

## Resolution 11-03-2009

### Administrative Law Judges: Fairness in Peremptory Challenges

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code section 11425.40 to read as follows:

§ 11425.40

(a) The presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding.

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(c) The provisions of this section governing disqualification of the presiding officer also govern disqualification of the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(d) An agency that conducts an adjudicative proceeding may provide by regulation for peremptory challenge of the presiding officer and in situations where the presiding officer is an administrative law judge, shall so provide.

(Proposed new language underlined; language to be deleted stricken.)

**PROPOSERS:** John Wagner, Joan Stone, Jay-Allen Eisen, Emory King, Borden Webb, Karen Goodman, Summer Haro, Kelly Borelli, Jennifer Kaufman, Robert Sullivan

### **STATEMENT OF REASONS:**

Existing Law: Allows, but does not require, administrative hearing agencies to provide for peremptory challenges of the presiding officer in an adjudicatory proceeding. The Department of General Services' (DGS) Office of Administrative Hearings (OAH), which may hold the most administrative hearings in the state, provides for peremptory challenges as do many other state hearing agencies. The Department of Health Care Services' (DHCS) Office of Administrative Hearings and Appeals (OAHA), however, does not. This causes a great burden on administrative litigants before the DHCS OAHA or other agencies that do not provide peremptory challenges because, in order to challenge an administrative law judge, they must prepare detailed declarations, typically including extensive hearing transcript documentation. The compilation and preparation of such materials is very time consuming and expensive. In superior court, on the other hand, civil litigants are allowed peremptory challenges pursuant to Code of Civil Procedure section 170.6.

This Resolution: Grants the same rights to administrative litigants appearing before an administrative law judge. Nothing in this Resolution requires peremptory challenges where agency members, individually or collectively, sit as the presiding officer of an adjudicative proceeding; this Resolution is limited solely to administrative law judges. This Resolution would greatly reduce, and perhaps eliminate, the need for requests to disqualify administrative law judges for cause.

The Problem: Is exemplified in the case of *Sutter Medical Center Sacramento (SMCS) v. Shewry*, Sacramento Superior Court Case No. 07CS00583. In this administrative proceeding before the DHCS OAHA, no peremptory challenge was available. SMCS filed a voluminous request for disqualification of an administrative law judge, with detailed declarations and extensive pages of evidentiary support from transcripts. The challenged administrative law judge responded to this detailed request for disqualification with a brief order that did not address any of the specific grounds raised and that denied disqualification with a conclusory finding of no bias, no prejudice, and no interest in the proceeding. SMCS sought reconsideration before the OAHA Chief Administrative Law Judge, who ruled that no administrative review of an administrative law judge's finding against disqualification was available. SMCS then had to proceed to Superior Court, at significant time and expense, to litigate and obtain an order requiring disqualification of the administrative law judge. This not only caused significant expense, but the administrative delays related to implementing the court's writ were significant, further delaying a decision on the merits of the case.

Administrative litigants should not be put through such obstacles. The OAH system under DGS of having peremptory challenges has worked with great success. There is no reason now why all agencies should not provide for peremptory challenges of administrative law judges.

**IMPACT STATEMENT:**

This resolution does not affect any other law, statute or rule.

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