

CALIFORNIA SUPREME COURT CLARIFIES STANDARDS FOR CHALLENGING HEARING OFFICERS ON GROUNDS OF BIAS

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On May 6, the California Supreme Court issued a long-awaited decision clarifying the standards for asserting bias on the part of administrative hearing officers.

Haas v. County of San Bernardino, 27 Cal.4th 1017, concerned an effort by San Bernardino County to revoke Theodore L. Haas' license to operate a massage clinic because an employee of the clinic had solicited an act of prostitution. The county hired and paid an attorney in private practice to preside over the hearing. Haas moved for the hearing officer's recusal, arguing the officer had an apparent conflict of interest because the desire for similar future assignments might incline her to rule in favor of the county. The hearing officer denied Haas' motion and ultimately recommended a decision in the county's favor, which the County Board of Supervisors adopted.

The Superior Court reversed the board's determination without prejudice. In a decision originally reported at 69 Cal.App.4th 1019, Division 2 of the Fourth District Court of Appeal affirmed, ruling that the selection of the hearing officer had violated Haas' due process rights.

The Court of Appeal rejected the argument that the hearing officer had an improper pecuniary interest in the outcome of the hearing, finding her interest in future employment too "remote, contingent and slight" to have required her recusal. It noted there was little likelihood the county would employ her again, her compensation did not depend on the decision she made, and there was no evidence of actual bias. Further, the County Code authorized the procedure employed for selecting her.

However, because "public perceptions of justice are not furthered when a judge who is reasonably thought to be biased in a matter hears the case," the Court of Appeal ruled that "there are some situations in which the probability or likelihood of the existence of actual bias is so great that disqualification of a judicial officer is required to preserve the integrity of the legal system, even without proof that the judicial officer is actually biased towards a party." Since there were only minimal restrictions upon the selection of the hearing officer, the county's attorney had hired and arranged to pay her, and that same attorney was appearing before her as an advocate, the court concluded "the totality of the particular circumstances" of the case raised an impermissible possibility of bias.

The Supreme Court affirmed, but on different grounds. While recognizing the constitutional requirement that all administrative decisionmakers be "impartial," the court distinguished claims of bias based upon such factors as "matters of kinship, personal bias, state policy, [and] remoteness of interest," from those grounded in the hearing officer's "pecuniary interest."

The court emphasized that "Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny." In cases of financial interest, the issue is not whether the hearing officer actually was biased, but rather "whether sitting on the case would offer a possible temptation to the average judge to lead him not to hold the balance nice, clear and true."

The court cited as "paradigmatic examples of adjudicators with pecuniary interests in the outcome . . . (1) adjudicators serving, in effect, as judges of their own cases, and (2) judges whose compensation depends on the result of adjudication." Contrary to the analysis of the Court of Appeal, the Supreme Court concluded that Haas' situation was an example of the second type of case, recognizing in these facts the possible "tendency on the adjudicator's part to give steady customers the benefit of the doubt more often than not." In so ruling, the court emphasized that "We have no reason to believe that anyone involved in this proceeding acted unethically."

The risk of bias was not eliminated by the hearing officer's suggestion that Haas pay half her fee, because the county might retain her in future hearings, while Haas would not. Likewise, the court rejected the argument that there could be no prejudice when a hearing officer only makes a recommended decision which would be independently reviewed by higher officials. The court ruled that a party appearing before an administrative agency is "entitled to a neutral and detached judge in the first instance."

The court emphasized that the county has alternative means of conducting its hearings. The Government Code authorizes it to establish an office of County Hearing Officer or to contract with the state Office of Administrative Hearings for the services of an administrative law judge. Alternatively, the county may continue to retain temporary hearing officers, albeit "in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county."

A similar standard based upon the mere possibility of bias prevails in judicial proceedings when a party seeks a judge's recusal for reasons other than financial ones. Code of Civil Procedure § 170.1(a)(6)(C), provides that a judge shall be disqualified when "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

However, in administrative cases, claims of bias based upon non-pecuniary concerns involves a different standard. The *Haas* court explained that "due process allows more flexibility in administrative process than judicial process, even in the matter of selecting hearing officers." For such cases, the court followed *Andrews v. Agricultural Labor Relations Board*, 28 Cal.3d 781 (1981), in holding that the party challenging the hearing officer's impartiality must demonstrate "actual bias sufficient to render a fair hearing improbable."

Andrews involved a dispute between an agricultural employer and its employees. The agency had appointed an attorney belonging to a public interest law firm that had represented farm workers to act as a temporary hearing officer in the case. The employer objected, but the

Supreme Court declined to exchange the "established principle" requiring "concrete facts that demonstrate the challenged judicial officer is contaminated with bias or prejudice" for a new rule "as vague, unmanageable and laden with potential mischief as an 'appearance of bias' standard." In particular, the *Andrews* court held that "the political or legal views" of a hearing officer, in themselves, are not grounds for disqualification.

The *Haas* decision clarified the rules regarding claims of bias, but their application at times will remain uncertain. Not all pecuniary concerns on the part of adjudicators offend the Due Process Clause. The court noted that there might not be a constitutional violation when the "financial interests . . . [are] far more indirect, impersonal, and insubstantial than cash paid in hand to the adjudicator with the prospect of more." However, the examples cited by the court do not establish a bright-line test for determining when a financial "temptation" would be too great for "the average judge."

For example, the *Haas* court explained that its ruling was consistent with both *Gai v. City of Selma*, 68 Cal.App.4th 213 (1998) and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Gai*, the Court of Appeal dismissed as "remote, indirect and uncertain" a claim of pecuniary bias on the part of a board member who regularly did business with the city. By contrast, in *Liljeberg*, the U.S. Supreme Court vacated a decision by a judge who had been unaware that a university on whose board he sat had a financial interest in the case.

One might think the actual "temptation" in *Gai* exceeded the unknown one in *Liljeberg*, but the results of the two cases imply the contrary. Despite some continuing degree of uncertainty, *Haas* does provide substantial guidance to litigants and agencies when hearing officers may have an interest in the outcome of a case.