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License Holder's Due Process Rights Were Not Violated By Attorney Prosecuting Matter Before State Board And Simultaneously Serving As An Advisor To That Board In An Unrelated Matter

In *Morongo Band of Mission Indians v. State Water Resources Control Board*, (--- Cal.Rptr.3d ---, Cal., Feb. 9, 2009), the California Supreme Court considered whether the constitutional rights of a water license holder were violated by the agency attorney prosecuting the revocation of the license holder's license before the State Water Resources Control Board while simultaneously serving as an advisor to that board in an unrelated matter. The Supreme Court held that the license holder's constitutional right to due process of law was not violated.

Facts

The State Water Resources Control Board ("Board") sought to revoke the license to divert water held by the Morongo Band of Mission Indians ("Morongo Band"). Board alleged that the Morongo Band "had failed to beneficially use the water for an extended period and had violated license terms by using the water for unauthorized purposes." Board notified the Morongo Band that Samantha Olson ("Olson") would be a member of the enforcement team prosecuting its case. The Morongo Band asked Board to disqualify the entire enforcement team on the ground that one or more enforcement team members had advised Board in other matters. The Morongo Band argued that the team members' dual enforcement and advisory roles created an appearance of unfairness and bias. The Morongo Band alleged, that during the license revocation proceeding, Olson was not only acting in a prosecutorial capacity in the revocation case, but also acting in an advisory capacity as a member of the hearing team in a separate matter regarding the American River that was before the Board.

A hearing officer denied the Morongo Band's request to disqualify the enforcement team. The Morongo Band filed a petition for writ of mandate alleging that the hearing officer had violated its due process rights by denying its

petition to disqualify the enforcement team. The trial court found that Olson should be disqualified from serving on the enforcement team and the Court of Appeal affirmed that decision.

Decision

The California Supreme Court reversed the decision of the Court of Appeal and found that the Morongo Band failed to show that its due process rights had been violated. Both the United States Constitution and the California Constitution provide that a person may not be deprived of life, liberty, or property, without due process of law. When "an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal," which means that the "judge or other decision maker is free of bias for or against a party."

Unless an adjudicator has a financial interest in the outcome of the proceedings, he or she is presumed to be impartial. The Morongo Band presented no evidence that either Board or its members are prejudiced against it. Instead, the Morongo Band argued that an agency attorney who is prosecuting a license revocation and at the same time advising the adjudicator in a separate and unrelated matter will be biased in favor of the prosecuting agency. The Supreme Court disagreed and found that "any tendency for the agency adjudicator to favor an agency attorney acting as a prosecutor because of that attorney's concurrent advisory role in an unrelated matter is too slight and speculative to achieve constitutional significance."

The fact that the investigative, prosecutorial, and adjudicatory roles are combined within a single administrative agency does not, by itself, "create an unacceptable risk of bias." To ensure impartiality of administrative adjudicators, the California Administrative Procedures Act "generally prohibits ex parte

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communications . . . and requires 'internal separation of functions.'" The Act, however, only requires "the internal separation of prosecutorial and advisory functions on a case-by-case basis," and "does not prohibit an agency employee who acts in a prosecutorial capacity in one case from concurrently acting in an advisory role in an unrelated case."

An agency head may speak to anyone in the agency to receive advice, except for the employees that served as adversaries in a specific case. The agency head can also speak to the prosecutor about settling or dismissing a case. The prosecutor, however, cannot communicate with the agency's decision maker about the substance of a case.

The Court of Appeal had held that an administrative agency's internal separation of functions must be complete as to all cases, even those that are unrelated, that are pending before an agency at any given point in time. The Supreme Court disagreed and held, "In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." Unless evidence to the contrary is brought forth, the Court will "remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions."

Here, there was no evidence that Olson or any other Board attorney acted in both a prosecutorial and advisory role in a single administrative proceeding or that Olson was the Board's sole or primary legal advisor. The facts establish only that Olson had advised Board in a matter unrelated to the Morongo Band's license revocation proceeding. Because the Morongo Band failed to present evidence of bias, the Court concluded that it failed to show that its right to due process was violated.

Questions

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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