



ALJIPP 5800.1
6 MAR 2012

ADMINISTRATIVE LAW JUDGE INTERNAL PRACTICES AND PROCEDURES 5800.1

Subj: STANDARDS OF CONDUCT FOR ADMINISTRATIVE LAW JUDGES AND PROGRAM EMPLOYEES

Ref: (a) COMDT INST. 5370.8B

1. PURPOSE. In accordance with 46 C.F.R. § 1.10-25(d), this directive provides policy concerning the general administration and management of the Coast Guard Administrative Law Judge Program (ALJ). This *Administrative Law Judges' Internal Practices and Procedures* (ALJIPP) establishes policy on conduct, ethics, and professional responsibility. The directive also clarifies procedural points on conflicting rules. Further, it explains the differences between the standards of conduct and the standards for disqualification. Finally, it provides general administrative instructions applicable to all personnel in the Office of Chief Administrative Law Judge (CG-00J) and field offices.

2. ACTION. The CALJ will provide copies of the most recent edition of the American Bar Association's *Model Code of Judicial Conduct* to all ALJs, which will serve as guidelines for ALJs and provide opportunities for training and education in judicial ethics. This ALJIPP is authorized for Internet release.

3. DIRECTIVES AFFECTED. None.

4. APPLICABILITY. This directive applies to all personnel assigned to the Coast Guard Administrative Law Judge (ALJ) Program, including ALJs, Senior ALJs on temporary contract or ALJs on loan from other agencies, as well as all attorneys, law clerks, paralegal specialists, and other federal employees assigned to the ALJ Program.

5. RELATIONSHIP TO RULES OF PROFESSIONAL RESPONSIBILITY FOR ATTORNEYS. Attorney-advisors in the ALJ Program are subject to their licensing jurisdiction's rules of professional responsibility.

DISTRIBUTION - SDL No.

| | a | b | c | d | e | f | g | h | i | j | k | l | m | n | o | p | q | r | s | t | u | v | w | x | y | z |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| A | | | | | | | | | | | | | | | | | | | | | | | | | | |
| B | | | | | | | | | | | | | | | | | | | | | | | | | | |
| C | | | | | | | | | | | | | | | | | | | | | | | | | | |
| D | | | | | | | | | | | | | | | | | | | | | | | | | | |
| E | | | | | | | | | | | | | | | | | | | | | | | | | | |
| F | | | | | | | | | | | | | | | | | | | | | | | | | | |
| G | | | | | | | | | | | | | | | | | | | | | | | | | | |
| H | | | | | | | | | | | | | | | | | | | | | | | | | | |

NON-STANDARD DISTRIBUTION:

6. RELATIONSHIP TO STANDARDS OF CONDUCT FOR FEDERAL EMPLOYEES. ALJ Program personnel, including ALJs, are subject to the Standards of Conduct for Employees of the Executive Branch, detailed at 5 C.F.R. Part 2635 and Commandant Instruction 5370.8B regarding standards of ethical conduct.

7. THE ACTUAL BIAS STANDARD IS APPLIED FOR CLAIMS OF BIAS, PREJUDICE, OR CONFLICT OF INTEREST. The ALJ Program is committed to providing every respondent fair and unbiased treatment. *See*, 5 U.S.C. §§ 554(d) and 556(b); 33 C.F.R. §§ 20.202 and 20.204. ALJs must disqualify themselves from proceedings under certain circumstances if they are unable to be impartial.¹(e.g. An ALJ may disqualify herself or himself at anytime; or either party may move to disqualify the ALJ for personal bias or other valid cause. *See* 33 C.F.R. § 20.204(a) and (b)). The standard applied to disqualify an ALJ for bias, prejudice, or conflict of interest is different from the heightened standard of impropriety applied to Article III Federal Judges.² Several circuits have held that the “appearance of impropriety” standard of 28 U.S.C. § 455(a) applied to disqualify federal judges does not apply to ALJs. Bunnell v. Barnhart, 336 F.3d 1112, 1115 (9th Cir. 2003) (holding recusal based on the appearance of impropriety applies only to federal judges and not to ALJs) *see also*, Greenberg v. Bd. of Governors of Fed. Reserve Sys., 968 F. 2d 164, 166-67 (2d Cir. 1992) and Harline v. Drug Enforcement Admin., 148 F.3d 1199, 1204 (10th Cir. 1998). Applying the heightened “appearance of impropriety” standard to ALJs as employees of the agency and whose decisions the agency reviews is impractical. “Otherwise, ALJs would be forced to recuse themselves in every case.” Greenberg, 968 F.2d at 167.³ Actual bias must be shown to disqualify an ALJ. Bunnell, 336 F.3d at 1115.

It is well settled that a party cannot demonstrate bias based solely on the ALJ’s rulings during the proceedings. NLRB v. Donnelly Garment Company, 330 U.S. 219, 236-237 (1947); Marcus v. Director, Office of Workers Compensation Program, 548 F.2d 1044, 1051 (D.C. Cir., 1976); Atkins v. Department of Commerce, 81 M.S.P.R. 246, 252 (1999); *see also*, Berkley v. Department of the Army, 71 M.S.P.R. 341, 348 n. 1 (1996).

8. PRESUMPTION OF HONESTY AND INTEGRITY. An ALJ is presumed to have exercised his or her powers with honesty and integrity; therefore, the party alleging bias has the burden of overcoming the presumption of impartiality with convincing evidence that a risk of actual bias or

¹Statutes, regulations and the *Model Code* use the term disqualification when seeking removal of an ALJ when an ALJ is unable to be impartial. *See*, 5 U.S.C. § 556(b); 33 C.F.R. § 20.204 and Model Code Rule 2.11. However, case law uses the term recuse. Please see cases cited in paragraph 7 of this ALJIPP. For the purposes of this ALJIPP, the terms disqualification and recusal are synonymous.

²Article III courts consist of Magistrate Judges, Federal District Judges, Judges of the Courts of Appeals, Justices of the Supreme Court, and certain other courts created by an Act of Congress. 28 U.S.C. § 451.

³ *But see*, Commandant v. Dresser, NTSB Order No. EM-195 (Jun 2003) (CG ALJs are expected to strive to avoid even an appearance of partiality to the position of either party to a proceedings and are held to the same standards regarding bias, prejudice and interest as are all members of the federal judiciary) and Commandant v. Shine, NTSB Order No. EM-209 July 20, 2011) (citing Dresser holding that standard of review for determining judicial bias as whether the circumstances presented an unacceptable appearance concerning the law judge’s impartiality). These decisions are inconsistent with 28 U.S.C. § 451 and applicable case law.

prejudgment is present. That party must rebut the presumption by showing a conflict of interest or some other specific reason for disqualification. Any alleged prejudice on the part of the ALJ must be evident from the record and cannot be based on speculation or inference. *See, Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Navistar Int'l Transp. Corp. v. EPA*, 941 F.2d 1339, 1360 (6th Cir. 1991); *Collier v. Commissioner of Social Security*, 108 Fed. Appx. 358, 363 2004 WL 1922187 (6th Cir. 2004); and *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

9. APPLICATION OF THE MODEL CODE OF JUDICIAL CONDUCT. This ALJIPP adopts the American Bar Association's *Model Code of Judicial Conduct* (Model Code) as guidance. The Merit System Protection Board (MSPB) has also held that the Model Code is an appropriate guide for evaluating the conduct of ALJs. *Social Security Administration v. Whittlesey*, 50 M.S.P.R. 684, 696 (1993); *Matter of Chocallo*, 1 M.S.P.R. 612, 652-53 (1978). In recent cases, the MSPB has applied the latest version of the Model Code in effect at that time. The latest Model Code approved February 12, 2007, and now in its 2011 edition provides that the Model Code is applicable to ALJs in section I (B), entitled "Applicability of This Code."

10. CONFLICTING FINANCIAL INTEREST. Title 18 U.S.C. § 208(a) prohibits ALJs as well as federal employees from participating personally and substantially in an official capacity in any particular matter in which the ALJ or any person or entity whose interests are imputed to the ALJ by that statute has a financial interest, if the particular matter will have direct and predictable effect on that interest. If an ALJ believes that a conflict exists or that a waiver or exemption is appropriate, the ALJ must coordinate with the Ethics Official at Headquarters through CG-00J. Reference (a) provides guidance and procedure for exemptions and waivers. Even if the Ethics Official finds no conflict or that an exemption or waiver is appropriate, the ALJ may still decide that recusal is appropriate. *See cases cited in ¶ 9.*

11. ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES. In accordance with COMDTINST M12750.4, the Coast Guard may take appropriate personnel action against an Administrative Law Judge. However, it may not remove, suspend, reduce in grade, reduce in pay, or furlough for 30 days or less in the absence of good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board. MSPB on the record hearings do not include:

- 1) Suspension or removal in the interests of national security;
- 2) Reduction-in-force under section 3502 of this title;
- 3) Commission of a prohibited personnel action;
- 4) Violation of a law, regulation, or some conduct of which the Special Counsel has jurisdiction over; or
- 5) Knowingly or willfully failing to comply with an order issued by MSPB.

See 5 U.S.C. § 7521; 5 C.F.R. § 930.211 and 5 C.F.R. §§ 1201.137 to 1201.145 for further guidance.

An ALJ who alleges action by an agency which violates 5 U.S.C. § 7521 may file a complaint with the MSPB. *See*, 5 C.F.R. § 1201.142.

12. OUTSIDE EMPLOYMENT. Due to the high level of integrity demanded of the ALJ Program, any practice of law outside of the ALJ Program by its judges, lawyers or staff is prohibited except when he or she is acting pro se or advising family members without compensation. Any other outside employment must be approved in accordance with Coast Guard Civilian Personnel Rules. Licensing jurisdictions typically proscribe the practice of law by full time judges. *See also* Rule 3.10 (“A judge shall not practice law.”), *ABA Model Code of Judicial Conduct*, 2007 edition, updated as of 2011.

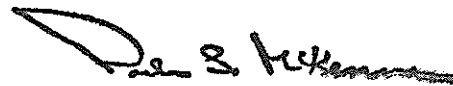
13. REQUESTS FOR CHANGES. ALJ Program employees and Coast Guard personnel may recommend changes to this directive by writing via the chain of command to: Commandant (CG-00J), U.S. Coast Guard, 2100 2nd Street, SW, Stop 7000, Washington, DC 20593-7000.

14. NO RIGHT OF ACTION. Nothing in this Instruction creates a private right of action or legal duty, and no violation of the Standards of Ethical Conduct (COMDTINST M5370.8B) or the ABA Model Code of Judicial Conduct creates a private cause of action or presumption of a breach of legal duty. Complaints against ALJ Program civilian personnel other than ALJs are processed in accordance with “Civilian Personnel Actions: Discipline, Performance, Adverse Actions, Appeals, and Grievances,” (COMDTINST M12750.4). Complaints against ALJs are processed in accordance with Administrative Investigations Manual (COMDINST M5830.1A). Allegations of ALJ misconduct are processed in accordance with “Investigations and Complaints Against Administrative Law Judges” (ALJIPP 5830.1).

15. ENVIRONMENTAL ASPECT AND IMPACT CONSIDERATIONS. The Office of the CALJ has thoroughly reviewed this directive in conjunction with the Office of Environmental Management and concludes the policies contained herein are categorically excluded under USCG CE #33 from further environmental analysis in accordance with Section 2.B.2. and Figure 2-1 of the National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts (COMDTINST M16475.1D). Because this directive contains guidance on, and provisions for, compliance with applicable mandates, Coast Guard categorical exclusion #33 is appropriate.

16. FORMS/REPORTS. Commandant (CG-00J) maintains records of complaints or allegations of professional misconduct in accordance with current Coast Guard directives.

17. GUIDANCE DISCLAIMER. This document is intended to provide operational requirements for Coast Guard personnel and is not intended to nor does it impose legally-binding requirements on any party outside the Coast Guard.



Hon. Parlen L. McKenna
Acting Chief Administrative Law Judge (CG-00J)
U.S. Coast Guard