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Haas v. County Of San Bernardino
California Supreme Court Requires Changes In Selection of Administrative Hearing Officers

by

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On May 6, 2002, the California Supreme Court decided an important case which will require the attention of every local government in California that relies on administrative hearing officers to resolve such issues as parking ticket appeals, barking dog disputes, code enforcement matters, dangerous animal determinations, land use decisions, and personnel actions. This paper describes the Court's ruling and identifies a number of means to comply with its new mandate.

The Facts of the Case. The case is *Haas v. County of San Bernardino*,[1] and involved the County's decision to revoke a massage parlor license based on a male police officer's report that a female massage technician had exposed her breasts to him and proposed a sexual act. The County selected a hearing officer for the hearing on the proposed license revocation on a one-time basis and in an informal way. The Assistant County Counsel who ultimately presented the case for revocation before the hearing officer hired a local attorney to serve as hearing officer, agreeing to pay her standard hourly fee for her work, making no promises of future employment, but not discounting that possibility. Counsel for Mr. Haas objected to this attorney's service as hearing officer, arguing that she could not be unbiased, as due process requires, because she would have an incentive to favor the County in order to induce it to hire her for future such hearings. Mr. Haas' counsel offered to pay for the services of an Administrative Law Judge provided by the state Office of Administrative Hearings, but the County refused to present the matter to such a judge. The hearing went forward, the hearing officer recommended revocation of the license, and the County Board of Supervisors accepted her recommendation. Mr. Haas sought a writ of mandate to reverse the decision raising, among other issues, the alleged legal bias of the hearing officer. The trial court accepted Mr. Haas claim of bias and granted the writ, compelling the County set aside the license revocation.

The Inland Empire Panel of the 4th District Court of Appeal affirmed. It declined to adopt Haas' view of the law – that local government could never select and pay a

[1] ___ Cal.4th ___, 2002 Daily Journal DAR 4893 (No. 2076868) (filed May 6, 2002).

hearing officer on an "ad hoc" or one-time basis with the potential for further work. It viewed the "totality of the circumstances" of the case, however, to evidence unacceptable bias, emphasizing the apparent unfairness that arose from the fact that the very Assistant County Counsel who retained the hearing officer and who would presumably decide whether to do so again, was an advocate before her.

The County petitioned the California Supreme Court for review of the case, which was granted in April 1999. An *amicus curiae* ("friend of the court") brief listing 110 California Cities as *amici* and coordinated by the League of California Cities was filed in the case. That brief argued for flexibility in interpreting due process requirement for local government hearings in light of the broad range of such hearings and the huge expense that a rigid mandate could impose on local governments.[2] After considering the case for more than three years, the Court rendered its 6-1 decision on May 6, 2002.

The Background Law. The due process clause of the federal Constitution and parallel provisions of the California Constitution provide that government may not deprive a person of "life, liberty, or property without due process of law." Local governments affect liberty and property interests of their employees, residents, and property owners in a very broad array of matters ranging from their regulation of the use of land; the employment, discipline and termination of public employees; and the regulation of conduct within their borders. These regulations often call for administrative hearings to which due process applies for matters as trivial as a contested parking ticket to matters as grave as the termination of an employee for misconduct. In these varied administrative settings, there are several fundamental requirements of "due process." Among the most basic is that the hearing must before an "unbiased" decisionmaker.

The law of bias has two aspects – substantive (or "actual") bias and procedural or "legal" bias. A decisionmaker is actually biased when he or she cannot give a fair hearing based on the evidence, as is true when a person with a stake in a matter (an affected neighbor in a land use dispute, for instance) is asked to decide it. A person can be "legally biased" even in the absence of actual bias where the circumstances of the administrative hearing are such that there is a sufficient risk of, or appearance of, unfairness that the law demands a different procedure.

The California Supreme Court relied in the *Haas* case on two lines of federal cases discussing legal bias. In each, the decisionmaker had some financial stake in the matters he or she was deciding. As the Court pointed out, of all the procedural flaws identified in federal due process case law, "pecuniary interest [of the decisionmaker] has long received the most unequivocal condemnation and the least forgiving scrutiny."[3] In the "fee system cases," the courts struck down state judicial systems which allowed a plaintiff – either the prosecutor in a criminal action or the plaintiff in a civil action, often a bank, credit card company or other creditor – to choose among a number of available judges and paid the judges based on the number of cases they heard. If a judge knew he would make more money by inducing prosecutors to choose his courtroom over those of his peers, he would have a financial incentive to favor the prosecution. Similarly, if a judge knew that she stood to make more money by attracting civil filings from repeat plaintiffs, such as banks and collection agencies, she might favor them in

[2] The author of this paper wrote that brief along with Gabriel K. Coy of Loeb & Loeb and Roy A. Clarke of Richards, Watson & Gershon.
[3] Slip Op. at 9.

her rulings. Due process, as interpreted by the courts in cases dating from the 1970s and 1980s, forbade such systems.[4]

The Supreme Court also cited cases in which a decisionmaker had a financial stake in the outcome of cases in another sense. Among these were cases striking down "the Mayor's Court" system in which motor vehicle ticket appeals were decided by a city's the Mayor and the proceeds of any fines levied were payable into the City budget.[5] Such a process, combined with a speed trap for unwary tourists on a rural country highway, does little to inspire confidence in the fairness of the process.

Haas' Reasoning. Thus, it was clear that due process is violated in the judicial setting if a decisionmaker has a direct, personal financial interest in the outcome of the cases before him. The *Haas* decision applies this long-standing body of law to the current facts and made two, rather short, steps into new territory. First, the Court applied these cases involving judicial due process to the administrative hearing context. Second, the Court agreed with Mr. Haas that a hearing officer hired on an ad hoc basis, with some prospect of future employment has a meaningful financial incentive to favor the party who hired her and who might hire her again.

Viewed in this light, the decision is not a shocking change in the law, nor even very surprising. The Court articulated this standard for determining whether the details of any particular administrative hearing scheme comports with due process:

> "*Tumey* [*v. Ohio*, 273 U.S. 510 (1927)] and *Ward [v. Village of Monroeville,* 409 U.S. 57 (1972)] do not require proof of actual judicial prejudice or of a direct pecuniary interest in the outcome of particular case. The test is whether a fee system presents a 'possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.'"[6]

The Court continued: "our inquiry here is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge."[7] Speaking of the incentives San Bernardino County provided its hearing officer, the Court wrote: "In this context, when the danger to be avoided is that the desire for more work will offer a possible temptation to the average person to favor the frequent litigant, even fees of $10 and $15 per case have been considered direct, personal, and substantial."[8]

This issue is not merely at stake when a local government hires a hearing officer on a one-time basis. It is a central concern to the private arbitration business, in which parties pay for the services of a private decisionmaker rather than make use of the state court system. It is possible that the California Supreme Court's extraordinary delay in deciding this case (Mr. Haas' three-year wait is roughly twice the Court's current

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[4] Slip Op. at 8, nn. 10 and 13.
[5] Slip. Op. at 12 and n.14.
[6] Slip. Op. at 14, *quoting Brown v. Vance*, 637 F.2d 272, 282 (5th Cir. 1981), a decision written by John Minor Wisdom, a judge of great renown who rendered many famous rulings during the civil rights struggle in the southern states served by the federal 5th Circuit Court of Appeals.
[7] Id.
[8] Slip. Op. at 18.

average) was intended to allow the rule-making process regarding private arbitrators to run its course before this case was decided. In any event, there are obvious issues of fairness if insurance companies and other frequent litigants include mandatory arbitration clauses in their contracts with consumers, refer the resulting volume of work to a particular private judge or arbitration firm, and leave consumers to hope that the private judges will not favor the company which is a source of substantial income to them. The *Haas* Court cited this very risk and the rules adopted to address it, demonstrating the relevance of the issue.[9]

Complying with *Haas'* Requirements. The California Supreme Court was sensitive the fact that this interpretation of federal due process would apply to a broad variety of hearing processes. The Court was therefore at pains to state that *Haas* is to be applied flexibly. The Court specifically states that local governments may compensate hearing officers.[10] Indeed, under some circumstances, due process *requires* a local government to pay the hearing officer, rather than to require the person whose interests are at stake to do so.[11] The local government need not surrender or share the power to select the decisionmaker, [12] either, although doing so will eliminate risk in this area. The problem in *Haas* arose from the adjudicator's incentive to seek future work by favoring the local government, not from the fact the County selected and compensated her.

The Court's decision identifies at least five means by which local governments can select hearing officers without violating *Haas*:

- A County may establish the office of County Hearing Officer pursuant to Government Code Section 27720 and a City may contract with a County that has done so.[13]
- Local governments may contract with the State Office of Administrative Hearings for the services of an Administrative Law Judge.[14] While such judges are probably too costly for more mundane administrative hearings, this option does provide access to a corps of professionally trained and disinterested administrative judges with familiarity with local government issues arising from their mandatory jurisdiction over disputed pensions under PERS and other issues.[15]
- Members of an agency, such as a Planning Commission or City Council, may decide cases, provided that they comply with the regulations of the Fair Political Practices Commission under the Political Reform Act regarding disqualifying financial interests.[16] This will not be practical for

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[9] Slip Op. at 16 and n.8 (citing Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts* (1981) 84 **Harv. L. Rev**. 1592, 1608; Cal. Rules of Court, rules 244(c)(2), 244.1(c)(2), 244.2(e)(2); and Cal. Rules of Court, appen. Div. VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, eff. July 1, 2002). These new rules allow repeat business to a private decisionmaker, but require the repeat relationship to be disclosed to affected parties and provide for the disqualification of a neutral under certain circumstances.

[10] Slip Op. at 17-18. ("Certainly due process does not forbid the government to pay an adjudicator when it must provide someone with a hearing before taking away a protected liberty or property interest.")

[11] Id. at 18.

[12] Id. ("Furthermore, no generally applicable principle of constitutional law permits the affected person in such a case to select the adjudicator.")

[13] Slip op. at 1, n.1 and 26.

[14] Slip Op. at 1, n.1 and 25-26.

[15] Additional information about OAH is available from its website at www.oah.dgs.ca.gov.

[16] Slip. Op. at 25.

less substantial matters, but is useful for most land use matters and personnel matters heard before a Civil Service Commission.

- The local government may appoint an ad hoc hearing officer and provide in his or her contract that no further work will be provided him or her for a substantial time.[17] As Justice Brown points out in dissent,[18] however, no guidance is given for how long this time must be and the conservative approach would be to forbid rehiring, ever.
- The local government might employ a rotation system in which a list of hearing officers is established and cases are assigned in some pre-ordained manner to those on the list.[19]

The Court does not say so explicitly, but its reference to the new disclosure and disqualification system adopted for private neutrals[20] suggests that a similar system, in which the person affected by a hearing is notified that the hearing officer might be retained for future matters and is given an option to object to his or her service, would presumably suffice as well. Further, whenever the stakes are large and there is any question as to the constitutional adequacy of the process by which a hearing officer is selected, a local government should consider whether to seek an on-the-record stipulation to the service of the hearing officer from the person whose interests are at stake. Such a stipulation should eliminate the issue from subsequent contest.

Other means to comply with *Haas* that are sensitive to the practical realities of smaller jurisdictions that do not have sufficient business to justify employing a full-time hearing officer, or establishing a rotation system, suggest themselves, too:

- A rotation system might be established by a group of local governments, perhaps in cooperation with a local bar association, with an officer pulled from the list by each local government in turn as the need arises. Such systems are employed in the Coachella Valley and in Chico.
- A City employee can serve as an ad hoc hearing officer. If this approach is used, care should be taken to avoid any other source of pecuniary bias – as where the hearing officer is called upon to evaluate the work of his superiors and may have an incentive to curry favor. It might also be helpful to select an employee covered by the local conflicts of interest policy so that compliance with the Political Reform Act can be demonstrated.
- Use of a private arbitration service such as JAMS, the American Arbitration Association, etc. These services are credible and professional, but relatively expensive.
- Contract with a hearing officer for a fixed term of service, guaranteeing him or her all cases of a particular type during that term. This can work even where the number of cases is not likely to be large, because the hearing officer knows the next case is hers whether she pleases the local government or not. To be effective, this approach must provide for a relatively lengthy term, perhaps one or more years, and should provide that the contract cannot be terminated by the local government absent some showing of cause unrelated to the outcomes of hearings.

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[17] Slip. Op. at 26, n.22.
[18] Slip Op. at 2, n.1.
[19] Slip. Op. at 26, n.22.
[20] Slip Op. at 16 and n.17.

Conclusion. Local governments and their counsel must give some thought to use of preexisting administrative hearing procedures after *Haas* and there is some risk of further litigation as the implications of the decision develop. On close scrutiny and with the clear vision that hindsight affords, however, *Haas* is an unsurprising and modest extension to administrative hearings of an established principle affecting court systems – judges cannot have a financial stake in the cases they decision. The California Supreme Court took pains to allow local governments meaningful flexibility in complying with the ruling and, with a little thought, most should be able to find practical means to do so.