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Utica Packing Co. v. Block, 781 F.2d 71 (6th Cir. 1986)

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UTICA PACKING CO. V. BLOCK
781 F.2d 71 (6th Cir. 1986)

Agency replacement of Judicial Officer improper decision rendered by replacement is voided

[Editor's Synopsis]

The Federal Meat Inspection Act, 21 U.S.C. §§ 601, et seq. (1982), authorizes the Secretary of Agriculture to suspend inspection services to a meat packer (thereby, in effect, suspending the meat packer's ability to conduct business) when, inter alia, a person responsibly connected with the packing company has been convicted of a felony. The Secretary may condition the suspension order, so as to be applicable only until the responsible felon has severed his employment.

The administrative review process used by the Department of Agriculture ("USDA") is unusual in one respect. When the Secretary charges a meat packer with having violated the act (as, for example, by employing a felon), the company has a right to a hearing before an Administrative Law Judge (ALJ) in accordance with customary administrative practice. The hearing is controlled by the Administrative Procedure Act.

However, in a departure from the general model, appeals from an ALJ's decision are not decided by the Secretary of Agriculture. Rather, the Secretary has appointed a "Judicial Officer" to review the decision of the ALJ and issue a final agency order, which is then subject to judicial review. In this respect, the Department of Agriculture resembles those agencies which utilize structurally independent review boards, with one important difference. The Judicial Officer has no tenure in that office. According to the government, the Judicial Officer serves at the pleasure of the Secretary, and may be replaced at will. Moreover, in Utica Packing, the Court of Appeals, by dictum, appears to agree that such is the Secretary's general power.

One Fenster, President and part owner of Utica Packing, was convicted of the felony of bribing a meat inspector. Following a hearing, an ALJ ordered withdrawal of meat inspection services unless Fenster divested himself of his interest in Utica and withdrew from management. The Judicial Officer affirmed and, noting that Fenster's crime went to the heart of the meat inspection program, refused to consider any extraneous mitigating circumstances. The District Court granted summary judgment to the USDA enforcing the Order. On further appeal, however, the Court of

Appeals reversed and remanded the case, directing the Judicial Officer to consider evidence in mitigation of the penalty imposed.

Upon remand, the Judicial Officer expressed strong disagreement with the Court of Appeals, stating that "any person who is convicted . . . of corruptly bribing a Federal meat inspector is unfit to receive Federal inspection, regardless of any mitigating circumstances". However, as directed by the Court, he did review the mitigating evidence: ethnic slurs of Fenster by one of the inspectors, Fenster's ill health, his desire to operate a clean plant, etc. Stating that he would give no weight to this evidence had it not been for the Court's direction, the Judicial Officer concluded that "if any felon convicted . . . of bribing a meat inspector is fit to receive Federal meat inspection", Fenster is. The Judicial Officer dismissed the complaint.

Under the USDA rules, the agency had ten days to apply to the Judicial Officer for reconsideration of the decision. In the alternative, the agency could immediately seek review in the District Court. USDA officials "violently disagreed" with the decision of the Judicial Officer dismissing the complaint, and had little hope for reconsideration. Accordingly, for the admitted purpose of improving their chances on reconsideration, the agency prosecutors caused the Judicial Officer to be removed, and replaced by the Secretary with another Judicial Officer. The second Judicial Officer was a non-lawyer. Accordingly, to assist him in reconsideration, he was assigned an attorney who worked on the staff of one of the USDA employees who had participated in the decision to replace the first Judicial Officer. Neither the second Judicial Officer nor his assigned attorney had any prior personal contact with the case. A petition for reconsideration was presented to them within ten days of the original Judicial Officer's decision dismissing the complaint. The new Judicial Officer, on reconsideration, ruled against Fenster and Utica. The District Court again granted summary judgment to the agency. The case then returned to the Court of Appeals. Chief Judge Lively, speaking for the panel, said:

* * *

> Utica and Fenster have presented a number of arguments for reversal, two of which require our consideration. In the first place, they contend that the actions of USDA violated the Administrative

Procedure Act, particularly 5 U.S.C. § 554(d), which provides in relevant part:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

The plaintiffs admit that Franke [the second Judicial Officer] performed no investigative or prosecuting functions in the Utica case. They argue, however, that the selection of Franke and Davis [Franke's staff attorney] by officials who were involved in the prosecution of the case violated the prohibition against prosecutors participating or advising in the decision of the second Judicial Officer. The Secretary counters that there was no violation of § 554(d) since neither Franke nor Davis had prior contact with the Utica case and no prosecutor or investigator participated as a judge.

The second basis for reversal urged by the plaintiffs is that the procedures followed by USDA in this case violated the due process guarantee of the Fifth Amendment. They assert that fundamental fairness was sacrificed to gain a desired decision from a hand-picked judge and that all appearance of fairness was 'shattered'. The plaintiffs point out that Campbell [the first Judicial Officer] was a career employee who was protected under the merit system and thus immune to departmental pressures (though he had no tenure in the position of Judicial Officer), whereas Franke, a political appointee, had no job protection and could be fired at will. In addition, they contend, the appointment of Davis, a subordinate of Kelly [an Associate General Counsel of USDA], guaranteed that the group who chose the 'option' of revocation and redelegation would have strong influence over the decision on reconsideration.

The Secretary responds that there is a presumption of honesty and integrity on the part of responsible officers and that the plaintiffs produced no evidence of any improprieties by Franke or Davis. He argues that the supervision of agency adjudicators by prosecutorial officers has been upheld and that

criminal cases involving blending of prosecutorial and judicial functions are not controlling in administrative settings.

III.

A.

Neither the court nor the parties have found a case with facts similar to those established by this record. This may be because very few federal agencies and departments have a position like the USDA Judicial Officer. He acts as delegee of the Secretary who appears to have total discretion in selecting and appointing the person to fill the position. While admitting that one of the reasons for removing Campbell and appointing Franke was to improve the chances of USDA on reconsideration, the Secretary asserts that the primary reason was that Campbell so 'grossly misinterpreted' this court's decision ordering a remand that he was incapable of exercising an objective review. Reduced to its essence this is a claim that the Secretary's delegation can be withdrawn before reconsideration any time he disagrees with the Judicial Officer's conclusions. Yet discovery in this case disclosed that Judicial Officers had made hundreds of decisions since 1940, and none had ever had his delegation revoked on this ground. If the Judicial Officer is to have stature as an independent decision-maker, this argument of the Secretary cannot be accepted.

B.

The actions of USDA in this case do not appear to have violated APA § 554(d). The clear purpose of this section is to separate the investigative and prosecutorial functions from the adjudicative function. Wong Yang Sung v. McGrath, 339 U.S. 33, 41, 70 S.Ct. 445, 450, 94 L.Ed. 616, modified, 339 U.S. 908, 70 S.Ct. 564, 94 L.Ed. 1336 (1950). We do not accept the Secretary's position that § 554(d) is to be read so narrowly that it applies only to cases where the same person acts as prosecutor or investigator and judge. However, so far as this record shows neither Franke nor Davis had any prior contact with the Utica case, and there was no showing that anyone in USDA actually influenced the decision on reconsideration. Nor was there any showing that either Franke or Davis was acquainted with ex parte information about the case.

By regulation USDA has specifically prohibited ex parte communications between investigators or prosecutors and the Judicial Officer.

> (a) At no stage of the proceeding between its institution and the issuance of the final decision shall the Judge or Judicial Officer discuss ex parte the merits of the proceeding with any person who is connected with the proceeding in an advocative or in an investigative capacity, or with any representative of such person: Provided, That procedural matters shall not be included within this limitation; and Provided further, That the Judge or Judicial Officer may discuss the merits of the case with such a person if all parties to the proceeding, or their attorneys have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

7 CFR § 1.151(a).

In Grolier Inc. v. Federal Trade Commission, 615 F.2d 1215, 1220 (9th Cir. 1980), the court stated the intention of Congress in adopting § 554(d) as follows:

> "We conclude that by forbidding adjudication by persons 'engaged in the performance of investigative or prosecuting functions,' Congress intended to preclude from decisionmaking in a particular case not only individuals with the title of 'investigator' or 'prosecutor', but all persons who had, in that or a factually related case, been involved with ex parte information, or who had developed, by prior involvement with the case a 'will to win'.

The focus under § 554(d) is on the past involvement of the adjudicator. Under the peculiar facts of this case we include both Franke and Davis within the term 'adjudicator' or 'judge' because of Franke's obvious reliance on Davis in all matters legal. In order for § 554(d) to cause disqualification where the adjudicator was not actually a prosecutor or investigator in the case or a factually related one, the person challenging his right to adjudicate has the burden of showing that some past involvement has acquainted him with ex parte information or engendered in him an unjudgelike 'will to win'. Id. at 1221. Though the

'redelegation' of Franke as Judicial Officer was invalid for other reasons the plaintiffs did not make this showing and we do not believe the move violated the Administrative Procedure Act.

IV.

A.

The Secretary does not quarrel with the indisputable fact that Anglo-American law does not permit anyone to be the judge of his own case. At least since Lorde Coke's decision in Dr. Bonham's Case, 8 Rep. 114a (C.P.1610), this has been the rule. The Secretary also recognizes that Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), established the principle that it violates due process for a judge to have a direct and substantial interest in the outcome of a case before him. However, the Secretary argues that these principles were not involved in the removal of Campbell and the appointment of Franke, since Franke was not a party and was not shown to have any interest in the outcome of the case.

The Secretary places principal reliance on Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), in arguing that the due process rights of Fenster and Utica were not violated in the present case. Marcello involved proceedings under § 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1252(b). The Petitioner charged that the proceedings violated due process because they failed to provide for a fair and impartial hearing. The objection was that the special inquiry officer who conducted the deportation proceedings was subject to the supervision and control of officials in the Immigration Service charged with investigative and prosecuting functions. Rejecting this claim, the court stated:

> 'The contention is without substance when considered against the long-standing practice in deportation proceedings, judicially approved in numerous decisions in the federal courts, and against the special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters.'

Id. at 311, 75 S.Ct. at 762. Marcello appears to be limited to immigration cases.

The Supreme Court affirmed in Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), that the due process requirement of a fair trial in a fair tribunal 'applies to administrative agencies which adjudicate as well as to courts.' (Citation omitted.) Nevertheless, the Court distinguished cases where the probability of actual bias is 'too high to be consitutionally tolerable' from normal administrative adjudication:

> 'The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'

Id. at 47, 95 S.Ct. at 1464.

B.

* * *

We believe this is a case where the plaintiffs have shown the risk of unfairness to be 'intolerably high.' Every disappointed litigant would doubtless like to replace a judge who in the regular course of his or her duties has decided a case against the litigant and present a motion for a new trial or for reconsideration to a different judge of his own choosing. All notions of judicial impartiality would be abandoned if such a procedure were permitted.

There is no guarantee of fairness when the one who appoints a judge has the power to remove the judge before the end of proceedings for rendering a decision which displeases the appointer. Yet that is exactly what occurred in this case. Campbell was appointed

Judicial Officer long before the Utica case arose, and considered the case in the normal course of his duties. When Campbell rendered a decision in the case with which USDA 'violently disagreed,' officials of the department unceremoniously removed him and presented a petition for reconsideration to their handpicked replacement.

It is of no consequence for due process purposes that Fenster and Utica were unable to prove actual bias on the part of Franke or Davis. The officials who made the revocation and redelegation decision chose a non-career employee with no background in law or adjudication to replace Campbell. They assigned a legal advisor to the new Judicial Officer who worked under an official who was directly involved in prosecution of the Utica case. Such manipulation of a judicial or quasi-judicial, system cannot be permitted. The due process clause guarantees as much. As the court stated in D.C. Federation of Civil Ass'ns v. Volpe, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972):

> 'With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality.'

V.

Nothing in this opinion should be perceived as minimizing the seriousness of Fenster's criminal activities. . . . It is not certain that Campbell properly construed this court's remand order in considering mitigating circumstances. However, that is not the issue presently before us. Whether the Judicial Officer was correct or incorrect in his application of the law, the Secretary's efforts to change the result by the methods described in this opinion cannot be permitted to succeed.

The judgment of the district court is reversed, and the case is remanded with directions to remand it to the Secretary for re-entry of Judicial Officer Campbell's order dismissing the complaint against Utica and Fenster.