

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2016-03
(Finalized and effective November 14, 2016)

ISSUE PRESENTED:

The requesting judge was elected to sit on the Board of Trustees of the Colorado PERA. PERA is the organization responsible for managing and distributing retirement and other benefits to its membership of government and public employees. A member of the PERA staff makes the initial eligibility and benefits determination based on the facts of an individual's situation as applied to state law and PERA rules.¹ If the PERA member disagrees with the staff member's eligibility decision, he or she may request that the Executive Director review the decision.

If the PERA member disagrees with the Executive Director's review, he or she may request an administrative hearing before a panel comprised of three members of PERA's Board of Trustees (Panel) to review the Executive Director's decision. The petitioning party may be represented by a lawyer and may submit an opening statement for the Panel to review, consisting of the issues presented, a list of witnesses to appear, each witness's expected testimony, and written information for the Panel to consider. The petitioning party also has an opportunity to submit a responsive statement addressing any issues brought forth by the PERA administration.

A legal advisor is present at the hearing to assist the Panel on matters related to the law and rules but does not cast a vote in the decision. A court reporter is also present to make a record of the hearing. At the end of the hearing, the party requesting review must draft "Proposed Findings of Fact, Conclusions of Law, and Decision." The Panel then deliberates, using the testimony and evidence from the hearing and the documents in the record. It will then either adopt the proffered Findings of Fact, Conclusions of Law, and Decision, or will prepare its own. If the PERA member disagrees with the Panel's decision, he or she may appeal the decision to the full Board of Trustees, or may file an appeal in the district court.

The requesting judge anticipates that, as part of his duties as a member of the Board of Trustees, he will be asked to sit on one or more Panels. The judge asks whether, under the Code of Judicial Conduct (Code), he may do so.

CONCLUSION:

The Code prohibits judges from acting as arbitrators or from performing judicial functions outside of a judge's official duties unless expressly authorized by law. The PERA administrative hearing process is a form of arbitration occurring outside of a judge's assigned duties. Thus, we conclude that a judge's participation on a Panel violates the Code and that, accordingly, a judge should abstain from participating on a Panel.

¹ The PERA-related information contained in this section was taken from PERA's "Administrative Appeals" publication, July 2016, available at <https://www.copera.org/resources/forms-publications/administrative-appeals>.

APPLICABLE PROVISION OF THE COLORADO CODE OF JUDICIAL CONDUCT

The Rule applicable to this inquiry is 3.9, “Service as an Arbitrator or Mediator.” Rule 3.9 provides that “[a] judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge’s official duties unless expressly authorized by law.” Comment [1] of the Rule clarifies that “[t]his Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties” but that “[r]endering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.”

DISCUSSION:

Rule 3.9 prohibits judges from acting as arbitrators or mediators² or performing other judicial functions outside of a judge’s official duties. The Code does not define “arbitration,” nor does it provide an example of an “other judicial function.” The term, “arbitration,” however, is broadly defined as a “dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a binding decision resolving the dispute.” BLACK’S LAW DICTIONARY, (10th ed. 2014). Thus, the first question the CJEAB must resolve is whether a judge’s participation on the Panel may be construed as arbitration or another judicial function.

The purpose of PERA’s administrative hearing process is to give PERA members an opportunity to “present arguments and evidence to a . . . Panel of the PERA Board of Trustees.” *See PERA Administrative Appeals*, p.1. To this end, the parties present evidence, call witnesses to provide testimony, and proffer written documents supporting their position. Following the hearing, the Panel issues its Findings of Fact, Conclusions of Law, and Decision. The Panel’s decision is binding and may be appealed. Because the administrative hearing is an adjudicative process in which the Panel is asked to preside over a dispute and to enter a decision after deliberation, the CJEAB concludes that the hearing is a form of arbitration or judicial function and that the Panelists act as arbitrators or fulfill a judicial function.

Having determined that the administrative hearing equates to arbitration or a judicial function, the CJEAB considers whether a judge may, nevertheless, participate on the Panel. Under Comment [1] to Rule 3.9, judges may participate in arbitration, mediation, or settlement conferences as long as the action is performed as part of assigned judicial duties.

The sixteen-member Board of Trustees is elected, and, by law, one of the Board’s members must represent the Judicial Division. The Board’s primary purpose is to manage PERA’s retirement funds, but each Board member also has additional responsibilities, one of which is to participate on a Panel as the need arises. Though presiding on a Panel is one of the duties of a Board member, such a function is not “part of [an] assigned judicial dut[y]” (emphasis added) that would present an exception to Rule 3.9’s prohibition on arbitration

² Though not defined in Rule 3.9, “mediation” is broadly defined as a “method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.” BLACK’S LAW DICTIONARY, (10th ed. 2014). Because this is not the role of the Panel, mediation is not discussed.

because a judge would be participating in a dispute-resolution proceeding outside of his or her official judicial capacity.

As explained in the annotated notes of the ABA Model Code's Rule 3.9, which is identical to Colorado's Rule 3.9, the Rule exists in relevant part because the

potential dangers inherent in permitting judges to serve as arbitrators or mediators outweigh the public service Those dangers include the possibility that (1) arbitration proceedings could come before the court on which the judge sits; [or] (2) the court could be drawn into social and political controversies in which a judge acted as an arbitrator. . . .

Under PERA's administrative hearing procedures, a PERA member may appeal the Panel's decision to the district court, and that decision may later be appealed to Colorado's appellate courts. Thus, the possibility exists that the arbitration proceeding could come before the court on which the judge sits.

We, therefore, conclude that while a judge may sit on PERA's Board of Trustees, he or she may not participate on a Panel because such involvement is considered an arbitration proceeding or a judicial function outside of his or her assigned judicial duties, which violates Rule 3.9.

FINALIZED AND EFFECTIVE this 14th day of November, 2016.