D.C. Association of Administrative Law Judiciary

Winter 2013

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Presidential Ponderings

Happy New Year! I hope your resolution is to be an advocate for "Setting the Gold Standard for Administrative Adjudication." As President of the DCAALJ, I am resolved to providing resources for you to ensure that happens.

If you joined us for our tour of the National Portrait Gallery's "Struggle for Justice," you know it is an honor to accept the responsibility of "wearing the robe." I particularly was struck by the themes throughout the exhibition that still permeate our cases and courtrooms today. See "Organize, Agitate, Educate" for some specific examples.

Too often, we make a resolution in January only to let it languish by March. The entire Board is working together to make sure that doesn't happen with my resolution.

If you are anything like me, you have not been to the Court of Appeals since leaving the active practice of law for the bench. On February 6, 2013, **Judge Kathryn A. Oberly** will give us a presentation in the ceremonial courtroom at the D.C. Court of Appeals. The focus of this presentation (making appellate judges "happy") is more than just writing better decisions that withstand scrutiny because being affirmed is only part of the goal of adjudication. Judge Oberly is going to offer a broader perspective. You do not want to miss this unique opportunity to hear from such an esteemed speaker.

February is going to be our biggest month to date, but we are not stopping there. March will take us inside the Board of Judges Conference Room in Superior Court where **Chief Judge Lee F. Satterfield** will discuss bench skills and judicial demeanor.

Throughout 2013, there will be many other exciting and informative programs for you to attend. In the meantime,

please join me in a toast, "To a year filled with inspiration and appreciation." ₪

Organize, Agitate, Educate

For Susan B. Anthony, these words formed a war cry. Members of the DCAALJ heard that cry loud and clear during the November 6, 2012, tour of "Struggle for Justice" at the National Portrait Gallery.

As the docent said, "The whole museum should be the Struggle for Justice," and before long, it was easy to understand

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why; the present has much to learn from the past.

The tour started with an 1844 portrait of Frederick Douglass, a strong leader of the American abolition movement who lectured widely on behalf of passage of the 14th and 15th amendments. Douglass, who taught himself to read and write, demonstrated courage and eloquence in persevering against divisive forces that tried to perpetuate human bondage and relegate groups of Americans to a subordinate status.

Administrative law judges perform our duties ever mindful of the obligation to facilitate justice. Whatever challenges arise, we must always exercise the independence necessary to say or do those things which promote the aims of justice. The next time you face a challenging situation, remember the example of Frederick Douglass: courage, strength, perseverance, patience and the ability to lead divisive forces to a just resolution.

Portraits of Harriett Beecher Stowe, Elizabeth Cady Stanton, and Belva Lockwood took on special meaning. These modern women examined the laws effecting women and knew that (in the words of Frederick Douglass at the women's rights convention at Seneca Falls), "Without the right to vote, you are nothing." This message was particularly powerful given that our tour took place on Election Day.

As explained by the docent, Gilbert Stewart's portrait of George Washington may be best described as a job description of what a president should be. In this painting, you do not find any symbols of royalty, religion, or militaria. Instead, you find a strong, civilian in a black suit with his hand

outstretched in welcome. Is there any better job description for a judge than a civilian in a black robe whose outstretched hand welcomes parties to the judicial system?

Nearing the end of our tour, the lesson about the portrait of Earl Warren reminded us that people can change. Justice Warren was once a conservative, Republican prosecutor, but as Chief Justice of the U.S. Supreme Court, he grew into his role as a great, liberal justice and author of *Brown v. Board of Education.* In this particular role, Justice Warren wanted not only a unanimous opinion but an opinion that could be read and understood by any man or woman touched by its ruling. Administrative adjudicators strive for this goal in every decision.

Perhaps the best part of the tour was the gathering of judges from the Office of Administrative Hearings, the Human Rights Commission, the Office of Hearings and Adjudication, and the Compensation Review Board. They stood together as a modern portrait - a diverse group of men and women who continue to fight for justice in their courtrooms. After all, the fight can never stop, for "[i]f there is no struggle, there is no progress." (Frederick Douglass)

℻ Melissa Lin Jones

Online Resources

The National Judicial College offers several webcasts that should be of interest to the administrative adjudicators. Unfortunately, your schedule may not permit you to view a webcast on a specific date at a specific time. We have good news; recordings of NJC webcasts can be found at http://www.judges.org/webcasts/recorded/index.html. Click on the internal links to watch sessions focusing on decision making, communication skills, professional responsibility, ruling on objections, and so much more. The best part- most of the recorded sessions are

Similarly, on his website, http://www.lawprose.org/interviews/interviews.php, Bryan A. Garner (editor of *Black's Law Dictionary*) offers video clips of interviews with approximately 200 judges, law-firm partners, and professional writers. The clips offer suggestions for effective and persuasive speech in both its written and oral forms. Take advantage of valuable advice from some sage professionals.

℻ Melissa Lin Jones

Deference Isn't As Deferential As It Used to Be

Professor Jerome Nelson was the keynote speaker at our annual meeting. A retired federal administrative law judge himself, Professor Nelson discussed a number of recent departures from *Chevron* deference, a key concept in administrative law.

Chevron deference refers to the recognition a court will afford an agency's reasonable interpretation of an ambiguous statute or regulation. When an agency's construction of a statute clashes with a prior judicial opinion, however, it now seems *stare decisis* prevails, notwithstanding *Chevron* deference. Similarly, when an agency's interpretation of a regulation is presented for the first time in a brief, that promulgation lacks due process and will not be afforded deference.

Of importance here is the role administrative adjudicators play when interpreting statutes and regulations in their opinions. Consistency in interpretation regarding both the law itself and the cases interpreting that law is fundamental; inconsistency destroys deference.

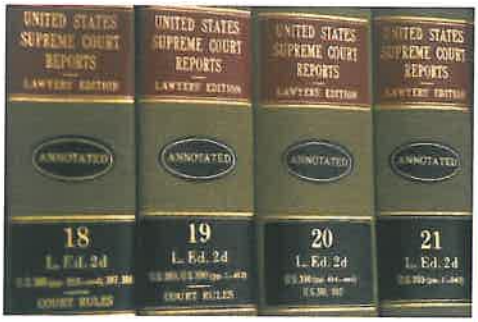
Professor Nelson referred to the following cases regarding the new deference standard:

United States Supreme Court October 2011 Term

Deference To Agency Construction Of Statutes Under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

- Holder v. Martinez Gutierrez, 132 S. Ct. 2012 (2012); and Astrue v. Capato, 132 S. Ct. 2021 (2012) (conventional applications of deference rule)

- United States v. Home Concrete & Supply, LLC,132 S. Ct. 1836 (2012) (declining deference in some circumstances where a prior judicial decision clashes with agency's later statutory interpretation)



Deference To Agency Construction Of Regulations Under Auer v. Robbins, 519 U.S. 452 (1997)

- Christopher v. Smithkline Beecham Corp.,132 S. Ct. 2156 (2012) (declining deference in certain circumstances)

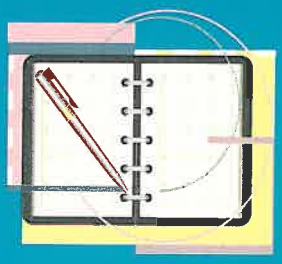
Upcoming Events

February 6, 2013, 4:00 p.m.
Judge Katherine Oberly,
D.C. Court of Appeals,
Ceremonial Courtroom
Five Tips for Making Appellate Judges Happy
RSVP to Melissa.Jones@dc.gov
no later than January 25, 2013
Reservations will be honored on a first come, first served basis.

March 6, 2013, 4:00 p.m.
Chief Judge Lee Satterfield,
D.C. Superior Court
Board of Judges Conference Room, 6th Floor
Bench Skills for the Administrative Adjudicator
SEATING IS LIMITED
RSVP to Melissa.Jones@dc.gov
no later than February 27, 2013
Reservations will be honored on a first come, first served basis.

April 14 - 16, 2013
NAALJ Midyear Conference
Williamsburg, Virginia
Details to be announced soon at http://www.naalj.org/upcoming-conferences

May 2013
Ms. Brianne Paugh
The Mutually Beneficial Clerkship



Arbitrary and Capricious

- Judulang v. Holder, 132 S. Ct. 476 (2011).

For a complete list of cases referred to during Professor Nelson's presentation, contact Melissa Lin Jones. ₪

17 Syllables

Pursuant to a bequeath from Judge Erskin Ross, each year the American Bar Association hosts the Ross Essay Contest. This year, the ABA sent out the call for haiku poems in the categories of Innovation, Inspiration, Law Practice, On Being a Lawyer, or The U.S. Supreme Court. After reviewing almost 450 entries, the following ten entries (including one from DCAALJ President Melissa Lin Jones) were chosen as the winners as announced in Read 10 Law-Inspired Haiku, Contest Winners Announced:

A precedent made
May, like a mountain, endure
Or vanish like dew.
—Edward Hess

Palsgraf was injured
When explosion made scales fall
Unforeseeable
—Marcus Brisson

Pass the bar exam
Setting out to change the world
Debt crushes the dream
—Melissa Jones

Engineers at heart
Lawyers build cases with facts
Arguments with words
—Kathryn Walter

Team of nine black robes
Making the law crystal clear:
5 to 4. Say what?
—James Cox

First-year attorney
Dreams of SCOTUS victory
Stuck on doc review
—Meehan Rasch

recent graduate
summa cum laude and still
home and unemployed
—Anthony Andricks

Remember? Wanting
to change the world? Help others?
Wake up. You still can.
—Kimberly DelMonico

Practice makes perfect?
Why, after practicing YEARS,
Am I not perfect?
—Alice Murray

Thank you! Thank you sir!
You saved me and my business!
The sweetest words heard.
—Anthony Monioudis

Melissa Lin Jones ₪

In the Spotlight – Office of Human Rights- Upon a finding of probable cause by the Office of Human Rights ("OHR"), and after an attempt to conciliate the matter has failed, the complaint is certified to the Commission. The only issues the Commission may adjudicate are those OHR has found probable cause and certified to the Commission.

After a case is certified to the Commission, the parties engage in "discovery." Discovery is a process in which either party can obtain information that may lead to evidence from the opposing party, including answers to interrogatories, requests for production of documents, requests for admissions and depositions. This process can last several months.

Sometimes, a motion for summary judgment is made after discovery is completed. The party making the motion argues that the evidence is in its favor, compares it to the opposing party's evidence, and argues that a reasonable fact finder looking at the evidence could only decide the case one way---for the moving party. If the Commission Tribunal agrees with the moving party, an evidentiary trial is unnecessary and the Commission enters judgment in favor of the moving party.

If summary judgment is not filed or is denied, the administrative law judge ("ALJ") conducts an evidentiary hearing in a trial-type setting with testimony given by witnesses who are subject to cross-examination along with the admission of evidence. The Commission's hearing procedures---with a few exceptions---are almost identical to those performed in other courts. Although we do not currently have a bailiff, we do have a court reporter who transcribes the proceeding.

At the conclusion of the evidentiary hearing, the ALJ issues a scheduling order that governs the filing of post-hearing briefs. The parties' post-hearing briefs should contain the following: 1) proposed findings of facts; 2) proposed conclusions of law; and 3) a proposed order.

After receiving the parties' post-hearing briefs, the ALJ will review the hearing transcript and admitted evidence, his or her notes of the hearing, and the parties' post-hearing briefs. The ALJ then writes a Proposed Decision and Order containing their proposed findings of fact, proposed conclusions of law, and a recommended order, including any remedies.

The Proposed Decision and Order is then sent to the parties who may choose to file "exceptions." An exception may argue the ALJ's finding of fact is not supported by the record or that the ALJ failed to consider a material fact. An exception may also argue the ALJ's conclusion of law does not rationally flow from the findings of fact.

After any exceptions to the Proposed Decision and Order are filed, the Commission Tribunal assigned to the case will receive a copy of the hearing transcript and admitted evidence, the parties' post-hearing briefs, any exceptions filed by the parties, and the ALJ's Proposed Decision and Order. Importantly, the ALJ's Proposed Decision and Order is only a recommendation. In a closed-to-the-public meeting, the Commission Tribunal deliberates and determines whether to accept, reject or modify the ALJ's Proposed Decision and Order.

Eli Bruch ₪

Office of Human Rights
DISTRICT OF COLUMBIA

District of Columbia Association of Administrative Law Judiciary, Inc.

AN AFFILIATE OF THE NATIONAL
ASSOCIATION OF ADMINISTRATIVE LAW JUDICIARY

2013 - 2014 MEMBERSHIP APPLICATION AND DUES INVOICE

Dues for **DCAALJ /NAALJ** membership year 2013–2014 are now payable for the period from October 1, 2013 - September 30, 2014. Please remit your payment as soon as possible. The annual payment of $50.00 ($100.00 for sustaining members) includes membership dues for both the **DCAALJ and NAALJ**.

NAME: _____
Last Name First Name Middle Name

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CITY, STATE, ZIP CODE: _____

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AGENCY NAME: _____

BUSINESS ADDRESS: _____

PLEASE SEND MAIL TO: ☐ HOME ☐ WORK

EMAIL ADDRESS(ES): _____

ARE YOU AN ATTORNEY?: ☐ YES ☐ NO

REFERRED BY: _____

ARE YOU INTERESTED IN SERVING ON A DCAALJ OR NAALJ COMMITTEE SUCH AS MEMBERSHIP, PROGRAM DEVELOPMENT, LOGISTICS, CONTINUING EDUCATION, COMMUNICATIONS, OR CHARTER REVIEW?

☐ YES I AM INTERESTED IN: _____

☐ NO

SIGNATURE: _____ DATE: _____

THANK YOU FOR YOUR INTEREST!

Send Application with Payment to:

District of Columbia Association of Administrative Law Judiciary, Inc.
c/o Hon. William L. England, Jr., Treasurer
P.O. Box 77203
Washington, DC 20013-7203