



ALAN WILSON  
ATTORNEY GENERAL

July 1, 2011

John L. Finan, Executive Director  
SC Department of Employment and Workforce  
P.O. Box 995  
Columbia, SC 29202

Dear Director Finan:

We received your letter requesting an opinion of this Office regarding the options SC Department of Employment and Workforce has to prevent bias if a party on appeal has previously worked closely with the Appeal Tribunal and the Appellate Panel. You asked what ability the agency has “to avoid the Appellate Panel but still be in compliance with S.C. Code Ann. 41-35-690.”

As a way of background, you provided a hypothetical situation to describe the general appeal process of the SC Department of Employment and Workforce (SCDEW) and the reason a special referee may be necessary:

In a routine claim for unemployment benefits, an individual will file after separation from their most recent employer. SCDEW has claims adjudicators who will make a decision on the claimant’s eligibility after reviewing fact findings from both the employer and the claimant. Either party, if not satisfied with the adjudicator’s determination, may appeal to the next level in the agency referred to as the Appeal Tribunal. After the appeal, both claimant and employer are notified of a scheduled hearing. A single hearing officer will hold a *de novo* hearing taking live testimony from claimants and employer. As the fact finder, the hearing officer will then render a decision based on the evidence. The party adversely affected by the Appeal Tribunal Decision can then appeal to the Appellate Panel.

The Appellate Panel is made up of three members elected every four (4) years by the legislature. They will review the hearing transcript from the Appeal Tribunal’s hearing and choose either to render a decision based solely on review of the record or choose to allow oral arguments from both sides. The Appellate Panel is bound by the Code of

Judicial Ethics pursuant to S.C. Code Ann. 41-29-300. The party adversely affected by this decision may choose to appeal to the Administrative Law Court.

Normally this process is relatively standardized. However, recently individuals who work closely with the Appeal Tribunal and the Appellate Panel have been separated from their positions. SCDEW realizes the perceived bias if the appeals were handled “in house” as is the normal procedure. The law allows the Executive Director of SCDEW to appoint a “special referee” to take the place of the hearing officer if such a conflict arises.

This opinion will address the relevant statutes to clarify SCDEW’s options in the situation posed above.

### Law/Analysis

S.C. Code § 41-35-690 sets forth the exclusive procedure<sup>1</sup> for appeals as follows:

The **procedure provided in this chapter for appeals** from a determination or redetermination to the appeal tribunal and for appeals from the tribunal, **first to the Department of Employment and Workforce Appellate Panel**, as established by Section 41-29-300, **and afterward to the administrative law court**, pursuant to Section 41-29-300(C)(1), is the **sole and exclusive appeal procedure**.

S.C. Code § 41-35-690 (emphasis added).

As mentioned in the statute above, SCDEW’s Appellate Panel and the appropriate appellate procedure is established in S.C. Code § 41-29-300. Also, it is clearly stated that panelists are bound by the Code of Judicial Conduct:

- (A) There is **created the Department of Employment and Workforce Appellate Panel** within the Department of Employment and Workforce, which is separate

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<sup>1</sup> S.C. Code § 41-35-720 permits SCDEW to establish rules of procedure for appeals:

The department must promulgate regulations establishing rules of procedure for proceedings, hearings, and appeals to the appellate panel and the appeal tribunals pursuant to Section 41-35-790. The rules of procedure must address the manner for determining the rights of each party to an appeal. The rules of procedure are not required to conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record must be kept of all proceedings in connection with an appealed claim. Testimony at a hearing before an appeals tribunal on an appealed claim must be recorded but must not be transcribed unless the claim is appealed to the appellate panel.

S.C. Code § 41-35-720.

and distinct from the department's divisions. **The sole purpose of the panel is to hear and decide appeals from decisions of the department's divisions.**

...

- (C) **A party only may appeal from a decision of the department directly to the panel. A party only may appeal a decision of the panel to an administrative law court** in the manner provided in Section 41-35-750.

...

- (F) (1) **A panelist is bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules, and the State Ethics Commission is responsible for enforcement and administration of Rule 501 pursuant to Section 8-13-320.** A panelist also must comply with the applicable requirements of Chapter 13, Title 8. . . .

S.C. Code § 41-29-300 (emphasis added).

The Code of Judicial Conduct “is intended to establish standards for ethical conduct of judges.” SCACR, Rule 501, Preamble. As stated above in S.C. Code § 41-29-300(F)(1), the Department of Employment and Workforce Appellate Panel panelist are bound by the Code of Judicial Conduct. Canon 2 emphasizes the importance of not only avoiding impropriety but avoiding the appearance of impropriety. Specifically, a “judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment.” Code of Judicial Conduct, Canon 2 (B). The commentary to Canon 1 explains that deference to the courts “depends upon public confidence in the integrity and independence of judges,” meaning judges must act “without fear or favor.” In other words, if the public is aware that the judge, or in this instance, the panelist has a close working relationship with one of the parties, then his or her rulings may be questioned. Even though the judge or panelist may be able to remain objective, the public may perceive impropriety. The Advisory Committee on Standards of Judicial Conduct suggest that “the judge must use his or her discretion to determine if there is impropriety in presiding” when there is a question as to the judge’s ability to rule without bias. Opinion No. 4-2010. While disqualification or recusal may seem like an extreme precaution, the commentary to Canon 2(A) discusses that judges must accept restrictions on his or her conduct “that might be viewed as burdensome by the ordinary citizen.”

In Opinion No. 10-2010, the Advisory Committee on Standards of Judicial Conduct addresses disqualification and recusal as follows:

Canon 3.E. governs disqualification and states that a judge “**shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned. . . .**” Rule 503, SCACR. Section 3.E.1.(a) states that a judge shall disqualify himself if the judge “**has a personal bias or prejudice concerning a party. . .**” The inquiring judge must consider these factors in determining if recusal is appropriate.

Advisory Committee on Standards of Judicial Conduct, Opinion No. 10-2010 (emphasis added). One should note that under Canon 3(F) a judge, or in this case a panelist, may “disclose on the record the basis of the judge’s disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge whether to waive disqualification.” Code of Judicial Conduct, Canon 3(F).

When a “statute’s language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute’s operation.” Strickland v. Strickland, 375 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007). The statute is clear that panelists are bound by the Code of Judicial Conduct, S.C. Code § 41-29-300(F)(1). And the statute is also clear that a decision of the department may only be directly appealed to the Appellate Panel and a decision of the Appellate Panel may only be appealed to the Administrative Law Court, S.C. Code § 41-29-300(C).

#### Special Referee

Specifically, S.C. Code § 41-35-700(A) governs Appeal Tribunals and states as follows:

- (A) To hear and decide appeal claims, the executive director must appoint one or more impartial appeal tribunals consisting of either:
  - (1) a **referee**, selected pursuant to Section 41-29-70;<sup>2</sup> or
  - (2) a body consisting of three members, one of whom:
    - (a) must be a referee who must serve as chairman;
    - (b) one of whom must be a representative of employers; and
    - (c) the third of whom must be a representative of employees.

S.C. Code § 41-35-700(A). The plain meaning of S.C. Code § 41-35-700(A) suggests that a referee may be selected by the executive director to hear and decide appeals during the Appeal Tribunal stage of the process.

However there is no discussion of appointing a “special referee” during the Appellate Panel stage of the process. S.C. Code § 41-29-300(C); S.C. Code § 41-35-690; S.C. Code § 41-35-710. In fact the statutory language says “[a] party *only* may appeal from a decision of the department directly to the panel.” S.C. Code § 41-29-300(C) (emphasis added).

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<sup>2</sup> S.C. Code § 41-29-70 allows for the employment of personnel by the Department of Employment and Workforce: “[s]ubject to the provisions of Chapters 27 through 41 of this title, the department may employ or retain on a contract basis other accountants, attorneys, experts necessary to perform the department’s duties.”

Mr. Finan  
Page 5  
July 1, 2011

### Conclusion

It is the opinion of this Office that SCDEW must comply with the appellate process set forth in S.C. Code § 41-29-300 and S.C. Code § 41-35-690, meaning that cases appealed from the Appeal Tribunal would first go to the Appellate Panel and then, if appealed again, the case would go to the Administrative Law Court. Since the Appellate Panel is bound by the Code of Judicial Conduct according to S.C. Code § 41-29-300(F)(1), panelists should follow the Judicial Canons.

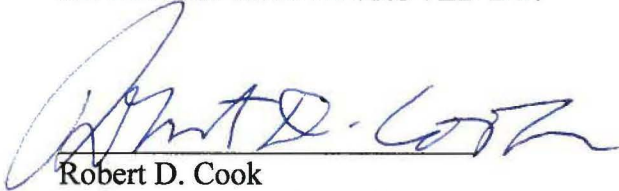
Ultimately, our Office defers to the Supreme Court's interpretation of the Judicial Canons. However, in accordance with established interpretations of the Judicial Canons and the plain meaning of S.C. Code § 41-29-300, it is the opinion of this Office that the panelist should use his or her discretion and best judgment to determine if there is impropriety in presiding when a party who works closely with him or her is before the Appellate Panel.

Sincerely,



Leigha Blackwell Sink  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General