

INVITATION TO COMMENT ON PROCEDURE FOR USING HEARING OFFICERS IN JUDICIARY COMMISSION MATTERS

The Judiciary Commission of Louisiana presented a proposal to the Court that would allow retired judges to be assigned as hearing officers to assist the Commission primarily by conducting hearings on formal charges and preparing proposed findings of fact and conclusions of law for *de novo* review and consideration by the Commission. A copy of the Commission proposal follows.

The Court considered the proposal and a majority of the Justices have agreed to implement it on a two-year pilot program basis. It is hoped that three principal benefits will result from using retired judges as hearing officers:

- Workload relief will be provided to overburdened Commission members;
- a more expeditious movement of cases will be facilitated; and
- perceptions of fairness in the judicial discipline process will be enhanced.¹

In the event the Legislature approves funding, the Court anticipates commencing the pilot program in the Fall of 2007.

The purpose of this memorandum is to allow interested persons to comment on the procedure that has been suggested for using hearing officers. **Persons interested in commenting on the procedure suggested by the Commission for using hearing officers should forward their comments to Deputy Judicial Administrator/General Counsel Tim Averill no later than Monday, April 30, 2007.** Mr. Averill's mailing address is:

Supreme Court of Louisiana
Judicial Administrator's Office
400 Royal Street, Suite 1190
New Orleans, LA 70130-8101

or via e-mail to: tfa@lajao.org.

Please be advised that any comments which are forwarded constitute matters of public record and are subject to public inspection.

¹ In the introduction to the proposed rule, the Commission notes that "the use of a hearing officer who has not participated in any aspect of the investigation of the complaint that led to the formal charges is perceived to provide a viewpoint unaffected by early reports about the case, some of which may have proven groundless."

PROPOSED

RULE

In order to implement a system wherein the Judiciary Commission utilizes hearing officers, it is our opinion and recommendation that the Supreme Court amend Supreme Court Rule XXIII. First, Rule XXIII, § 2 should be amended to provide for a definition of "hearing officer." A new §29 of Supreme Court Rule XXIII should be added to provide for the Judiciary Commission's employment of hearing officers. The proposed changes are as follows:

I. Introduction

A change to the procedures of the Judiciary Commission is being proposed for two reasons. First, the use of a hearing officer who has not participated in any aspect of the investigation of the complaint that led to formal charges is perceived to provide a viewpoint unaffected by early reports about the case, some of which may have proven groundless.

Second, using hearing officers has the potential for more expeditious movement of cases through the system, shortening the time periods for resolution of a case. Hearing Officers will have flexibility in scheduling because they will be able to hear cases that are projected to take several days, or more, to try to complete on an uninterrupted basis, without the necessity of scheduling over several months, which is necessary for Commission members who have other jobs that prevent their being absent for numerous days in a sequence.

II. § 2 of Rule XXIII should be amended to add a sub-section (h) as follows:

Section 2(h):

Hearing officer means any person designated by the Supreme Court pursuant to section 29 (a) of this rule to hear and report to the commission.

III. § 29 of Rule XXIII should be added as follows:

Section 29. Hearing Officers

(a) **Designation; authority.** This court may designate fifteen (15) retired judges to serve as hearing officers to hear and report to the commission in accordance with the provisions of sections five through nine and eleven of this rule. The court may appoint judges who have retired from courts of limited jurisdiction, such as city courts and juvenile courts. Justices of the peace may not be appointed as hearing officers. Such hearing officer shall be empowered to conduct hearings, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that the hearing officer may deem relevant or material to the subject of the hearing.

(1) Except as provided hereafter, in each case wherein the commission authorizes formal charges with respect to the alleged misconduct of a judge, a hearing officer shall be appointed to commence proceedings, as more fully set forth below.

(b) **Random allotment and Venue.** From the hearing officer designees of the court, the commission shall select a hearing officer for each case by random allotment to conduct hearings pursuant to sections five through nine and eleven of this rule. The random allotment procedure shall not, however, include the designee from the supreme court district where the respondent judge sits on the bench. All proceedings shall be conducted in New Orleans unless all parties agree to convene the hearing officer proceeding elsewhere. When proceedings are convened outside of New Orleans at the request of the respondent judge, all hard costs of the proceedings, including the travel expenses of the Commission staff shall be reimbursed to the Commission by the respondent judge.

(c) **Exceptions and motions; hearing officer bound by Code of Judicial Conduct.**

(1) The commission shall decide all exceptions and the following motions:

(i) any motion which would be determinative of the merits of the case;

- (ii) a motion to confirm or disaffirm the findings of the hearing officer;
- (iii) a motion made prior to the appointment of the hearing officer, except that the commission may refer such motion to the hearing officer when such referral is not inconsistent with the other provisions of this section; and
- (iv) a motion to proceed without appointing a hearing officer for a particular proceeding, as more fully set forth below.

(2) In each case where the commission is designated to decide a motion, such decision shall be made by a majority of the commission at the next regularly scheduled meeting, except that in cases where the hearing officer notifies the commission of a motion which he or she believes should be decided expeditiously, the hearing officer shall notify the commission in writing through its chief executive officer or commission counsel, who shall poll the commission for disposition on the motion.

(3) The designated hearing officer may decide all other motions, subject to the hearing officer's right to request that for good cause, the commission decide a motion other than those described in Subsection (c)(1) hereof. All motions shall be in writing and there shall be no absolute right to oral argument, which shall only be had in the discretion of the hearing officer, as to motions to be heard by him or by her, or by the chair of the commission as to motions to be decided by the commission.

(4) Motions for the disqualification or recusal of a hearing officer are to be made to the designated hearing officer within 10 calendar days of the parties receipt of notification of the appointment of the hearing officer. If the hearing officer deems the recusal motion meritless, he or she shall provide written reasons therefor and the motion shall be automatically referred to the commission for decision at the next regularly scheduled meeting, except where the respondent judge withdraws the request for disqualification after reviewing the hearing officer's reasons. So long as the motion is pending, all proceedings will be stayed until the commission has rendered its decision.

(5) In deciding a motion, the hearing officer shall not engage in *ex parte* communications with the special counsel or with the respondent judge and his or her counsel. In this regard, as to exceptions, motions, and all other matters, during the time the hearing officer is serving with regard to formal charges filed, the hearing

officer shall be subject to the Code of Judicial Conduct, pursuant to the rules that apply to retired judges.

(d) **The conduct of hearings.** The hearing officer shall set a prompt hearing date, regulate the course of the hearing, make appropriate rulings, set the time and place for adjourned or continued hearings and fix the time for filing proposed findings, briefs and other documents, and shall have such other authority as specified by the commission, not inconsistent with the provisions of this rule.

The respondent judge who is the subject of the hearing, and the special counsel, shall be afforded a reasonable opportunity to present to the hearing officer written argument on issues of law and fact, including but not limited to briefs and/or proposed findings of facts and conclusions of law. The respondent judge and the special counsel may file briefs and/or proposed findings with the hearing officer at the offices of the commission no later than four weeks after their receipt of the transcript of the hearing. For good cause, the hearing officer may grant a reasonable extension or may shorten the period.

(e) **Proposed findings of fact and conclusions of law.** The hearing officer shall submit a report to the commission with proposed findings of fact and conclusions of law. The Commission shall review the report de novo, and may on its own motion remand the case to the hearing officer for the taking of further evidence on any issue presented by the formal charge(s). No recommendation shall be made with respect to a sanction to be imposed by the commission. The hearing officer shall endeavor to submit such report: (i) no later than 30 days after receipt of the briefs and/or proposed findings of fact and conclusions of law referred to in sub-section (d) of this section; or (ii) no later than 30 days after the failure of the respondent or the special counsel to file such brief and/or proposed findings of fact and conclusions of law within the time prescribed in sub-section (d) of this section. A copy of the hearing officer's report shall be sent to the respondent judge and the special counsel.

(f) **Procedure to consider hearing officer's proposed findings of fact and conclusions of law.**

(1) The commission shall consider the hearing officer's report and/or agreed statement of uncontested material facts and shall provide reasonable opportunity for the submission of briefs and oral argument by the respondent judge and the special

counsel with respect to such report or agreed statement of uncontested material facts and with respect to possible sanctions. The respondent judge shall file an original and 9 copies of any brief submitted to the commission. Thereafter, the special counsel shall file an original and 9 copies of any reply brief submitted to the commission.

(2) The respondent judge may request an appearance before the commission to make a statement about the case, and the commission, on its own motion, may require the respondent judge to appear to answer questions about the allegations pending and/or about the hearing officer's report or about any stipulations of fact. The commission may require any witness who appeared before the hearing officer to appear before the commission for questioning.

(g) ~~Procedure to consider proceedings without appointment of a hearing officer.~~

(1) If the respondent judge and the special counsel have presented for approval a statement of uncontested material facts (as to all factual allegations of the formal charges) and such stipulation has been accepted, a motion to dispense with the services of a hearing officer shall be granted, reserving to the commission the decision whether to permit or require the respondent judge to address the commission in person. The parties may further present a stipulation as to the relevant law, or if there is a failure to agree, each side may brief such law. If the parties have presented for approval a statement of uncontested facts as to less than all the alleged factual allegations, the motion to dispense with appointment of a hearing officer shall be made by majority vote of the commission, which may be decided at a meeting or by a telephone poll.

(2) If for any reason there is no qualified person designated to serve as hearing officer and such circumstance persists for a period of 60 days after the filing of formal charges in a particular case, the commission shall proceed to hear the case without the benefit of a hearing officer.

(3) If upon the filing of formal charges the respondent judge makes a written request to the commission for a deferred recommendation of discipline agreement, a hearing officer shall be appointed at that time, but no proceedings shall be conducted until the issue is decided. If the commission and the respondent judge cannot agree upon the terms of a deferred recommendation of discipline agreement within 45 days

of the date the commission receives the request for such an agreement, a hearing officer shall be appointed and proceedings shall continue toward a hearing

(h) Confidentiality

The proceedings before the hearing officer shall remain confidential, and such confidentiality may not be waived by the respondent judge.

(i) Remuneration

A hearing officer shall be entitled to remuneration for his or her services in the same manner as the court compensates retired judges.

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