



LABOR AND EMPLOYMENT

**Administrative Hearing Officers:
Impact of the Haas Case**

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A public agency may not unilaterally select and pay an administrative hearing officer on an ad hoc basis where the hearing officer’s income from future work depends entirely on the public agency’s good will, the California Supreme Court held in *Haas v. County of San Bernardino*, 27 Cal.4th 1017 (2002). Many public agencies have rules allowing for this method of selecting a hearing officer for employee discipline appeals (as well as license revocations, code enforcement, parking ticket appeals, and other administrative proceedings). All public agencies should review their appointment and selection procedures to assure that they are consistent with the limitations imposed by Haas.

BACKGROUND

Theodore L. Haas operated a massage clinic under a license issued by San Bernardino County. The County revoked the license when a deputy sheriff reported that an employee at the clinic had solicited an act of prostitution. Haas appealed the revocation. The ordinance allowed the County Board of Supervisors to conduct the hearing or to appoint a hearing officer. In practice, the Board used hearing officers and generally delegated the selection of hearing officers to the County Counsel. The Deputy County Counsel who presented the County’s case contacted and selected a local attorney to serve as the hearing officer. The County compensated the hearing officer personally for the work actually performed, using the same rate the County

Counsel charged internally. While there was no definite arrangement, the Deputy County Counsel confirmed, in the presence of the hearing officer, that the County foresaw employing the hearing officer in the future on an ad hoc basis.

**THE CONSTITUTIONAL REQUIREMENT: AVOIDING
BIAS FROM AN IMPERMISSIBLE FINANCIAL
INTEREST**

The critical issue the Court identified in this type of unilateral appointment is the financial or “pecuniary” interest of the hearing officer in future hearing work for the public agency. While the rules on disqualification of administrative hearing officers are often more flexible than those involving judges, the rules are not more flexible when it comes to financial interest, according to the Court. “Of all of the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal and least forgiving scrutiny.”

The hearing officer in Haas had an impermissible financial interest in the outcome of the hearing. The impermissible interest arose from the prospect of future employment from the County, measured against the applicable constitutional standard of a “possible temptation to the average [person] as a judge...not to hold the balance nice, clear and true.” Stated differently, in a close case, a hearing officer might be tempted to give the benefit of the doubt to a source of potential future employment. The use of such a hearing officer in instances where a hearing is required violates a party’s constitutional due process right to an impartial adjudicator.





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The Court was also careful to note that not all questions of bias or issues of judicial qualification rise to the level of constitutional significance. Adjudicators challenged for personal bias based on political views or associations may enjoy a presumption of impartiality requiring a showing of actual bias. In contrast, financial interest only requires the showing of a potential for or a probability of actual bias.

Finally, it was the combination of factors involved in the County’s procedures, not individual factors taken in isolation, which led to the Court’s conclusion. “Neither payment nor selection, considered in isolation, is the problem.” Due process does not prohibit a public agency from paying a hearing officer, nor does the constitution generally give the affected person a right to select the hearing officer.

ALTERNATE PROCEDURES

No particular procedure or set of rules is required. Instead, according to the Court, all a public agency needs to do is exercise its authority in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the public entity. However, the Court did suggest several procedures that might help to eliminate the risk of bias:

- Adopt a rule that no person appointed on an ad hoc basis after a predetermined period of time long enough to eliminate any temptation to favor the public agency. However, as Justice Brown notes in her dissent, it is unclear how long is long enough.

- Appoint a panel of attorneys to hear cases under a pre-established rotation system.
- Contract with the State for the services of an administrative law judge.
- For counties, establish and staff the office of the county hearing examiner that is authorized by statute.
- Other public agencies could contract with a county that has established such an office.

Other possibilities suggested by the Haas case include:

- City councils or local boards, agencies, commissions or committees could conduct the hearing and decide cases. In this regard, Haas does not invalidate the use of personnel commissions, civil service commissions and similar bodies, subject to other laws and rules that may apply such as the Political Reform Act or local ethics rules.
- A group of local agencies could establish a panel of experts in a particular subject area and establish a selection procedure that avoids the public agency’s unilateral decision (e.g. random draw, rotation, or a list where each side takes turns striking names).
- Use of an appropriate local agency employee, while controversial, is not prohibited by the Haas decision provided the employee’s future employment and compensation are not affected by the outcome of the hearing or future hearing assignments. However, some view this as a risky option, at best.



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CONCLUSION

All public agencies and their legal counsel should review their procedures for appointing hearing officers. When possible in pending cases, it may be advisable to seek a stipulation on the record if the party whose interests are at stake does not object to the hearing officer.

For future cases, some adjustment of appointment procedures may be needed. The Supreme Court has left local agencies with many options and the Haas decision can be accommodated with a little forethought.

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