

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2008090252

ORDER DENYING STUDENT'S
REQUEST FOR RECUSAL, REQUEST
FOR MISTRIAL, AND REQUEST FOR
CONFERENCE CALL

On May 8, 2009, Student filed a request for recusal seeking to disqualify Administrative Law Judge (ALJ) Darrell Lepkowsky from this case and/or issuing a decision in the matter. In the same pleading, Student appears to move for a mistrial in the hearing, which was heard by ALJ Lepkowsky on April 27 and 29, 2009, and also requests a conference call between the parties and the ALJ, the basis for which is unclear. The District filed a response on May 13, 2009. For the following reasons, all of Student's requests are denied.

APPLICABLE LAW

Due process requires an impartial tribunal for administrative hearings. To help meet this requirement, the Administrative Procedure Act (Gov. Code, § 11400 et seq.) permits a party to seek disqualification of an ALJ or other presiding officer from hearing an administrative case. Government Code section 11425.40 establishes two methods by which a party can seek disqualification of an ALJ – preemptory challenge and challenge for cause.

The request for recusal cites no legal authority and it is unclear whether the request is intended as a preemptory challenge or as a challenge for cause. Assuming that Student intended to file a preemptory challenge, his challenge is untimely as it was made after the case was heard and the matter submitted as of May 7, 2009, when the parties filed their closing briefs.¹

Government Code section 11425.40, subdivision (d), and California Code of Regulations, title 1, section 1034, permit a party to make one preemptory challenge (disqualification without cause) of an ALJ assigned to an OAH hearing, provided that the challenge is timely made. To be effective, the preemptory challenge must be: (1) directed to the Presiding Administrative Law Judge; (2) filed by a party, attorney or authorized representative; (3) made in writing or orally on the record in substantially the form set forth in the regulation (Cal. Code Regs., tit. 1, § 1034, subd. (b)(3)); (4) served on all parties if made in writing; and (5) filed within the required time limits. (Cal. Code Regs., tit. 1, §1034.)

The time limits for making a peremptory challenge are set forth in California Code of Regulations, title 1, section 1034:

(c) If, at the time of a scheduled prehearing conference, an ALJ has been assigned to the Hearing, any challenge to the assigned ALJ shall be made no later than commencement of that prehearing conference.

(d) Except as provided in (c), if the Hearing is to be held at an OAH regional office, the peremptory challenge of the assigned ALJ shall be made no later than 2 business days before the Hearing.

(e) Except as provided in (c), if the Hearing is to be held at a site other than an OAH regional office, the peremptory challenge of the assigned ALJ shall be made by noon on Friday prior to the week in which the Hearing is to commence.

(Cal. Code Regs., tit. 1, § 1034, subds. (c), (d) & (e).)

In no event will a peremptory challenge be allowed if it is made after the hearing has commenced. (Cal. Code Regs., tit. 1, § 1034, subd. (a).) Therefore, to the extent that Student's motion for recusal was meant as a peremptory challenge, it is untimely and is denied on that basis.

Government Code section 11425.40, establishes the criteria for disqualification of the presiding officer and provides in relevant part that:

- (a) The presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding.
- (b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:
 - (1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.
 - (2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.
 - (3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

The case law in this area is well established that, with certain exceptions, bias and prejudice are not to be presumed and a factual showing of actual bias or prejudice is required. In *American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464, 472, the court stated:

Due process, of course, requires a competent and impartial tribunal for administrative hearings. [Citation.] If, as appellant asserts, the public members of the board were biased, determination of matters before that tribunal would result in a denial of due process. In *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792-794...our Supreme Court reaffirmed that disqualification of a judicial or administrative law officer for bias cannot be based solely on expressed or crystallized political or legal views, even if those views result in an appearance of bias. A party must generally allege concrete facts that demonstrate the challenged judicial officer is contaminated with actual bias or prejudice; bias and prejudice are never to be implied.

Assuming that Student's motion to recuse is meant as a challenge for cause, Student fails to raise any issues addressing any alleged bias or prejudice by ALJ Lepkowsky. The only grounds on which Student bases his request are allegations that the District's closing brief contained misinformation and a vague reference to ALJ Lepkowsky being unable to decide the case without bias because she did not handle the prehearing conferences or pretrial motions. Student provides no citation to statute or case law in support of his bases for his request for recusal. In any case, since Student has failed to cite any actual bias or prejudice by ALJ Lepkowsky, his request for recusal is denied.

Student also alludes to moving for a mistrial, again citing alleged misconduct by the District with regard to information in pretrial pleadings and its closing brief. There is no provision for a grant of a motion for mistrial in special education proceedings. Student's recourse if he feels that the due process hearing was procedurally flawed or that the ALJ's decision was not supported by the evidence is to file an appeal within the statutory time frame. To the extent that Student is moving for a mistrial, his motion is denied.

The ALJ issued her decision in this case on May 11, 2009. Student's request for a conference call between the parties and the ALJ is denied.

ORDER

1. Student's challenge of ALJ Lepkowsky is denied.
2. Student's motion for mistrial is denied.
3. Student's request for a conference call between the parties and the ALJ is denied.

Dated: May 15, 2009

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings