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Legal Summaries

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Legal Summaries*

Table of Cases

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

ALASKA STATE COURT

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* Prepared by the Legal Summaries Editor of the Journal of the National Association of Administrative Law Judges at Pepperdine University School of Law. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.

TABLE OF CASES (CONT.)

UNITED STATES SUPREME COURT

Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003).

LAW: ERISA does not require plan administrators to accord special deference to opinions of treating physicians.

FACTS: Kenneth Nord was formerly employed by a Black & Decker subsidiary as a material planner. His job was classed "sedentary" and required up to six hours of sitting and two hours of standing or walking per day. The Black & Decker Disability Plan ("Black & Decker") is an ERISA-governed employee welfare benefit plan that provides benefits for eligible employees with a disability. Disability determinations are to be made based on suitable medical evidence and a review of the participant's employment history that the administrator "deems satisfactory in its sole and absolute discretion." Nord submitted a claim for disability benefits which was denied. At the review stage, Nord submitted letters and supporting documentation from his physician, Dr. Hartman, and a treating orthopedist to whom Hartman had referred Nord. These treating physicians stated that Nord suffered from a degenerative disc disease and chronic pain that rendered him unable to work. Black & Decker referred Nord to a neurologist for an independent examination. The neurologist concluded that, aided by medication, Nord could perform sedentary work. The administrator recommended that Nord's claim be denied, which Black & Decker accepted. Nord filed this action under ERISA seeking to overturn the decision, claiming that ERISA plan administrators must follow a "treating physician rule." Under said rule, if a plan administrator rejects the opinions of a treating physician, it must come forward with specific reasons for its decision. The Ninth Circuit found that the plan administrator had not provided adequate justification for rejecting the opinions of the treating physicians.

ANALYSIS: The treating physician rule imposed by the Ninth Circuit was originally developed by Courts of Appeals as a means to control disability determinations by administrative law judges under the Social Security Act. Nothing in the ERISA regulations, however, suggests the plan administrators must accord special deference to the opinions of treating physicians, nor does it impose a heightened burden of explanation on administrators when rejecting a treating physician's opinion. The Secretary of Labor has not adopted such a rule and the *amicus* brief reflecting the Secretary of Labor's position opposes adoption of such a rule for disability determinations under ERISA. Whether such a rule should apply is a question for the Legislature, not the courts. Plan administrators may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of a treating physician. But, courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician, nor may courts impose on administrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation.

HOLDING: Because the treating physician rule lacked endorsement by the Department of Labor, the Court of Appeals erred in imposing such a rule. The judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for further proceedings.

IMPACT: The Supreme Court limits the discretion that lower courts have in fashioning a remedy under ERISA regulations. Since the treating physician rule is not adopted in the regulations, it should not be employed unless endorsed by the Secretary of Labor and then it would be reviewed by the courts. Without such an endorsement, this rule must be added by the Legislature if it is to be used.

City of Los Angeles v. David, 538 U.S. 715 (2003).

LAW: A thirty day delay in holding a hearing for a parking violation does not violate the Due Process Clause of the Constitution.

FACTS: An officer of the city of Los Angeles Department of Transportation ordered Edwin David's automobile towed from a spot where parking was forbidden. After paying $134.50, David recovered his car. David, believing that the trees obstructed his view of the "no parking" sign, requested a hearing to recover the money. Twenty-seven days after the vehicle was towed, the city held the hearing and denied David's claim. David brought this lawsuit in federal district court arguing that the city, in failing to provide a sufficiently prompt hearing, had violated his federal right to due process of law. The District Court granted summary judgment for the city; but the Ninth Circuit Court of Appeals reversed, holding that the Constitution required the city to provide an earlier payment-recovery hearing, perhaps within forty-eight hours, and at least within five days.

ANALYSIS: The Court considered three factors in determining whether the delay violated due process of law. The first factor is the private interest that will be affected by the official action. In the instant case, the private interest is monetary – his interest in maintaining the use of money between the time of paying the impoundment and towing fees and the time of hearing. Since any loss in the time value of money can be compensated by an interest payment, the private interest here does not meet the requisite harm. Second, the Court looks at the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards. A thirty day delay in presenting evidence is unlikely to spawn significant factual errors. Most administrative and judicial proceedings take place after considerably more time has elapsed. Finally, the Court considered the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. The nature of the city's interest in delay is one of administrative necessity, since it conducts more than one thousand vehicle impound hearings annually. Because it takes time to organize the hearings and resources are limited, imposing a 48-hour (or five day) time limit would prove overly burdensome.

HOLDING: The thirty day delay in holding a hearing here reflects no more than a routine delay substantially required by administrative needs. The Ninth Circuit's judgment is reversed.

IMPACT: The Supreme Court recognizes the limitations of state resources and gives local administrative bodies leeway in conducting its hearings.

FCC v. NextWave Personal Communications, Inc., 537 U.S. 293 (2003).

LAW: Section 525 of the Bankruptcy Code prohibits an agency from canceling licenses held by a bankruptcy debtor upon the debtor's failure to make timely payments to that agency for purchase of the licenses.

FACTS: In an FCC auction, NextWave Personal Communications, Inc. ("NextWave") bid on and was awarded personal communications services licenses, payable in installments. NextWave made a down payment on the purchase prices, signed promissory notes for the balance, and executed agreements giving the FCC a first lien on, and security interest in the licenses. The agreements recited that they were conditioned on the full and timely payment of all moneys due the FCC, and that failure to comply with this condition would result in their automatic cancellation. NextWave eventually filed for Chapter 11 bankruptcy protection and suspended payments to all creditors, including the FCC, pending confirmation of its reorganization plan. The FCC objected to the plan, asserting NextWave's licenses had been canceled automatically when the company missed its first payment deadline, and announced that NextWave's licenses were available for auction. The District of Columbia Circuit Court held that the cancellation violated 11 U.S.C. § 525(a).

ANALYSIS: The Court rejected the FCC's argument that the FCC did not revoke NextWave's licenses "solely because" of nonpayment under § 525. The fact that the FCC had a valid regulatory motive for its action is irrelevant. The failure to pay a dischargeable debt must alone be the proximate cause of the cancellation. Further, the Court rejects the contention that regulatory conditions like full and timely payment are not properly classified as "debts." The plain meaning of a "right to payment" is nothing more nor less than an enforceable obligation. Therefore, any debt (such as the one to the FCC) that arose before the confirmation of a reorganization plan is dischargeable. Finally, there is no conflict with the Communications Act by obstructing the functioning of that Act's auction provisions. Nothing in those provisions demands that cancellation be the sanction for failure to make agreed-upon periodic payments or even requires the FCC to permit payment to be made over time.

HOLDING: Section 525(a) of the Bankruptcy Code prohibits the FCC from revoking licenses held by a bankruptcy debtor upon the debtor's failure to make timely payments to the FCC for purchase of the licenses. The decision of the Court of Appeals is affirmed.

IMPACT: The Supreme Court applies the provisions of the Bankruptcy Code to the contract between the FCC and NextWave even if it was beyond the bankruptcy court's jurisdictional authority to alter or modify regulatory obligations. This decision affords great protection to debtors who file for Chapter 11 bankruptcy.

Meyer v. Holley, 537 U.S. 280 (2003).

LAW: The Fair Housing Act provides for vicarious liability against the corporation, but not its owner or officer, for the torts of its employees or agents.

FACTS: The Holleys, an interracial married couple, tried to buy a house listed for sale by Triad, a real estate corporation. A Triad salesman is alleged to have prevented the Holleys from buying the house for racially discriminatory reasons. After filing suit in federal court against the salesman and Triad, the Holleys filed a separate suit against Meyer, Triad's president, sole shareholder, and licensed "officer/broker," claiming that he was vicariously liable in one or more of these capacities for the salesman's unlawful actions. The District Court consolidated the lawsuits and dismissed the claims against Meyer because it believed that the Fair Housing Act did not impose personal vicarious liability upon a corporate officer. The Ninth Circuit reversed, holding that the Act imposes strict liability principles beyond those traditionally associated with agent/principal or employee/employer relationships.

ANALYSIS: The court determined that, although the Act says nothing about vicarious liability, it is well established that it provides for such liability. Traditional vicarious liability rules ordinarily make principals or employers vicariously liable for the acts of their agents or employees in the scope of their employment. Such silence by the statute on the issue cannot show that Congress intended to apply an unusual modification of those rules. Further, the Department of Housing and Urban Development ("HUD"), the agency charged with the Act's implementation and administration, has specified that ordinary vicarious liability rules apply in this area, and the Court should defer to an administering agency's reasonable statutory interpretation.

HOLDING: The Act imposes liability without fault upon the employer in accordance with traditional agency principles. The decision of the Ninth Circuit Court of Appeals is vacated and remanded for further proceedings.

IMPACT: When a statute is silent on an issue, the administering agency's interpretation will be given great weight when being reviewed by the courts. This decision affords administering agencies great power in interpreting statutes.

Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803 (2003).

LAW: This decision did not determine any controversy over the meaning of the law, but rather determined that the controversy was not yet ripe for judicial resolution.

FACTS: After Congress enacted the National Parks Omnibus Management Act of 1998 ("1998 Act"), establishing a comprehensive concession management program for national parks, the National Park Service ("NPS") issued an implementing regulation, 36 CFR § 51.3 (2002) ("§ 51.3"), that purported to render the Contract Dispute Act ("CDA"), a statute that established rules governing disputes arising out of certain government contracts, inapplicable to concession contracts. The National Park Hospitality Association, a concessioners' association, challenged the validity to this regulation on its face. The District Court upheld the regulation, concluding that the CDA is ambiguous on whether it applies to concession contracts and finding NPS' interpretation reasonable under the Chevron test. The District of Columbia Circuit affirmed, placing no reliance on Chevron, but finding the NPS' reading of the CDA consistent with both the CDA and § 51.3.

ANALYSIS: The Supreme Court looked to whether this controversy was ripe for judicial review by evaluating (1) the issues' fitness for judicial decision and (2) the hardship to the parties of withholding court consideration. Since NPS has no delegated rulemaking authority under the CDA, § 51.3 is not a legislative regulation with the force of law. Neither is § 51.3 an interpretative regulation advising the public of the agency's construction of the statute because the NPS is not empowered to administer the CDA. The Court determined that § 51.3 is nothing more than a general policy statement designed to inform the public of the NPS' views on the CDA's proper application. Thus, § 51.3 does not create "adverse effects of a strictly legal kind," which are required for a hardship showing. Moreover, § 51.3 does not affect a concessioner's primary conduct, as it leaves the concessioner free to conduct its business as it sees fit. Should a dispute arise, there is nothing in the regulation that prevents concessioners from following the procedures set forth in the CDA. Mere uncertainty as to the validity of a legal rule does not constitute hardship for the purposes of the ripeness analysis. As to whether the issue is fit for review, further factual development would "significantly advance this court's ability to deal with the legal issues presented, even though the question is 'purely legal' and § 51.3 constitutes 'final agency action' under the APA."

HOLDING: Judicial resolution of the question presented should await a concrete dispute about a particular concession contract. The decision of the lower courts is vacated and remanded.

IMPACT: If an agency has not been delegated rulemaking authority or the power to administer a specific statute, any regulations it sets forth regarding the applicability of another statute is nothing more than a "general statement of policy" that can only serve to inform the public of its views on the proper application of that statute. Such a regulation carries no weight or persuasive authority when being reviewed by the courts.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Local Joint Executive Bd. of Las Vegas v. NLRB, 309 F.3d 578 (9th Cir. 2003).

LAW: In order for a board's decision to be upheld, it must present a reasoned explanation to support its order.

FACTS: The employers and the union had collective bargaining relationships for more than thirty (30) years. The employers had separate, but substantially identical, agreements with the union. The most recent agreements contained a dues-checkoff provision under which the Employers agreed to deduct union dues directly from employee paychecks and remit to the union. The Board determined that the union had a contractual right to such checkoffs so long as the contracts remained in force. Thus, "when the contracts terminated, the [employer] was free of its checkoff obligation to the Union." However, under the "unilateral change doctrine," as set forth in NLRB v. Katz, 369 U.S. 736 (1962), an employer's obligation to abide by the terms of a contract survives expiration of the contract before bargaining for a new agreement or impasse. The Board relied on Bethlehem Steel Co. v. NLRB, 320 F.2d 615 (3d Cir. 1963), that involved a union contract containing a union security provision and a dues checkoff provision, unlike the instant case that only had a dues checkoff provision. The Board cited numerous Board and court cases citing the holding of Bethlehem Steel for the proposition that an employer's checkoff obligation does not survive the contract created the obligation. However, no analysis is made in the absence of a union security provision. Therefore, the issue is whether the dues checkoff provision, unaccompanied by a union security provision, survives the expiration of the contract.

ANALYSIS: The court reasoned that "[a]lthough a Board rule may become 'well established' through repetition, it may 'come to stand for' a legal rule only through reasoned decisionmaking." The Board failed to offer an explanation, beyond that provided in Bethlehem Steel, for excluding dues-checkoff from the unilateral change doctrine in the absence of union security. The court found that the Board's finding --- that the dues-checkoff arrangement implemented the union security provision --- created substantial ambiguity in the rationale underlying Bethlehem Steel's holding regarding dues-checkoff. The court's reasoning in Bethlehem Steel was that the right to require union membership as a condition of employment is dependent upon a contract which the meets the statutory standards. The checkoff is merely a *means of implementing* union security. Here, since the collective bargaining agreements between the Employers and the union do not contain union security provisions, the Board's reasoning would not support the rules that it applies in this case.

HOLDING: The court could not discern the Board's rationale for its rule and therefore vacated the Board's decision and remand so that the Board can articulate a reasoned explanation for the rule it adopted or adopt a different rule and present a reasoned explanation to support it.

IMPACT: This decision forces the National Labor Relations Board to present well-reasoned analyses for its decisions. The Board is not granted wide deference to make decisions without providing legal support. This decision underscores the responsibility that Board members have in decisionmaking.

Idaho Watersheds Project v. Hahn, 307 F.3d 815 (9th Cir. 2002).

LAW: The district court may impose interim measures without holding an evidentiary hearing depending on the facts of the case.

FACTS: Idaho Watersheds Project and Committee for Idaho's High Desert ("Environmental Groups") brought suit in federal district court alleging a violation of the National Environmental Policy Act ("NEPA") by the Bureau of Land Management ("BLM") in the exercise of its power to issue grazing permits to cattle ranchers on federal lands in the Owyhee Resource Area ("Owyhee"). The BLM is responsible for managing the Owyhee and is required to consider the environmental impact of its actions, such as issuing permits on livestock grazing. In 1981, the BLM adopted a master plan to guide its management of the Owyhee. In 1995, major changes were made to the grazing regulations including a new requirement that all ranchers grazing cattle in the Owyhee obtain a grazing permit and undergo an annual reauthorization. As a result of these changes, most ranchers needed new multi-year permits because they either did not hold a permit or their permit had expired. The BLM issued sixty-eight permits to ranchers and the Environmental Groups filed suit. The district court found that the BLM violated NEPA by not preparing required environmental documentation before issuing the permits. It granted a permanent injunction imposing interim conditions on grazing and imposing a timetable for the BLM to issue new permits in compliance with NEPA.

ANALYSIS: The court reasoned that the BLM was the party that proposed the interim measures and much deference is shown to factual and technical determinations made by the agency with substantial expertise. Further, since the measures were only interim and not permanent, it would be inefficient to require the district court to conduct an extensive inquiry in order to support interim measures that are designed to *temporarily* protect the environment while the BLM conducts studies in order to make the very same scientific determinations. While the BLM is conducting environmental studies, the Ranchers and Environmental Groups will be given adequate opportunity to give input as to what measures should be implemented permanently and then they can challenge the outcome in court if necessary.

HOLDING: Because the interim measures are designed to allow for a process to take place which will determine permanent measures, and all parties will have adequate opportunity to participate in the determination of permanent measures, an evidentiary hearing is not required on the facts of this case.

IMPACT: This decision gives great discretion to the district court in fashioning a remedy, specifically interim measures. The court's remedy is quite practical in that there is no need to undergo the very same scientific studies twice to determine both interim and permanent measures. Experts can duel it out when determining permanent measures, but the court has the discretion to forego these efforts when issuing a temporary remedy.

ALASKA STATE COURT

Brandon v. State, 73 P.3d 1230 (Alaska 2003).

LAW: Under Alaska law, charges of high-moderate infractions do not guarantee a three-person panel to preside over the disciplinary proceeding. Absent some showing of impartiality or constitutional violation, a single hearing officer may hear the case.

FACTS: Richard Brandon, an inmate at a correctional facility in Seward, Alaska, was searched and found to have tobacco in his pocket, in violation of the Alaska Administrative Code. He was charged with what amounted to a "high-moderate" infraction, and the disciplinary hearing was conducted by a single hearing officer. Brandon called no witnesses and conceded his possession of the tobacco, but pled not guilty and argued only that he should have been charged with a lesser infraction. He was found guilty and sentenced to fifteen days of punitive segregation. Brandon appealed his conviction to the correctional facility superintendent on the sole ground that his hearing had been conducted by a single hearing officer instead of the three-member committee required by the administrative code in force at the time of his infraction and hearing. His appeal was rejected by the superintendent and he then appealed to the superior court claiming violations of his state and federal constitutional rights. Again, the conviction was upheld and Brandon has sought final review by the Alaska Supreme Court.

ANALYSIS: The court rejected Brandon's appeal, reasoning that a three-member hearing body is required for major infractions, but not for lesser infractions. The court has never specifically addressed what process is due in proceedings involving less than major infractions. Because single hearing officers are not presumed to be biased in prison disciplinary proceedings, and because Brandon offered no specific allegations of bias or explanation of why a high-moderate infraction requires adjudication by a committee instead of a single hearing officer, the court held that Brandon has not shown a violation of his constitutional rights. Further, the fact that the Department of Corrections failed to follow its own regulations does not amount to a due process violation. The proposition that an administrative agency must follow its own regulation is a proposition of administrative law, not constitutional law. The Alaska statute specifically distinguishes between failures to follow regulations in Department of Corrections disciplinary hearings that result in constitutional violations and those that do not. Since Brandon has not demonstrated that his constitutional rights were violated, the statute does not permit reversal.

HOLDING: Because Brandon did not show any violation of his constitutional rights or any substantive prejudice arising from the Department of Correction's alleged failure to follow its own regulations, the decisions of the Department of Corrections are affirmed.

IMPACT: The court gives great deference to the Department of Corrections in determining how it will conduct disciplinary proceedings. Absent some showing of prejudice or violations of constitutional rights, it is likely that the Department of Corrections procedures will be upheld.

CALIFORNIA STATE COURT

Nightlife Partners, Ltd. v. City of Beverly Hills, 133 Cal. Rptr. 2d 234 (Cal. Ct. App. 2003).

LAW: The protections of procedural due process require a fair hearing before an unbiased decision maker in administrative proceedings. Where counsel acts as an advocate in a given case, he or she is precluded from advising a decisionmaking body in the same case.

FACTS: Nightlife Partners, Ltd. owns and operates adult entertainment establishments in Beverly Hills, California in accordance with the regulatory permit required by the city's municipal code. Nightlife filed a petition for a writ of administrative mandate seeking relief from an order denying its renewal application for an adult entertainment regulatory permit. At the hearing where Nightlife was denied the permit, the hearing officer was assisted by an assistant city attorney who had represented the city in its initial denial of Nightlife's permit renewal application. In the hearing officer's declaration in opposition to Nightlife's mandamus petition, he denied that he was biased, but failed to respond to the claim that he was assisted during the hearing by the city attorney. The trial court refused to admit the declaration into evidence and granted the petition, determining that Nightlife's due process rights had been violated. The trial court ordered the city to grant Nightlife a new hearing. The California Court of Appeal modified the order to direct that the new hearing not be conducted by the original hearing officer nor by any person who had served as the city's advocate in this or any related case. It otherwise affirmed the trial court's ruling.

ANALYSIS: The court reasoned that since there was a combining of the functions of advocacy and adjudication by a single individual, Nightlife's procedural due process rights were violated. Under the abuse of discretion standard of review, the court of appeal invoked its power to review evidence not in the body of the record since the claim on appeal is one of procedural unfairness. The court examined the possible *ex parte* contacts between the hearing officer and the city attorney, which was not available in the court record. The court determined that the trial court abused its discretion in refusing to admit the hearing officer's declaration and that an inference was created by his omissions in the declaration that he was assisted by the city attorney. Since the dual functions were not held by different sections of a single office, but rather a single individual, such assistance to the hearing officer is improper. Further, there was no procedure in place that automatically prevented the hearing officer's decision from being the final decision, absent some action and expense on the part of the applicant.

HOLDING: Affirmed as modified. The confounding of advocacy and adjudicative functions, without procedural safeguards in place, is violative of applicants' due process rights.

IMPACT: The court narrows the longstanding rule that the combination of investigative and adjudicative functions, standing alone, does not create a due process violation in the absence of some showing of bias. The court stated that when prosecutory and adjudicative functions are so closely combined, it is a violation of due process, even though previous courts had somewhat relaxed the procedural due process standard in such cases. Without procedural safeguards in place, an individual acting as an advocate and advisor to the hearing officer will render the proceeding unconstitutional.

S. Cal. Edison Co. v. Peevey, 74 P.3d 795 (Cal. 2003).

LAW: A stipulated judgment between two parties that would only *maintain* current utility rates did not violate section 454 of the California Public Utilities Code, even though no public hearing was held and there was no issuance of findings.

FACTS: Electric public utility brought an action for injunctive and declaratory relief against Commissioners of California Public Utilities Commission ("PUC"), claiming that PUC's refusal to increase retail rates as its wholesale power costs rose was preempted by federal law. The federal district court granted permissive intervention to a nonprofit utility reform organization, but denied motions to intervene by wholesale generators of electricity, trade association for local manufacturing, and technology companies. The court approved the stipulated judgment between the parties, which resulted in an appeal by the nonprofit organization and proposed interveners. Upon appeal, the Ninth Circuit Court of Appeals certified to the California Supreme Court the question of whether the stipulated judgment violates section 454 of the Public Utilities Code by altering utility rates without a public hearing and issuance of findings.

ANALYSIS: The court reasoned it need not determine the question of whether a stipulated judgment to alter rates would be violative of section 454 because the judgment entered into did not change rates, but rather maintained the approved rates for a specified period. Section 454 contemplates a formal application for a "change" in rates or for alteration of some condition of services so as to create a "new rate," but an application merely to *maintain* a rate appears not within the statute's contemplation.

HOLDING: The California Supreme Court held that PUC's agreement to the settlement did not violate section 454's requirement that a rate change or new rate be justified by a showing and finding.

IMPACT: This decision gives the PUC greater autonomy in entering into settlement agreements. It limits the application of section 454 to a change in rates, rather than any action to maintain the current approved rate.

COLORADO STATE COURT

Venard v. Dep't of Corrections, 72 P.3d 446 (Colo. Ct. App. 2003).

LAW: When a board member serves as a direct adversary to complainant's counsel at the same time that she is sitting as a decision maker in complainant's case, there is an appearance of impropriety and it is abuse of discretion for the board to allow her to sit in the case.

FACTS: Complainant's employment was terminated by the Colorado Department of Corrections following the escape of three inmates from the prison where he worked. Following an investigation, the warden terminated complainant's employment for failing to comply with certain administrative regulations, including writing and submitting two false incident reports, for violating the staff code of conduct, and for intentionally assisting the inmates in escaping from the prison. Complainant appealed and the ALJ upheld the termination. The ALJ then filed the record with the board. After the board denied several of complainant's motions, he filed a motion for disqualification of one of the members of the board, which the board also denied. The board member whom complainant sought to disqualify sat as a decision maker in complainant's case while serving as adversary counsel to complainant's counsel in another matter. Disqualification of this board member was the issue on appeal.

ANALYSIS: The court reasoned that, under these circumstances, the board member's impartiality as a member of the tribunal could reasonably be called into question by the adversarial nature of her role as special assistant attorney general in a case in which complainant's counsel was her direct opponent.

HOLDING: The court of appeal vacated the order of the ALJ and remanded it to the board for further proceedings, without participation by the board member named in complainant's appeal.

IMPACT: This case sets a stringent standard for ensuring there is no appearance of impropriety in administrative hearings. Since a board member is treated like a judge, the same high standard applies to both. Even if there is no actual bias or conflict of interest by the board member, if her impartiality could reasonably be called into question, there is an appearance of impropriety which demands her disqualification.

MASSACHUSETTS STATE COURT

Covell v. Dep't of Soc. Servs., 791 N.E.2d 877 (Mass. 2003).

LAW: Evidence gleaned from hearsay sources can be enough to satisfy the substantial evidence test so long as that hearsay has an "indicia of reliability" and there is a sound basis for the decision made by the hearing officer.

FACTS: A school guidance counselor filed a report pursuant to the Massachusetts Administrative Code notifying the Department of Social Services of an allegation that Wayne Covell had sexually abused his teenaged stepdaughter, Linda. Following its investigation, the department decided that the allegation of abuse was supported and that Covell's name should be listed in the department's registry of alleged perpetrators. The matter was also referred to the office of the district attorney in accordance with the statute, and the district attorney brought a complaint against Covell alleging three counts of indecent assault and battery on a child. The department's decision to keep his name on the list was affirmed by a hearing officer and again by the superior court, and Covell appealed. While that appeal was pending, Covell was acquitted of the criminal charges. The appeals court was notified of his acquittal and deferred action on his appeal pending his application to reopen administrative proceedings and submit additional evidence gleaned at trial. Covell was granted a new hearing before a different hearing officer. At this hearing, Covell testified, but Linda did not.

However, Covell introduced most of the transcript from the criminal trial at which Linda, her mother and Covell had all testified. The hearing officer determined that there was reasonable cause to keep his name on the list, affirming the department's decision. Covell appealed, claiming that the hearing officer's decision was not supported by substantial evidence and that he is therefore entitled to reversal of the department's decision.

ANALYSIS: The court engaged in a detailed synopsis of the procedure by which a person's name is placed in the central registry and a component of that registry containing a list of alleged perpetrators. A decision to "support" an allegation does not mean that the department has made any finding with regard to the perpetrator of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that some caretaker did inflict abuse or neglect upon the child in question. When the investigation does identify a specific alleged perpetrator of a supported incident of abuse, there must be substantial evidence indicating that the alleged perpetrator was responsible for the abuse or neglect. The court explained that once the department has properly decided to support the report of abuse based on the "reasonable cause" standard, the listing of the alleged perpetrator is merely a matter of identification that does not impose a higher standard of proof on the underlying determination that the abuse occurred. To determine whether there was substantial evidence of the underlying abuse, there must be a complete transcript of the hearing. Covell only submitted part of the record, giving rise to the department's defense that Covell's substantial evidence argument should not be entertained in the absence of the entire hearing transcript. The court is convinced by this argument, but continues its analysis as if there was a complete transcript. The court determined that the detail and consistent nature of Linda's reports, her resistance to the suggestiveness of leading questions, and the absence of any motive or reason for her to make false allegations against Covell combined satisfy the substantial evidence test. Regardless of whether those statements were presented through hearsay sources, the test was met because that hearsay had an "indicia of reliability."

<u>**HOLDING:**</u> The court found that there was substantial evidence to support the hearing officer's decision to keep Covell's name in the central registry.

<u>**IMPACT:**</u> This decision gives great discretion to the hearing officer in determining what evidence can provide the basis for his or her decision. Since the substantial evidence test is such a low burden of proof, a hearing officer is only required to have a "sound basis" for his or her decision, which effectively grants wide latitude in decision-making.