ADMINISTRATIVE LAW PRACTICE AND PROCEDURE: MISCELLANEOUS ETHICS CONSIDERATIONS FOR ATTORNEYS ACTING AS HEARING OFFICERS

By: Peter L. Ostermiller
Attorney at Law
239 S. Fifth Street, Suite 500
Louisville, KY 40202

and

Scott D. Majors
Assistant Attorney General
Commonwealth of Kentucky
Office of the Attorney General
Division of Administrative Hearings

INTRODUCTION

Almost 30 years ago, former Chief Justice Palmore made the following statement in Cantrell v. Kentucky Unemployment Insurance Commission, Ky, 450 S.W.2d 235, 237 (1970):

> "When all else is said and done, common sense must not be a stranger in the house of the law."

This basic concept is worth repeating, and worth repeating often, in determining the propriety of actions taken by adjudicatory bodies, either Courts of the Court of Justice, or administrative Boards, Agencies and Commissions exercising adjudicatory functions.

The following is a brief review of several issues which relate to the ethics duties and responsibilities of an attorney serving as a hearing officer in administrative proceedings.

TOPICS

Non-Lawyers Representing Persons During Administrative Process.

Turner v. Kentucky Bar Association.

Ethics Responsibility of Attorney/ Hearing Officer When Confronted With a UPL Situation.

Hearing Officer as Attorney, and Procedural Due Process.

Disqualification of Hearing Officer.

Hearing Officer Discussing Pending Case with Another Hearing Officer.

Finding of Fact and Conclusions of Law Preparation.

DISCUSSION

NON-LAWYERS REPRESENTING PERSONS DURING ADMINISTRATIVE PROCESS

Through a long line of Unauthorized Practice of Law, ("UPL"), decisions from the Kentucky Bar Association, the prohibition against lay person representation of clients in courts and administrative proceedings has been repeatedly affirmed. See, e.g., U-3 (1962), U-15 (1956), U-15 (1976), and U-35 (1981).

In KBA E-266, (although not a UPL decision), the KBA held that an attorney may not send a non-lawyer to court to appear on behalf of the client. The question which was posed in that Ethics Opinion was, "Whether a lawyer may use paralegal in the courtroom." The KBA held that the answer to that question was "no." The Opinion noted that many of the actions of an attorney in court do not require any legal skill, such as matters that are routinely placed on the Motion Day or Motion Docket of the Court. However, the KBA reaffirmed the bright line rule that only lawyers

may appear in court on behalf of a client, and that a paralegal, even if there is a supervising attorney, may not appear in court.

In December of last year, the Kentucky Supreme Court again addressed the issue of the use of non-lawyers in the administrative hearing process. Turner v. Kentucky Bar Association, Ky, 980 S.W.2d 560 (1998), contains an excellent review of the Supreme Court's concerns regarding this topic. Moreover, the case contains general language of broad applicability in the administrative process. A copy of Turner is attached hereto.

TURNER V. KENTUCKY BAR ASSOCIATION, KY., 980 S.W.2D 560 (1998)

On December 17, 1998, the Kentucky Supreme Court addressed the issue of non-lawyer participation in state administrative proceedings. Although the case concerned the propriety of using "Workers' Compensation Specialists" in Workers' Compensation proceedings, the Kentucky Supreme Court also addressed the broader issue of the proper function and role of non-lawyers in state administrative proceedings.

Facts

The case-specific facts in Turner concerned the 1996 Amendment to Kentucky Workers' Compensation statute. In particular, the General Assembly in December of 1996 amended KRS 342.329 to increase the then-existing public services of the Department of Workers' Claims, and to create a new job class of "Workers' Compensation Specialists." The particular statute provided that such a "Specialist" had certain duties, including advising all parties of their rights and obligations under the Workers' Compensation Statute, and in assisting workers in obtaining medical

reports, job descriptions, and other material pertinent to a claim for benefits, and in preparing the documents necessary for the applicant to file a claim. KRS 342.329.

KBA U-52

The Kentucky Bar Association issued a formal Advisory Opinion, KBA U-52. In that Opinion, the KBA Board of Governors held:

1. Non-lawyers may not represent persons before the Department of Workers' Claims.

2. Non-lawyers may not serve as "Workers' Compensation Specialists" for the Department of Workers' Claims.

3. Duties assigned to non-attorney "Workers' Compensation Specialists" would be duties normally performed by an attorney and would therefore constitute the unauthorized practice of law.

Supreme Court Review of U-52

The Commissioner for the Department of Workers' Claims and the affected "Workers' Compensation Specialists" sought review before the Kentucky Supreme Court of the Board's KBA U-52. Reduced to its basics, the Kentucky Supreme Court held as follows:

1. The General Assembly's attempt to exempt "Workers' Compensation Specialists" from criminal sanction for unauthorized practice of law is an unconstitutional violation of Separation of Powers Doctrine.

2. "Workers' Compensation Specialists" under direct supervision of an attorney may perform procedural and administrative tasks provided for in KRS 342.329.

3. Legal representation by a lay person before an adjudicatory tribunal, however informal, involves advocacy and would constitute the practice of law.

Separation of Powers Issue

The Supreme Court reviewed what it referred to as "longstanding decisional law" setting out the exclusive authority of the Supreme Court to regulate the practice of law in Kentucky. The purpose of the Court's review was to reaffirm that the General Assembly violates the separate of powers doctrine in violation of Sections 28 and 116 of the Kentucky Constitution when the General Assembly seeks to enact a statute to exempt certain conduct from the practice of law. As the Supreme Court plainly held:

> "The legislature has no power to make rules relating to the practice of law or create exceptions to the settled rules of this Court."

"Workers' Compensation Specialists" Equated to Paralegals

The Kentucky Supreme Court in Turner reversed, in part, KBA U-52 to the extent that the Supreme Court held that such a "Specialist" could properly perform paralegal functions.

The Court reviewed SCR 3.700, which generally provides that a paralegal may work under the "supervision and direction" of an attorney. The Court, in holding that the administrative functions of the "Workers' Compensation Specialists" did not involve the unauthorized practice of law, noted that the pre-hearing activity of the "Specialists" was supervised by an attorney. The Court noted that most of the functions of the "Specialists" are "procedural and administrative in nature," did not require any interpretation or analysis of law, and were the types of duties which a paralegal may properly perform. In short, the Court held that a non-lawyer may serve as a "Workers' Compensation Specialist," and perform certain pre-hearing administrative duties under the direct supervision of an attorney. As the Court stated, such "Workers' Compensation Specialists," who are not attorneys, may "process claims, as long as their work is supervised by licensed attorney."

No Non-Lawyer Representation At Administrative Hearings

The Supreme Court in Turner affirmed the portion of KBA U-52 which held that non-lawyer "Workers' Compensation Specialists" could not represent parties in administrative proceedings before the Department of Workers' Claims.

The Supreme Court broadly set out the prohibition against the use of non-lawyers in administrative hearings. As the Court held:

> "Legal representation by a lay person before an adjudicatory tribunal, however informal, is not permitted by SCR 3.700 (Paralegal Rule), as such representation involves advocacy that would constitute the practice of law."

As the Court further held:

> "Yet, when representation before a tribunal is required, this Court has a duty to ensure that representation is from an individual with a Court-mandated duty of loyalty to the client and one who must comply with the Rules of Professional Conduct."

The Court also held that an attorney supervising such a paralegal "Specialist" would not meet the required standard such that the "Specialist" would be permitted to provide representation of a party at an administrative hearing.

In the Conclusion portion of the Opinion, the Court held that such a non-lawyer "Specialist" may not represent parties before "any adjudicative tribunal."

In Turner, the Kentucky Supreme Court held that a lay person could not represent a party in an informal hearing since such representation would involve advocacy which would constitute the practice of law. This holding by the Kentucky Supreme Court brings into question the validity of KRS 13B.080(5). That statute provides that in "informal proceedings," a party may be

represented by "other professionals" other than an attorney "if appropriate and if permitted by the agency by administrative regulation." Since the Kentucky Supreme Court in Turner, held that a lay person may not represent a party even in an informal hearing, the appropriateness of the lay representation or the permission by the agency would appear to be moot points.

ETHICS RESPONSIBILITY OF ATTORNEY/HEARING OFFICER WHEN CONFRONTED WITH A UPL SITUATION

Assume that a lay person is committing a UPL violation in an administrative proceeding in which an attorney is acting as the Hearing Officer. What are the ethics obligations/liability, if any, of the attorney/Hearing Officer when confronted with that situation.

This issue was addressed by the KBA in U-34. One of the questions posed in U-34 was as follows:

> "Would a Hearing Officer be in violation of SCR 3.470 if the Officer presided at a hearing in which a representative not a licensed attorney purported and attempted to represent an individual in a proceeding before the quasi-judicial body?"

The answer to the above-quoted question was a "qualified yes." As a result of that somewhat ambiguous answer, it is necessary to briefly review and analyze the KBA's discussion of this issue.

The Supreme Court Rule at issue in U-34 was SCR 3.470. That Rule provides, in full:

> "Any attorney who knowingly aids, assists, or abets in any way, form, or manner any person or entity in the unauthorized practice of law shall be guilty of unprofessional conduct."

Additionally, Kentucky's Rules of Professional Conduct similarly provide in Rule 5.5 that a lawyer shall not:

> ". . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

The KBA, in U-34, indicated that a violation of SCR 3.470 was not a strict liability offense, and would require some affirmative action or knowledge on the part of the attorney/Hearing Officer. The KBA appeared loathe to place an excessive burden on the Hearing Officer to make an inquiry into the "background and qualifications of every representative that appears" before the Hearing Officer. As the KBA also noted, such a burden was not on the Judges of the Court of Justice, and therefore such a burden would not be placed on Hearing Officers.

Having said that, the KBA concluded in U-34 that if the attorney/Hearing Officer "knows that the person is not licensed to practice law," the attorney would be aiding in the unauthorized practice of law. If the attorney did not know that the person appearing before him or her was not an attorney, the attorney/Hearing Officer would have no affirmative duty to determine if the representative is a licensed attorney. In short, this is the KBA's version of "Don't ask, don't tell."

A logical extension of U-34, necessarily implied from its language and based on a review of Kentucky's Judicial Code, suggests the duty of an attorney/Hearing Officer when confronted with a UPL situation.

In U-34, the KBA indicated that it would require nothing more nor nothing less of an attorney sitting as a Hearing Officer than would the KBA expect of a Judge. As the last sentence in U-34 reads:

> "The same rules should apply to a member of an administrative hearing as to the judiciary."

Additionally, the KBA, in U-34, expressed concern with placing an inappropriate burden on an attorney/Hearing Officer to determine whether certain conduct did or did not constitute the unauthorized practice of law. The KBA's most recent attempt to address this issue in U-54, and the partial reversal of the KBA's position in Turner v. Kentucky Bar Association, discussed above, reflects the continuing confusion as to what is or is not the unauthorized practice of law in administrative matters. The KBA, in attempting to diminish the burden on the attorney/Hearing Officer, noted in U-34 that the KBA and the Supreme Court have the authority to regulate the unauthorized practice of law in Kentucky.

The ethics obligation of a Judge, when confronted with a UPL situation, is very clear. The Unauthorized Practice of Law is a Class B Misdemeanor pursuant to KRS 524.130, and should be referred to the appropriate County Attorney's Office. Additionally, Judicial Canon 3(D)(2) requires a Judge to take appropriate action against a lawyer for unprofessional conduct by reporting the attorney to the KBA. A Judge is also required by statute, KRS 26A.080, to report such attorney misconduct. Even in the absence of attorney involvement, UPL proceedings should be instituted by the KBA pursuant to SCR 3.460.

In short, if an attorney/Hearing Officer is confronted with a UPL situation, (at least as identified in U-34), the attorney would have a duty to report this activity to the KBA or to the appropriate authorities for possible criminal prosecution. It may very well be that if this reporting occurred during the pendency of an administrative proceeding, the attorney/Hearing Officer would have to disqualify itself from any further proceedings in the case. If the UPL violation was by an officer or employee of one of the parties in the administrative proceeding, the "appearance of impropriety" issue could, at the very least, trigger the Hearing Officer's disqualification.

HEARING OFFICER AS ATTORNEY, AND PROCEDURAL DUE PROCESS

Kentucky Revised Statute 13B.030 does not require that a Hearing Officer be a licensed attorney. However, that statute, contains an implied, if not express, preference for the use of attorneys as Hearing Officers. In particular, KRS 13B.030(2)(a) provides that an agency has three options in obtaining Hearing Officers to conduct administrative hearings:

(1) Employ Hearing Officers;

(2) Contract with another agency for Hearing Officers; or

(3) Contract with private attorneys through personal service contracts.

However, the third option of using private attorneys is available only if the Attorney General's Office determines that the Attorney General cannot provide Hearing Officers to the particular Agency. The statute continues by indicating that if the Attorney General determines that the Attorney General's Office can provide Hearing Officers, the Agency has no choice and must use the Hearing Officers provided by the Attorney General's Office.

The implied preference for using attorneys as Hearing Officers is obviously reflected in the provision in KRS 13B.030(2)(a)(3), which provides that an Agency may contract with private attorneys to act as Hearing Officers. By necessary exclusion, an Agency may not contract with lay people to act as Hearing Officers.

The qualifications for a Hearing Officer are to be set by the Personnel Cabinet and the employing Agency. However, the General Assembly has provided that the goal to be met by those qualifications is to "assure competency in the conduct of an administrative hearing." Having said that, the statute exempts members of a Board, Commission, etc., who serve as Hearing Officers as a member of that body.

In the context of criminal proceedings before the Courts in which a person's life and liberty is at risk, various Constitutional rights are triggered which do not apply in civil proceedings or administrative proceedings. In Wyatt v. Transportation Cabinet, Ky. App, 796 S.W.2d 872, 874 (1990), the Kentucky Court of Appeals noted the general difference between an administrative proceeding to revoke a person's driver's license, and a criminal proceeding. As the Court held, quoting from Commonwealth v. Streiber, Ky, 697 S.W.2d 135, 136 (1985):

> "'License revocation is not a punishment but a cautionary measure to protect the safety of the public.' (Citation omitted.) As a result, the totality of rights of a criminal defendant are not necessarily available to Wyatt."

As American Beauty Homes Corporation v. Louisville and Jefferson Planning and Zoning Commission, Ky, 379 S.W.2d 450, 456 (1964) tells us, the sufficiency of administrative action on judicial review is limited to determining whether the administrative action was "arbitrary." In exercising that function, a reviewing court must review three main factors:

(1) Whether the agency acted within its statutory authority.

(2) Whether the agency's procedures afforded the party procedural due process, including the opportunity to be heard.

(3) Whether the agency's action is supported by substantial evidence.

The absence or failure of any one these factors is sufficient to overturn the administrative action.

In Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 357 (1997), the Kentucky Court of Appeals discussed the concept of "procedural due process." The Court, in reviewing both Kentucky and federal authority, noted that the concept of procedural due process is "flexible." As a result, Kentucky's exercise of its police power gave Kentucky the option to provide certain procedural

safeguards and protections for some proceedings, and to use different protections and safeguards for different proceedings, without running afoul of any Constitutional limitations.

Although procedural due process may be different for different administrative proceedings, the legal ethics duties of an attorney acting as a Hearing Officer remain the same regardless of the particular Board, Agency, or Commission for which the attorney sits as a Hearing Officer. This concept reflects the over-arching fact that an attorney is an attorney first and foremost, in any of his or her actions. In short, the attorney is acting as a Hearing Officer subject to the ethics limitations of being an attorney. It is not the situation of a Hearing Officer who also happens to be an attorney. As noted below, legislative attempts to insulate and immunize persons who practice law from Supreme Court scrutiny have been routinely rejected.

DISQUALIFICATION OF HEARING OFFICER

The disqualification of the Hearing Officer is expressly provided for in KRS 13B.040. Paragraph 1 of KRS 13B.040 provides that a person is disqualified from sitting as a Hearing Officer if they have served as an "investigator or prosecutor" in the same proceeding.

Paragraph 2 of KRS 13B.040 provides the procedure for voluntary or involuntary disqualification of the Hearing Officer. The disqualification procedure provided for in KRS 13B.040 is different than the disqualification procedure provided for in KRS 26A.015, in that under this judicial disqualification statute, the Disqualification Motion is directed in the first instance to the Trial Court. Under the procedure in KRS 13B.040(2), an involuntary request to disqualify the Hearing Officer is directed to the agency head.

The grounds for disqualification are set out in a non-exclusive list in KRS 13B.040(2)(b). In particular, the statute sets out four specific grounds for disqualification:

(1) Serving as an investigator or prosecutor in the proceeding;

(2) Participating in ex parte communications which prejudice the proceedings;

(3) Hearing Officer has a pecuniary interest in the outcome of the proceeding;

(4) Hearing Officer has a personal bias towards any party which would cause the Hearing Officer to prejudge the outcome of the case.

Interestingly, regarding ex parte communications, there is somewhat of a mismatch between what the Hearing Officer is prohibited from doing, and what would be sufficient grounds to disqualify the Hearing Officer if the ex parte communication occurred. In particular, KRS 13B.100 generally prohibits the Hearing Officer from participating in an ex parte communication concerning any "substantive issue." However, in order to disqualify the Hearing Officer, the ex parte communication must "prejudice" the proceedings. As a result, a Hearing Officer could participate in an ex parte communication on the substantive matter in violation of KRS 13B.100, but if that communication did not "prejudice" the proceedings, that would not be grounds for disqualification of the Hearing Officer. This may very well be a technical distinction, and that KRS 13B.040(2)(b)(2) and KRS 13B.100 actually reflect the same concern and prohibition regarding ex parte communications, and the consequences of that communication.

As noted above, the statutory list in KRS 13B.040(2)(b) is non-exclusive. Other grounds for disqualification are found in Canon 3(E), regarding disqualification of a Judge. Additionally, statutory grounds to request the disqualification of a Judge are found in KRS 26A.010. The Canon and the statute contain additional specific grounds for disqualification than those set forth in KRS 13B.040(2)(b), and also provide for a "catch-all" disqualification ground.

KRS 13B.040(2)(a) appears to set forth a subjective standard for disqualification, in that the Hearing Officer is required to voluntarily disqualify itself when the Hearing Officer "cannot afford a fair and impartial hearing or consideration." The Canon on judicial disqualification, noted above, provides an objective standard by stating that the Judge should disqualify himself or herself when the "judge's impartiality may reasonably by questioned." However, although KRS 13B.040 would seem to suggest that a Hearing Officer could not be disqualified under circumstances that would call for the disqualification of a Judge, it is unlikely that a Court, on judicial review of an administrative determination, would uphold the denial of a disqualification motion on grounds which would have disqualified the Court.

HEARING OFFICER DISCUSSING PENDING CASE WITH ANOTHER HEARING OFFICER

It is not uncommon, and it is quite common, for Judges to discuss among themselves cases they have pending before them to either reaffirm in their own mind the correctness of the approach the Judge is taking in a given case, or to "pick the brain" of another Judge as to what that other Judge thinks about the pending matter. These general discussions with other Judges are expressly permitted by the Judicial Code. In particular, Canon 5(7)(c) provides that a Judge may consult with other Judges concerning pending or impending proceedings, without running afoul of the prohibition against ex parte communications.

Kentucky Revised Statute 13B.100 generally prohibits ex parte communications off the record concerning any "substantive issue." Paragraph 2(a) excludes from that prohibition "communications with other agency staff." Certainly, to the extent that other Hearing Officers are deemed "agency staff," the Hearing Officer would expressly not have a problem with any ex parte

communication. However, to the extent that the "agency staff" refers to the staff of the agency which has employed the Assistant Attorney General to act as a Hearing Officer, that line of reasoning would not necessarily apply. Since the Judicial Code expressly permits such inter-judge communications, it is unlikely that a Judge would reverse an administrative proceeding determination based on conduct of a Hearing Officer which the Judge is expressly permitted to take.

FINDING OF FACT AND CONCLUSIONS OF LAW PREPARATION

The Hearing Officer is required pursuant to KRS 13B.110, to prepare findings of fact, conclusions of law, and a recommended order.

The Commentary to Canon 3 of the Judicial Code expressly authorizes a judge to request a party to submit proposed findings of fact and conclusions of law. As that portion of the Commentary reads:

> "A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprized of the request and given an opportunity to respond to the proposed findings and conclusions."

Kentucky Revised Statute 13B.080(2), provides in part, that the Hearing Officer may give the parties an opportunity to file supposed Findings of Fact and Conclusions of Law. The statute speaks in discretionary terms, and a Hearing Officer is certainly not required to give the parties the opportunity to submit proposed Findings and Conclusion.

Kentucky Revised Statute 13B.110(1) provides, that the Hearing Officer shall complete and submit Findings of Fact and Conclusions of Law, and a recommended disposition within the time frame provided for in that statute.

Case law indicates that a Judge may properly request parties to submit findings of fact and conclusions of law, and that the Judge may adopt those tendered findings and conclusions, without improperly delegating the Judge's fact-finding function. Several cases from Kentucky discuss the scope and reach of the proper delegation by the Trial Court of this function. This reasoning should be equally applicable to the Hearing Officer's delegation of that function. Although this function may be delegated, such delegation should be sparingly used in order to avoid a challenge to the Hearing Officer's decision as having been an improper delegation.

In Prater v. Cabinet for Human Resources, Commonwealth of Kentucky, Ky, 954 S.W.2d 954 (1997), the Kentucky Supreme Court, citing its seminal decision on this issue, Bingham v. Bingham, Ky, 628 S.W.2d 628 (1982), stated that it was not error for the Trial Court to adopt findings of fact which were "merely drafted by someone else." In Prater, the Trial Court requested both parties submit proposed findings of fact.

In Bingham the Supreme Court noted that the record reflected the active participation of the Trial Court in the trial and that the Trial Court had not delegated its decision-making responsibility. In short, it is impermissible for a Hearing Officer to delegate the responsibility to make the decision. However, as long as the Hearing Officer makes its own decision, the responsibility of preparing the findings and conclusions to support that decision may be delegated. In Bingham, the Court referred to the drafting of proposed findings as a "clerical task."

In Bingham, the Supreme Court noted that the Trial Court had made several additions and corrections to the findings and conclusions which had been prepared by one of the parties. The Court also noted that the facts of the case did not suggest that the Trial Court had made a "verbatim or mechanical adoption" of the findings and conclusions which had been tendered by the party.

No doubt there are administrative matters in which the issues of law and fact are relatively uncomplicated, where relatively limited testimony was presented, and the preparation of the findings and conclusions is neither a lengthy nor complex task. In those instances, it may very well be that the verbatim adoption of the findings and conclusions prepared by one of the parties may not run afoul of the concerns expressed by the Supreme Court in Bingham.

However, if the case involves either complex issues of law or fact, and detailed evidence was presented, the wholesale adoption of one party's tendered findings by the Hearing Officer may give a Court, on judicial review, concern that the Hearing Officer has improperly delegated the decision-making process. This concern would be reinforced if the Hearing Officer made no pronouncement of any preliminary decision at the conclusion of the evidentiary hearing, and thereafter merely adopted findings and conclusions tendered by one of the parties.

In summary, the preparation of the findings of fact and conclusions of law may be delegated by the Hearing Officer to the parties under particular circumstances. However, if the record does not support the active and appropriate participation of the Hearing Officer in the administrative process, the Hearing Officer's adoption of such proposed findings and conclusions may jeopardize the ultimate action taken by the Hearing Officer.

If the Hearing Officer is using the delegation of the preparation of Findings and Conclusions as a "short-cut" to the decision-making process, the Hearing Officer should not delegate that function. If the use of proposed Findings and Conclusions by the parties is more than the delegation of a "clerical" task, the delegation should be avoided. Unless the Hearing Officer is extremely careful, the attempt to delegate the function of preparing the Findings and Conclusions

may be later seen by a reviewing Court as a delegation of the decision-making function. As a result, the delegation of the fact finding function should be cautiously used in limited circumstances.