

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431  
(614) 387-9370 (888) 664-8345 FAX: (614) 387-9379  
www.sconet.state.oh.us

OFFICE OF SECRETARY

## **OPINION 2006-6**

Issued June 9, 2006

### ***Withdrawn by Adv. Op. 2023-06***

***[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]***

**SYLLABUS:** A CSEA staff attorney may not represent the state in a contempt action filed against a party for failure to abide by a court order involving a CSEA matter in which that staff attorney issued administrative orders as a CSEA administrative hearing officer. A CSEA staff attorney may not represent the state in any other action involving a CSEA matter in which that staff attorney participated as the CSEA hearing officer making determinations or issuing administrative orders. A CSEA staff attorney is not barred from representing the state in an action solely because a party in the action is a person who once appeared before that staff attorney who served as the administrative hearing officer.

**OPINION:** This opinion addresses questions regarding a CSEA staff attorney subsequently representing the state in actions involving matters in which the staff attorney served as the CSEA administrative hearing officer.

Is it proper for a CSEA staff attorney to represent the state in a contempt action filed against a party for failure to abide by a court order in a CSEA matter in which that staff attorney served as the CSEA administrative hearing officer and issued an administrative order?

Is it proper for a CSEA staff attorney to represent the state in any other action involving a CSEA matter in which that staff attorney participated as the CSEA hearing officer making determinations or issuing administrative orders?

Is a CSEA staff attorney barred from representing the state in an action solely because a party in the action is a person who once appeared before that staff attorney who served as the administrative hearing officer?

This inquiry raises several issues. One issue is the compatibility of a person serving in two public positions, an administrative hearing officer and a staff attorney for the same child support enforcement agency (CSEA).

A second issue is whether it is ethically proper under the Ohio Code of Professional Responsibility for an attorney to serve as a CSEA staff attorney in a matter in which that staff attorney had involvement as a CSEA administrative hearing officer.

A third issue is whether it is proper under Ohio Ethics Law for an attorney to serve as a CSEA staff attorney in a matter in which that staff attorney had involvement as a CSEA administrative hearing officer.

The first and third issues cannot be addressed by this Board. Advisory authority as to compatibility of public positions lies with the Office of the Ohio Attorney General. See e.g., OAG Op. 2005-022 (regarding whether a person may serve as a part-time administrative hearing officer for a county child support enforcement agency and a part-time magistrate of a court of common pleas in an adjacent county); OAG Op. 2002-039 (2002) (regarding whether the positions of a CSEA staff attorney and member of a county children services board within the same county are compatible); OAG Op. 97-044 (1997) (regarding whether a person may hold simultaneously the positions of assistant county prosecuting attorney and administrative hearing officer for a child support enforcement agency). Advisory authority as to the application of Ohio Ethics Law for public officials and employees lies with the Ohio Ethics Commission.

Only the second issue is addressed herein. Advisory authority as to application of the Ohio Code of Professional Responsibility properly lies with this Board. See Gov.Bar R. V §2(C). See also Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 90-10(1990) (regarding various ethical questions involving CSEA attorneys).

Administrative officers are hired by a child support enforcement agency "to issue administrative orders determining the existence or nonexistence of a parent and child relationship, requiring the payment of child support or, both." Ohio Rev.Code Ann. §3111.53 (West 2005). CSEA administrative officers are commonly referred to as hearing officers.

OAC 5101:1:32:01(B) The administrative officer's duties shall include, but not be limited to, issuing orders pertaining to paternity including genetic tests and support in accordance with sections 3111.21, 3111.38 and Chapter 3119. of the Revised Code. The officer may schedule and conduct conferences and hearings related to issues of paternity and the payment of support to include review and adjustment and mistake of fact hearings along with other administrative duties as determined by the CSEA director.

Administrative orders or determinations by a CSEA administrative hearing officer are a significant exercise of authority in a CSEA matter. An administrative order or determination by a CSEA administrative hearing officer becomes a final court order unless an action to contest the order or determination is brought by the parties. As an example, an administrative determination by an

administrative hearing officer as to the existence or nonexistence of a parent and child relationship becomes a final and enforceable order of a court unless the mother, alleged father, guardian, or legal custodian of the child brings an action within a prescribed time period. Ohio Rev.Code Ann. §§ 3111.46, 3111.48, 3111.49 (West 2005). As another example, an administrative order issued by a CSEA administrative hearing officer for the payment of support and provision of a child's health care becomes a final court order unless an action is filed by the mother or father within a prescribed period of time. Ohio Rev.Code Ann. §§ 3111.80, 3111.81, and 3111.84 (West 2005). See also, OAC 5101:1:32-01(C) ("In any administrative determination, the person(s) who is the subject of the process has the right to a notice and a right to contest the administrative determination to a judicial authority within a specified time limit.")

Staff attorneys may be hired by a CSEA "to advise, assist, and represent the agency in performance of its functions pertaining to the enforcement of support orders." Ohio Rev.Code Ann. § 3125.17 (West 2005). A CSEA staff attorney might be called upon to represent the state in a court action brought by a person challenging an administrative hearing officer's determination or order, or to represent the state in a civil proceeding involving in a CSEA matter, such as a contempt action filed for failure to abide by a final court order.

Pursuant to DR 102(A)(5), DR 9-101(A), DR 9-101(B), and DR 9-101(C), a CSEA staff attorney may not represent the state on matters in which that staff attorney participated as a CSEA administrative hearing officer making administrative determinations or issuing administrative orders.

Under DR 1-102(A)(5), an attorney is prohibited from engaging in conduct prejudicial to the administration of justice. The proper administration of justice requires that the same individual does not issue administrative orders or determinations and subsequently represent the state in matters related to those orders or determinations.

Under Canon 9, an attorney is instructed to avoid even the appearance of impropriety. DR 9-101(A) states that "[a] lawyer shall not accept private employment in a matter upon the merits of which he [she] has acted in a judicial capacity." DR 9-101(B) states that "[a] lawyer shall not accept private employment in a matter in which he [she] had substantial responsibility while he [she] was a public employee." Both of these rules apply. An administrative hearing officer is not a judge, but performs a quasi-judicial role in hearing child support matters. An administrative hearing officer is a public employee.

Both DR 9-101(A) and DR 9-101(B) explicitly restrict the acceptance of private employment, but implicitly and logically also restrict the acceptance of some public employment in matters in which an attorney acted upon the merits or in matters in which he or she had substantial responsibility. Under these rules, it is improper for the same individual who issues administrative orders or determinations in a matter to subsequently represent the interests of the state in actions related to those orders or determinations. When an attorney serving as a CSEA administrative hearing officer participates in a matter, renders a

determination, or issues an administrative order, he or she is considered to have exercised substantial responsibility and or acted upon the merits.

DR 9-101(C) states that “[a] lawyer shall not state or imply that he [she] is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.” Serving as a CSEA staff attorney in an action involving a matter in which the attorney participated as the CSEA administrative hearing officer may imply that the attorney would bear improper influence upon a tribunal hearing the action.

A CSEA staff attorney is not barred from the representing the state in an action solely because a party in the action is a person who once appeared before him or her as a CSEA hearing officer. Over time, the same person may be the subject of several distinct child support matters. In deciding whether representation of the state is proper in a CSEA matter, the ethical determination is whether the CSEA staff attorney while serving as a CSEA administrative hearing officer had substantial responsibility in the matter or acted upon the merits of the matter, such as by participating in the matter, rendering a determination, or issuing an administrative order. This determination will depend upon the facts and circumstances.

In conclusion, the Board’s advice is follows. A CSEA staff attorney may not represent the state in a contempt action filed against a party for failure to abide by a court order involving a CSEA matter in which that staff attorney issued administrative orders as a CSEA administrative hearing officer. A CSEA staff attorney may not represent the state in any other action involving a CSEA matter in which that staff attorney participated as the CSEA hearing officer making determinations or issuing administrative orders. A CSEA staff attorney is not barred from representing the state in an action solely because a party in the action is a person who once appeared before that staff attorney who served as the administrative hearing officer.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney’s Oath of Office.**