization, it would by implication preclude election to non-partisan community councils and boards, such as a school board. The staff believes this analysis is incorrect. Canon 5 does not deal directly with election to public office because that is irrelevant to judicial branch judges; they are constitutionally prohibited from holding public office. Cal. Const. Art. VI, § 17. The constitutional prohibition does not affect administrative law judges. The staff would add language to the Comment to make this clear:

Nothing in this section is intended to preclude an administrative law judge from election or appointment to a public office, such as a non-partisan community council or board, so long as it does not create the appearance of political bias or impropriety within the meaning of Canon 5. Contrast Cal. Const. Art. VI, § 17 (judicial branch judge ineligible for public office).

Second, the staff thinks it is important to understand the rationale behind the general ban on political activity by judges. It is not just that an issue related to the political activity may come before the judge. More significantly, a judge is clothed with the public perception of objectivity and impartiality, so that (1) the judge’s taking sides in a political debate may unfairly influence voters, (2) the judge’s political partisanship may compromise public confidence in the integrity and evenhandedness of the bench, and (3) active political partisanship may create the impression that the judge is acting not independently but pursuant to a political agenda or platform.

The staff tends to agree with the CUIAB ALJs that these concerns are far less significant for administrative law judges than for judicial branch judges. The CUIAB ALJs suggest an intermediate position for administrative law judges that the staff believes is worth looking at — allow administrative law judges to engage in political activities, subject to key limitations:

- An ALJ may not participate in a political activity if a related issue may come before the ALJ.
- An ALJ who participates in a political activity that creates the appearance of bias to a party in a case must be reassigned.
- An ALJ may not identify himself or herself as an ALJ in connection with participation in any political activity.

A draft along these lines might look something like this:

The introductory portion of Canon 5 of the Code of Judicial Ethics applies to an administrative law judge or other presiding officer, but Canons 5A-5D do not. An administrative law judge or other presiding officer shall not do either of the following, which together with the limitations in the introductory portion of Canon 5, are grounds for disqualification as well as cause for discipline:

- (1) Identify himself or herself as an administrative law judge or other presiding officer in connection with political activity.
- (2) Participate in political activity related to an issue that may come before the administrative law judge or other presiding officer.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Law Revision Commission
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File: _____

October 1, 1996

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California Law Revision Commission
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We are administrative law judges at the California Unemployment Insurance Appeals Board. We are writing to voice our objection to the proposal to apply Canon 5 to administrative law judges. We believe that such application unnecessarily restricts the first amendment rights of administrative law judges and harms the body politic by limiting administrative law judges' involvement.

Unlike constitutional judges, issues involving elections are not likely to come before an administrative law judge. An ALJ does not have the authority to declare a statute unconstitutional or an election invalid. ALJs in most agencies decide a narrow range of issues. There is no need for the broad restrictions in Canon 5.

If there is a need to limit the political activities of ALJs, beyond Hatch Act limitations, surely it can be done more narrowly. For instance, it might be appropriate to restrict an ALJ from participating in political activities if the issues involved are likely to come before the ALJ. An ALJ from the Public Utilities Commission would be barred from participating in an initiative campaign which affects the regulation of utilities. If an ALJ would be likely to deal with a broader range of issues, then perhaps the restrictions should be broader, but for most ALJs that is not the case.

Broad restrictions impinge not only on the rights of the ALJ, but are extremely detrimental to the community. They cost the community the active participation of some of its most interested and informed members. ALJs in our agency are members of school boards. After reading the definitions, we assume that leadership of organizations aimed at electing even non-partisan candidates would be barred. By implication election to community councils and boards would also be barred.

We are all members of various interest, ethnic and religious groups, and may feel it necessary as members of these groups to voice our opinions regarding political issues by making speeches on behalf of a political organization. In such situations, we are acting as members of a neighborhood or religious or ethnic group. No mention need be made of our role as ALJs.

In the unlikely event that a party did believe an ALJ deciding an unemployment insurance dispute, for example, was biased due to the ALJ's personal political activity, the case can and would be reassigned. Reassignment is a simple and less restrictive safety valve which should allow administrative law judges to continue to exercise their first amendment rights and avoid any appearance of bias.

We would like the comment period to be extended to allow more comment from ALJs who were unaware of the proposed changes regarding Canon 5.

In short, Canon 5 is too restrictive to apply to administrative law judges. Any restrictions should be narrowly drawn taking into account the different roles administrative law judges play and the narrow range of issues decided. Otherwise, in an effort, to assure the appearance of propriety, both ALJs first amendment rights and the community's right to the participation some of its most caring members will be denied.

Sincerely,

Lita Krowech and the ALJs listed below

Lita Krowech, Carmen Flores, Robert Mason, Ron Kammann, Robert Marder
Administrative Law Judges
California Unemployment Insurance Appeals Board
San Francisco Office of Appeals