XI. ADMINISTRATIVE PROCEDURE GENERALLY

Subdivision Index

For Notes of Decisions relating to administrative procedure with respect to particular subjects, see Notes of Decisions under the specific subdivisions.

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911. Generally

Many acts done by an agency of a state may be illegal in their character when tested by the laws of the state, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the "due process of law" enjoined upon the states by this clause. Snowden v. Hughes, C.C.A.Ill.1943, 132 F.2d 476, affirmed 64 S.Ct. 397, 321 U.S. 1, 88 L.Ed. 497, rehearing denied 64 S.Ct. 778, 321 U.S. 804, 88 L.Ed. 1090.

Normally, procedural due process rights are only applied to administrative decisions. Metropolitan Housing Development Corp. v. Village of Arlington Heights, D.C.Ill.1979, 469 F.Supp. 836, affirmed 616 F.2d 1006.

One of the primary objectives of procedural due process as applied to administrative proceedings is to insure that an agency will acquire the information it should have in a manner fairly calculated to eliminate the issues for reasoned decision making, and thereby to minimize the risk of erroneous or arbitrary action. National Ass'n for Advancement of Colored People v. Wilmington Medical Center, Inc., D.C.Del.1978, 453 F.Supp. 330.

Procedural due process is required in administrative proceedings when adjudications of fact are made which operate to deprive person of constitutionally protected interest. McDonald v. McLucas, D.C.N.Y.1974, 371 F.Supp. 831, affirmed 95 S.Ct. 297, 419 U.S. 987, 42 L.Ed.2d 261.

912. Factors determining proper procedure—Generally

Process due varies with the circumstances and various factors must be considered when evaluating administrative procedures: the private interest affected by the official action; the risk of an erroneous deprivation of that interest; and the governmental interest, including the function involved and the fiscal and administrative burdens that other procedures would entail. Illinois Physicians Union v. Miller, C.A.Ill.1982, 675 F.2d 151.

Likelihood of erroneous determinations, corresponding need for additional procedures to reduce such likelihood and magnitude of harm caused to individual claimants by erroneous adverse adjudications are major factors to be taken into account in deciding what process is due in the administrative sphere. Moore v. Ross, D.C.N.Y.1980, 502 F.Supp. 543, affirmed 687 F.2d 604, certiorari denied 103 S.Ct. 750, 459 U.S. 1115, 74 L.Ed.2d 969.

913. —— Convenience of agency

Mere administrative convenience is no justification for deprivation of property without due process. Remm v. Landriev, D.C.La.1976, 418 F.Supp. 542.

Howlett v. Walker, D.C.Ill.1976, 417 F.Supp. 84.

Due process requires hearing before impartial decision maker, but it does not prohibit single agency from combining investigative and adjudicative functions, with one group or individual passing upon facts developed by others within same organization; and fundamental fairness is satisfied so long as decision maker has not participated in making determination under review. Woodland Nursing Home Corp. v. Weinberger, D.C. N.Y.1976, 411 F.Supp. 501.

Fact that investigator in administrative body is biased is not fatal to decision of that body, but what is crucial to validity of decision is actual impact of bias on person who makes decision. Do-Right Auto Sales v. Howlett, D.C.Ill.1975, 401 F.Supp. 1035.

Due process mandates an unbiased and impartial administrative tribunal. Barszcz v. Board of Trustees of Community College Dist. No. 504, Cook County, Illinois, D.C.Ill.1975, 400 F.Supp. 675, affirmed 539 F.2d 715, certiorari dismissed 97 S.Ct. 827, 429 U.S. 1080, 50 L.Ed.2d 801. See, also, Marlboro Corp. v. Association of Independent Colleges & Schools, Inc., C.A.Mass.1977, 556 F.2d 78; Simard v. Board of Ed. of Town of Groton, C.A. Conn.1973, 473 F.2d 988; Kelley v. Action for Boston Community Development, Inc., D.C.Mass.1976, 419 F.Supp. 511; King v. Caesar Rodney School Dist., D.C.Del.1974, 380 F.Supp. 1112; Wagner v. Little Rock School Dist., D.C. Ark.1974, 373 F.Supp. 876; Taylor v. New York City Transit Authority, D.C.N. Y.1970, 309 F.Supp. 785, affirmed 433 F.2d 665; La Petite Auberge, Inc. v. Rhode Island Commission for Human Rights, R.I.1980, 419 A.2d 274; Guthrie v. Wisconsin Employment Relations Com'n, 1983, 331 N.W.2d 331, 111 Wis.2d 447; Westland Convalescent Center v. Blue Cross & Blue Shield of Michigan, 1982, 324 N.W.2d 851, 414 Mich. 247.

The combination, in an agency, of investigative and adjudicatory functions does not itself violate due process. Hoke v. Board of Medical Examiners of State of N.C., D.C.N.C.1975, 395 F.Supp. 357. See, also, Klinge v. Lutheran Charities Ass'n of St. Louis, C.A.Mo.1975, 523 F.2d 56; Rite Aid Corp. v. Board of Pharmacy of State of N.J., D.C.N.J.1976, 421 F.Supp. 1161, appeal dismissed 97 S.Ct. 1594, 430 U.S. 951, 51 L.Ed.2d 801; American Federation of State, County and Municipal Employees v. Jones, D.C. Ill.1975, 397 F.Supp. 405; Scott v. Department of Commerce & Community Affairs, 1981, 416 N.E.2d 1082, 48 Ill. Dec. 560, 84 Ill.2d 42; In re Cornelius, Alaska 1974, 520 P.2d 76, on rehearing 521 P.2d 497.

Due process does not require hearing to be conducted by those unconnected with the controversy where under the circumstances those who actually conduct a hearing are the only persons available for making the decision. Davis v. Barr, D.C.Tenn.1973, 373 F.Supp. 740.

920. Assistance of counsel

It is not essential in all circumstances to fair and adequate hearing that it be conducted in trial-like atmosphere, complete with attorneys to challenge offered evidence and legally trained hearing officers to rule on evidentiary questions. Toney v. Reagan, C.A.Cal.1972, 467 F.2d 953, certiorari denied 93 S.Ct. 951, 409 U.S. 1130, 35 L.Ed.2d 263.

921. Evidence and witnesses

This clause forbids agency to use evidence in way that forecloses opportunity to offer contrary presentation. Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., Ark.1974, 95 S.Ct. 438, 419 U.S. 281, 42 L.Ed.2d 447, rehearing denied 95 S.Ct. 1340, 1341, 420 U.S. 956, 43 L.Ed.2d 433, on remand 399 F.Supp. 157.

Rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scrutiny. Goldberg v. Kelly, N.Y.1970, 90 S.Ct. 1011, 397 U.S. 254, 25 L.Ed.2d 287, dissenting opinion 90 S.Ct. 1028, 397 U.S. 280, 25 L.Ed.2d 307.

Refusal in an administrative proceeding to permit a party to introduce evidence or otherwise made an effective defense may constitute a denial of due process if either liberty or property is at stake in the proceeding. Paskaly v. Seale, C.A.Cal.1974, 506 F.2d 1209.

Due process in administrative proceedings of a judicial nature does not permit admission of ex parte evidence given by witnesses not under oath and not subject to cross-examination by opposing party.

914. —— Financial burden on agency

Financial cost alone is not controlling weight in determining whether due process requires particular procedural safeguard prior to some administrative decision; but government's interest, and hence that of public, in conserving scarce fiscal and administrative resources, is factor which must be weighed. Mathews v. Eldridge, Va.1976, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18.

While cost alone is not controlling, it is a factor to be considered when determining the constitutional sufficiency of administrative procedures provided. Graves v. Meystrik, D.C.Mo.1977, 425 F.Supp. 40, affirmed 97 S.Ct. 2164, 431 U.S. 910, 53 L.Ed.2d 220.

Financial burden on administrative agency does not negate its obligation to comply with due process clause. McDonald v. McLucas, D.C.N.Y.1974, 371 F.Supp. 831, affirmed 95 S.Ct. 297, 419 U.S. 987, 42 L.Ed.2d 261.

915. Costs or expenses

No one has legitimate claim to be free from expense of defending himself in an administrative proceeding, however outrageously it may be conducted, if proceeding can not lead to a binding order and such expense is not a property interest protected by this clause. Paskaly v. Seale, C.A.Cal.1974, 506 F.2d 1209.

916. Notice

When an administrative agency is about to take action adverse to a citizen on the basis of "adjudicative facts," due process entitles the citizen at some stage to have notice, to be informed of the facts on which the agency relies, and to have an opportunity to rebut them, unless the circumstances indicate the citizen has waived such rights or he is unable to make a required preliminary showing of grounds that would warrant a hearing. N.A.A.C.P. v. Wilmington Medical Center, Inc., D.C.Del.1978, 453 F.Supp. 330.

917. Necessity of hearing

That hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that individual be given opportunity or a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake to justify postponing the hearing until after the event. Boddie v. Connecticut, Conn. 1971, 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed.2d 113, mandate conformed to 329 F.Supp. 844.

918. Time of hearing

The promptness and adequacy of administrative review is a significant factor in assessing the sufficiency of the entire process. Behan v. City of Dover, D.C. Del.1976, 419 F.Supp. 562, affirmed 559 F.2d 1207.

919. Bias of decision maker

Mere familiarity with the facts of the case gained by an agency in the performance of its statutory role does not disqualify it as the decisionmaker with respect to actions which assertedly affect the liberty or property rights of others. Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n, Wis.1976, 96 S.Ct. 2308, 426 U.S. 482, 49 L.Ed.2d 1, on remand 274 N.W.2d 697, 87 Wis.2d 347.

To show that combination of investigative and adjudicative functions necessarily created unconstitutional risk of bias in administrative adjudication, it was necessary to overcome presumption of honesty and integrity of those serving as adjudicators and to convince that, under realistic appraisal of psychological tendencies and human weakness, such a risk of actual bias or prejudgment was posed by conferring investigative and adjudicative powers on same individual that practice could not be allowed consistent with due process. Withrow v. Larkin, Wis.1975, 95 S.Ct. 1456, 421 U.S. 35, 43 L.Ed.2d 712, on remand 408 F.Supp. 969.

Though, in some circumstances, the nature of one's position or the relationship between that position and the outcome of adjudications disqualifies person from serving with the impartiality mandated by this clause, fact that decision maker has responsibilities to uphold standards of conduct does not inevitably mean that he is disqualified from adjudicating allegations that those standards have been breached. Powell v. Ward, C.A.N.Y.1976, 542 F.2d 101.

Although fair hearing, and probably fair investigation, is element of due process degree of bias which must be alleged and found to exist in order to usurp fact-finding function of public officials must border upon fraud or at least pecuniary interest in outcome.

Hornsby v. Allen, C.A.Ga.1964, 326 F.2d 605, rehearing denied 330 F.2d 55.

This clause merely affords one who is party in administrative proceeding the opportunity to cross-examine witnesses and one who does not choose to exercise that opportunity has no cause for complaint. 900 G.C. Affiliates, Inc. v. City of New York, D.C.N.Y.1973, 367 F.Supp. 1.

Requirements of due process are not as strict before administrative agency as they are in court of law and administrative agencies are not restricted by rigid rules of evidence. Mackatunas v. Finch, D.C.Pa.1969, 301 F.Supp. 1289.

Where facts are to be determined on basis of hearings before administrative agencies, personal appearance of witnesses is necessary. Holt v. Raleigh City Bd. of Ed., D.C.N.C.1958, 164 F.Supp. 853, affirmed 265 F.2d 95, certiorari denied 80 S.Ct. 59, 361 U.S. 818, 4 L.Ed.2d 63.

The rules of evidence applicable to judicial proceedings are not applicable to administrative hearings, but the concept of due process is applicable to such a proceeding. Williams v. Butterfield, D.C.Mich.1956, 145 F.Supp. 567, affirmed 250 F.2d 127, rehearing denied 253 F.2d 709, certiorari denied 78 S.Ct. 793, 356 U.S. 946, 2 L.Ed.2d 821, rehearing denied 78 S.Ct. 1009, 356 U.S. 970, 2 L.Ed.2d 1076.

922. Statement of reasons or decision

Requirement that administrative agency give reasons justifying departure from its prior determinations imposes measure of discipline on agency, discourages arbitrary or capricious action by demanding rational and considered discussion of need for new agency standard, fulfills duty of fairness and justice owed by agency to anyone "victimized" by agency's decision to shift its course, and facilitates judicial review. Baltimore and Annapolis R. Co. v. Washington Metropolitan Area Transit Commission, 1980, 642 F.2d 1365, 206 U.S.App.D.C. 397.

Governmental agency changing its course must supply reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. Larus & Brother Co. v. F.C.C., C.A.Va.1971, 447 F.2d 876.

Whether statement of an agency decision is sufficiently detailed and informative to comport with minimum due process depends on whether it satisfies the purposes of the reasons and evidence requirement when read in conjunction with the hearing record, and the more extensive and confusing a record is the more detailed and informative the statement must be. Moore v. Ross, D.C.N.Y. 1980, 502 F.Supp. 543, affirmed 687 F.2d 604, certiorari denied 103 S.Ct. 750, 459 U.S. 1115, 74 L.Ed.2d 969.

An impartial decision-maker and written statement of reasons are elements of fair hearing which are traditional and necessary for due process. Royer v. State Dept. of Employment Sec., 1978, 394 A.2d 828, 118 N.H. 673.

923. Stay of administrative action

Statute which, as ancillary to review of administrative action, gives complainant stay until final decision, affords due process. Porter v. Investors' Syndicate, Mont.1932, 52 S.Ct. 617, 286 U.S. 461, 76 L.Ed. 1226, rehearing denied 53 S.Ct. 132, 287 U.S. 346, 77 L.Ed. 354.

It is not a requirement of due process that administrative discretion be stayed until the courts pass upon its wisdom and prudence. Relco, Inc. v. Consumer Product Safety Commission, D.C.Tex. 1975, 391 F.Supp. 841.

Where, as ancillary to review and correction of administrative action, state statute provides that complaining party may have stay until final decision, there is no deprivation of due process, although statute attributes final and binding character to initial decision of board or commissioner; but where plain provisions of statute or decisions of state courts interpreting Act preclude supersedeas or stay until final action of reviewing court, due process is not afforded, and, where other requisites of federal jurisdiction exist, recourse to federal equity court is justified. Montana Power Co. v. Public Service Commission of Montana, D.C.Mont.1935, 12 F.Supp. 946.

924. Rehearing

While opportunity to be heard is generally considered fundamental component of due process, entitlement to rehearing does not automatically flow from finding that procedural due process is applicable. Tyler v. Vickery, C.A.Ga.1975, 517 F.2d 1089, rehearing denied 521 F.2d 814, 815, certiorari denied

96 S.Ct. 2660, 426 U.S. 940, 49 L.Ed.2d 393.

925. Weight and conclusiveness of administrative determinations

As long as due process requirements are met, legislature has power to prescribe binding effect of an administrative determination. Messier v. Zeiller, D.C.N.H.1974, 373 F.Supp. 1198.

926. Judicial review

The cutting down of the remedy of an abutting owner, dissatisfied with an award for the damages caused by the construction of an elevated viaduct changing the street grade, from a general review in a state court of general jurisdiction of the proceedings of the board confirming the award to a review limited to questions of jurisdiction, fraud, and willful misconduct on the part of the officials composing the board, does not take the property of such owner without due process of law. Crane v. Hahlo, 1922, 42 S.Ct. 214, 258 U.S. 142, 66 L.Ed. 514.

There is no constitutional right to judicial review of administrative action. Frederick v. Schwartz, D.C.Conn.1969, 296 F.Supp. 1321, certiorari denied 91 S.Ct. 1624, 402 U.S. 954, 29 L.Ed.2d 124.

Termination of civil rights complainant's administrative action for failure to make timely appeal of denial of his claim did not deny him due process where his failure to receive mailed notice of denial was caused by his failure to comply with instructions he received in the mail to collect document from postal service. Rogers v. Commission on Human Rights and Opportunities, 1985, 489 A.2d 368, 195 Conn. 543.

42 Pa.C.S.A. §§ 5571(b), 5572 providing that appeals from a government unit to a court must be commenced within 30 days after entry of order and that date of mailing, if service is made by mail, shall be deemed to be date of entry of order did not violate this clause of equal protection clause of this amendment, despite contention that by permitting time of mailing rather than time of receipt to control, full 30-day period has begun to run before an appellant receives his notice and contention that prospective appellants have different number of days in which they must prepare and file appeals depending on how far from point of mailing they live. Windrick v. Com., 1984, 471 A.2d 924, 80 Pa.Cmwlth. 401.

Administrative decision-making without a hearing is constitutionally validated by providing an aggrieved party a subsequent opportunity for judicial review. Connecticut Light and Power Co. v. City of Norwalk, 1979, 425 A.2d 576, 179 Conn. 111.

Code 1975, § 22–22A–7(c)(3) and corresponding administrative rule governing appeals of agency actions do not facially deny due process, notwithstanding that they allow no postponement of commencement of hearing after it is requested, since deadline is obviously necessary for efficient administration of programs and helps ensure aggrieved party of hearing, since no hardship for parties is created, and since rule allows for justified continuances. Dawson v. Cole, Ala.Civ.App.1986, 485 So.2d 1164.

927. Investigations

Due process does not require that individual referred to adversely in state investigation commission hearing must remain anonymous so long as no legislative purpose can be shown for divulging name. Freeman and Bass, P.A. v. State of N.J. Commission of Investigation, C.A.N.J.1973, 486 F.2d 176.

Neither the statutory mandate to the New Jersey State Commission of Investigation that it refer evidence of crime and misconduct of public officials to the proper prosecutorial authorities nor mandate that it "keep the public informed as to the operations of organized crime," was inconsistent with the Commission's character as an investigative body for purposes of determining whether its procedural safeguards for witnesses appearing before the Commission complied with due process, where the latter mandate had been construed by the state Supreme Court as calling for a general program of public education and such Court had held that the Commission could not make and publicize findings with respect to the guilt of specific individuals. U.S. ex rel. Catena v. Ellis, C.A.N.J.1972, 465 F.2d 765.

Purpose of an investigatory hearing is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the agency's judgment, the facts discovered should justify doing so; in contrast, an

adjudicatory hearing tests such evidence upon a record in an adversary proceeding before an independent hearing examiner to determine whether it sustains whatever charges are based upon it. Haines v. Askew, D.C.Fla.1973, 368 F.Supp. 369, affirmed 94 S.Ct. 2596, 417 U.S. 901, 41 L.Ed.2d 208.

XII. CIVIL PROCEDURE—GENERALLY

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meaningful way. Helminski v. Ayerst Laboratories, a Div. of American Home Products Corp., C.A.6 (Mich.) 1985, 766 F.2d 208, certiorari denied 106 S.Ct. 386, 88 L.Ed.2d 339.

967. Qualifications of judge

Former husband was not deprived of his due process and equal protection rights when his divorce action was heard by a referee who was not an attorney. Kumar v. Marion Cty. Common Pleas Court, Div. of Domestic Relations, C.A. Ohio 1983, 704 F.2d 908.

In Delaware, by virtue of Del.C.Ann. Const. Art. 1, §§ 4, 9, Art. 4, §§ 2, 11(1)(a) and general due process principles, civil defendant's due process right to meaningful opportunity to be heard entails not only right to jury trial but also to legally trained judge at some point during process of adjudication. Lecates v. Justice of Peace Court No. 4 of State of Del., C.A.Del.1980, 637 F.2d 898.

Where disqualification of judge is not matter of public policy, and parties with knowledge of disqualification do not proceed under Comp.St.Okl.1921, § 2633, such parties cannot urge disqualification on ground they have been deprived of due process of law. State ex rel. Dabney v. Ledbetter, 1932, 9 P.2d 728, 156 Okl. 23.

968. Number of judges

Although issues involved in divorce proceeding were heard by five different presiding judges and defendant's efforts to get motions heard were either summarily denied without hearing or order or left unattended for periods up to a year, such difficulties attributed to court system itself did not amount to denial of husband's right to due process. Colm v. Colm, 1979, 407 A.2d 184, 137 Vt. 487.

969. Comments or conduct of judge

Upon consideration of complaint in regard to manner in which trial was conducted in light of the whole record, there was no failure by trial judge to accord defendants due process on theory of hurrying the proceedings at an unduly fast pace, constantly interrupting counsel during examination of witnesses, taking over examinations, and unduly limiting examination and cross-examinations. El Ranco, Inc. v. First Nat. Bank of Nev., C.A.Nev.1968, 406 F.2d 1205, certiorari denied 90 S.Ct. 150, 154, 396 U.S. 875, 24 L.Ed.2d 133.

In proceeding on petition for increase in amount to be paid by defendant for support of minor child, defendant was not denied due process of law by judge's conduct and remarks during course of the hearing where, while judge intervened frequently during examination and cross-examination of the party and frequently cautioned and interrupted counsel, he did so in effort to bring out the relevant facts and expedite the hearing. Government of Virgin Islands ex rel. King v. Walcott, D.C.Virgin Islands 1969, 300 F.Supp. 855.

970. Recusal or removal of judge

Those with substantial pecuniary interest in legal proceedings should not adjudicate such disputes. Gibson v. Berryhill, Ala.1973, 93 S.Ct. 1689, 411 U.S. 564, 36 L.Ed.2d 488.

Mere size of sanctions, which were imposed on plaintiffs' attorney and his law firm and which were less than total attorney fees expended by defendants, did not transform sanctions into criminal fine, and given absence of personal embroilment or derogatory attacks leveled at trial judge that would ordinarily cause potential for bias so as to create disqualification as a matter of due process, due process did not mandate that a different judge preside over sanctions proceedings. Matter of Yagman, C.A.9 (Cal.) 1986, 796 F.2d 1165, amended, rehearing denied 803 F.2d 1085, mandamus granted 815 F.2d 575.

Since bankruptcy judge had sufficiently recovered his health to be present at a hearing and assist his counsel, the court of appeals, in exercise of its general supervisory authority, found it in the best interest of administration of justice that judge be given a hearing, with opportunity to supplement the record and call witnesses. Matter of Investigation of Administration of Bankruptcy Court, C.A.N.D.1979, 610 F.2d 547.

Determination that hearing was biased and party denied due process does not follow from fact that hearing examiner or trial judge may entertain an unfavorable opinion of a party as result of evidence received in a prior or connected hearing. Robison v. Wichita Falls & North Texas Community Action Corp., C.A.Tex.1975, 507 F.2d 245.

This clause did not foreclose state from determining whether decision to remove a magistrate could be based on majority of circuit judges present or voting or on absolute majority of all those eligible to vote; thus, removal of magistrate by the vote of 35 of 65 participating circuit judges did not violate due process because such vote was not by majority of the 71 judges eligible to vote. Field v. Boyle, C.A.Ill.1974, 503 F.2d 774.

Due process implies impartial court, which is not provided if judge has direct, personal and substantial pecuniary interest in case. Bradford Audio Corp. v. Pious, C.A.N.Y.1968, 392 F.2d 67.

That probate court, charged with administrative function of assessing inheritance tax, receives percentage thereof for fees, was not denial of due process. De Pauw University v. Brunk, D.C.Mo.1931, 53 F.2d 647, affirmed 52 S.Ct. 405, 285 U.S. 527, 76 L.Ed. 924.

Where adjudicator has substantial pecuniary interest in outcome of case, probability of actual bias is too high to be constitutionally tolerable. Rite Aid Corp. v. Board of Pharmacy of State of N.J., D.C.N.J.1976, 421 F.Supp. 1161, appeal dismissed 97 S.Ct. 1594, 430 U.S. 951, 51 L.Ed.2d 801.

Observance of right to an impartial judge is required to meet minimum standards of due process. Taylor v. New York City Transit Authority, D.C.N.Y. 1970, 309 F.Supp. 785, affirmed 433 F.2d 665.

Due process does not require that nonfrivolous motion for recusal be heard and decided by judge other than judge being challenged. Papa v. New Haven Federation of Teachers, 1982, 444 A.2d 196, 186 Conn. 725.

Absent showing of knowledge on part of trial justice that defendant had recently discharged the justice's wife from case on which she might have earned large fee, record did not demonstrate probability of actual bias on the part of the trial justice which was too high to be constitutionally tolerable, and thus defendant was accorded due process of law even if alleged inadequate representation by defendant's attorney was responsible for the trial justice's lack of knowledge. Brengelmann v. Land Resources of New England and Canada, Inc., Me. 1978, 393 A.2d 174, certiorari denied 99 S.Ct. 1535, 440 U.S. 971, 59 L.Ed.2d 788, rehearing denied 99 S.Ct. 2187, 441 U.S. 957, 60 L.Ed.2d 1061.

Code W.Va., 50–17–1 providing for a justice of the peace to charge a $5 fee for entering and trying any civil suit, whether the suit be completed or discontinued, creates a pecuniary interest in the justice of the peace and is violative of Const. W.Va. Art. 3 §§ 10, 17, and this amendment; further, such statute encourages justice for sale in violation of the West Virginia Constitution. State ex rel. Shrewsbury v. Poteet, 1974, 202 S.E.2d 628, 157 W.Va. 540.

Justice of the peace who got additional fee in civil case of $5 to be paid by plaintiff and who was entitled, if he found in favor of plaintiff, to additional fee of $2.50 for issuing execution of judgment in order to satisfy judgment for plaintiff had financial interest, in finding judgment for plaintiff, which was violative of due process clauses of federal and state Constitutions. State ex rel. Reece v. Gies, 1973, 198 S.E.2d 211, 156 W.Va. 729.

Due process requires that decision maker not have direct or indirect financial stake which would give a possible temptation to average person as decision maker to make him partisan towards maintaining high level of revenue generated by his adjudicative function, and even if individual cannot show special prejudice in his particular case, situation in which an official occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process. Wilson v. City of New Orleans, La.1985, 479 So.2d 891.

Where summons stated that order for removal of judge had been issued and placed burden on judge to show whether such order should be set aside, summons was not sufficient as notice, and thus order of removal was invalid inasmuch as notice was foundation of due process. Anderson v. State ex rel. Crain, 1979, 583 S.W.2d 14, 266 Ark. 192.

971. Magistrates

Where no fundamental principle of justice was infringed by Supreme Court's appointment of magistrate as trial judge, defendants' due process rights were not violated and question was only whether appointment was made in compliance with state law. McGill v. Lester, 1983,