

Institute for Local Government Lawyers

Conducting and Error Free Hearing

by

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INSTITUTE FOR LOCAL GOVERNMENT LAWYERS

"HOW TO HOLD AN ERROR FREE HEARING"

by

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One of the most important tasks of the local municipal attorney is to assist the local boards and officials in conducting proper hearings. All too often local officials do not understand the protocols for holding a hearing. Sometimes their only understanding is what they may have seen on television- or worse, from local hearings full of errors.

As municipal attorneys, we interact in the hearing process in various ways. It is important to understand the issues involved in each phase of a hearing so that not only will we be prepared, but the local decision makers will be better trained. Not conducting a hearing properly is a frequent source of liability to municipalities as well as an embarrassing situation for local officials and especially legal counsel.

Because this program is being presented to municipal attorneys from North America, there will not be specific citations to particular laws or cases. It is important that you have a firm understanding of the laws in your jurisdiction concerning hearings. Develop a notebook of such statutes and cases.

While the laws may be different in the various jurisdictions, there are certain principles and techniques that should have universal application. The principles will generally apply whether it is a mayor holding a hearing or a board of selectmen or some other local board. It is in that framework that this material and presentation is made.

I. YOUR ROLE AS MUNICIPAL COUNSEL IN THE HEARING PROCESS-

While you may no doubt be familiar with conducting the hearing, you must be certain that your local officials are similarly familiar. This may involve your conducting training sessions for them or participating at the hearing. Municipal counsel's participation at hearings can take several forms.

You may be expected to present a case to the local board, similar to prosecuting a case. You may be expected to only advise the local board on legal issues and just assist them in conducting the hearing. In some instances you might not even be there, but will be expected to draft the decision for the board.

Practice Tip- Therefore, it is important that you understand in the very beginning what is going to be your role in any particular hearing. Be sure that your board understands your role. For example, if you are prosecuting a case before the board (such as for a license revocation or suspension) board members need to understand that it is problematic for them to consult you as to what decision they should make. In some instances, it may even be problematic for them to consult you concerning procedural issues. In complicated hearings, it may be necessary for there to be an attorney advising the board and another attorney presenting the case to the board.

II. PRE-HEARING CONSIDERATIONS-

It is critical that you and your board understand what the law provides for concerning the type of hearing you are holding. Some of the issues you need to be familiar with are:

Does the law allow you to do what you want?

Are there specific pre-conditions in the statute which must first be followed before you proceed to a hearing?

What are the notice requirements for the type of hearing you are holding?

Must the hearing be advertised or merely scheduled on the agenda?

Who is entitled to get notice? [typically abutters, affected employees, certain local government departments, sometimes neighboring governmental units or state agencies, etc.]

What must be included in the notice? [typically the notice must be sufficient to properly apprize interested parties what the hearing is about. This may depend on the type of hearing. A discipline hearing may require the notice to included certain specifics about the incident, notice of rights to the employee and possibly a requirement to include copies of certain laws.]

How is the notice to be served? [If by publication, for how long, how many days before the hearing, in what type of newspaper; can it by posting and if so where and for how

long and by whom; what happens if person refuses to accept service]

III. BEGINNING THE HEARING-

Now that presumably the case has been prepared and the proper notices and posting of meetings has occurred, you are ready to begin the hearing.

What is your local procedure for starting the hearing? This appears to be a matter of local custom, unless specifically set forth in state or local law.

Sometimes the chairman of the board or clerk of the board or the attorney for the board will read the notice or set forth what the hearing is about. Neighboring communities can have different protocols. It is helpful to know how your community normally starts the hearing. If you feel it should be changed, you should be sure to discuss it at a minimum with the chairman of the board and it would be wise to send out a memo to all members as to whatever changes you want them to implement.

While how you begin the hearing may not legally affect the process, you want to avoid a member of the board interrupting you in the beginning of the hearing by saying that "That is not how we do it here." This is true even if you are an experienced municipal counsel. You may be covering for a neighboring community's counsel and might not realize that they start their hearings differently than the community you generally counsel.

It is also a good idea for someone- whether it be the chair, clerk or you- to tell those assembled generally how the hearing will be conducted. Many people do not realize that they will have an opportunity to present their case and evidence. It helps create a smoother hearing process if the rules of procedure are made clear to everyone in the beginning.

IV. SECURING THE ATTENDANCE OF WITNESSES AND EXHIBITS-

We all know that a case is presented through witnesses and exhibits.

Usually several of the witnesses would be employees of the community, the applicants (if it is a hearing on an application), people in favor or opposed, or other such groups of people who usually come voluntarily to the hearing. These people would normally not need to be compelled to come to the hearing.

Some witnesses however will not come voluntarily to the hearing. Even if certain witnesses say that they will come voluntarily, sometimes you get a feeling that they will not show up. Some witnesses want to come, but for various reasons want to be subpoenaed to attend.

Practice Tip- If you need the employee who is the subject of a hearing to testify, do not presume that he will be there even if it is an important hearing. Sometimes, especially if that employee's testimony is critical to your case, he may not appear. If you need his testimony, you should

consider having him subpoenaed to attend or at least an agreement with his attorney that he will attend.

Subpoena witnesses-

For witnesses who will not come voluntarily or due to job or personal reasons need a subpoena, you need to have them subpoenaed. Similarly, if you want to ensure that they will bring certain documents, that has to be included in the subpoena.

State law typically provides the mechanism for having a witness subpoenaed. Be sure you follow the proper procedure and know how you enforce the subpoena if the person does not obey it.

In your jurisdiction, who can issue a subpoena- must it be a notary, an attorney, the board chair?

In addition to the statutory authority, there is generally considered to exist a customary right of bodies or persons holding hearings to have summonses issued to compel the attendance of persons at hearings. Know ahead of time what the process is and even have a boiler plate complaint ready in case you need it. Having such a complaint ready for filing with a court will save you time and will show your board how prepared you are.

V. MARKING OF EXHIBITS-

In any hearing where there are going to be documents used, which basically is all hearings, you should be prepared to mark the Exhibits with either numbers or letters. If there are not going to be too many Exhibits, you can use numbers if you wish. If there are going to be a large number of Exhibits, you should use numbers. It comes down to local practice and what you want to do.

You can purchase little tags that say "Exhibit" on them, with space for the date and number. It is also a good idea to keep a separate sheet called an "Exhibit List", indicating the name of the hearing, the date, what party the Exhibit is from or if it is a joint Exhibit, the number of the Exhibit and if possible, a brief description of the Exhibit. This will help you keep better track of the various exhibits and will make it easier to complete the record of the hearing.

In some hearings, the parties may agree in advance as to certain Exhibits and at the beginning of the hearing they may present to the board certain Exhibits that they have already agreed may be introduced. Sometimes they might pre-mark Exhibits that they will try to introduce in the proceedings.

In other hearings, the Exhibits are introduced as the hearing proceeds.

Some times the parties will make copies of each of the Exhibits they introduce for each of the board members hearing the matter. Other times they make just one copy and use that as

the document to be introduced. If there is just one copy, you can either make copies for the other people hearing the matter, or make sure that each of the people hearing the matter have an opportunity to review the document.

All testimony and exhibits that are relevant to the matter being heard should be allowed and introduced. Be sure your board has some understanding of what is meant by "relevancy". You can suggest that the board members should ask themselves whether it bears in some way on the issues before them. Would it be helpful in deciding the issues? Does it go to the establishing or disproving of any of the issues or allegations?

If it does, does the Exhibit appear to be accurate and either authentic or a copy of an authentic Exhibit? They should be satisfied that the Exhibit is what it is claimed to be. Usually this is done by having it certified by someone in a position to say that it is what it is claimed to be. Reasonable judgment can be used if it is not certified.

Many times the parties might stipulate that a document is what it is claimed to be. This of course makes it easier in terms of admitting the document. You should note for the record any such stipulations. Sometimes the parties may stipulate as to certain facts. These likewise should be noted for the record.

It is always a good idea to mark as an Exhibit, often the first ones, the notice of the hearing, the application if there is one and any other pertinent correspondence (such as agreements to reschedule the matter). This is not always done and that is not a problem, depending on the issues and the significance of the proceedings. As will be noted below, the more important it is to have a complete record of the matter, the more important it is to have documents, including the notices and applications, introduced. You can make a general reference in the beginning of the hearing that the notices and applications are deemed admitted. If there are other documents in the file that are important, you should have them deemed admitted. Often times, even when this is not done, when the record is being prepared, these items are incorporated into the record.

A sample of an Exhibit List could be as follows:

Appointing Authority Disciplinary Hearing
Re: Joseph Smith and the XYZ Police Department

Date:

Exhibit List

Number	By Whom	Description

[You can also number Exhibits by which party introduced them, such as T-1 (Town Exhibit 1), E-l (Employee Exhibit 1), J-1 (Joint Exhibit 1), and so on.]

VI. OATH TO BE TAKEN BY WITNESS-

All witnesses who are to testify should be sworn in by whomever your state law authorizes to administer oaths. This could be, depending on your law, the presiding officer or a Notary Public or Justice of the Peace. Sometimes this is done by the local municipal counsel or clerk to the board.

Having witnesses sworn in impresses on the participants the serious and solemn aspects of the hearing. In addition, if someone is later shown to have lied under oath, there may be a charge of perjury involved.

The oath can be in several different versions, depending on your local law, but basically would be:

> "Do you swear that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth, so help you God?"
>
> Other versions could be:
>
> "Do you solemnly and sincerely affirm under the penalties of perjury that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth?"
>
> "Do you solemnly swear [can use "affirm" instead of swear"] to tell the truth, the whole truth and nothing but the truth so help you God?"

Often times all the witnesses are sworn in at the same time. If new witnesses come later, they should sworn in before they testify. If the witnesses are sequestered (not present in the hearing room except when they are testifying) they can be sworn in when they enter the room to testify.

VII. ORDER OF PROCEEDINGS-

Now that you have started the hearing, noted any pre-marked Exhibits and sworn in the witnesses, the board is ready to begin hearing the matter.

Adversarial Hearings-

The order of proceedings in adversarial matters (disciplinary hearings, license suspension/revocation hearings, for example) is typically that the party making the charges puts their case on first and then the other party puts on their case.

In the presentation of both cases, either party has a right to object to the questions or Exhibits of the other party. These objections need to be ruled on. In addition, the person or body hearing the matter, can ask questions of the witnesses.

Let us assume there is a local level disciplinary hearing. In such a hearing, the order of proceedings might be as follows (we will assume that each party is represented by an attorney; in such instances it is the attorney who is acting for the Town or Employee):

– Town and Employee may make an opening, giving you an overview of the matter; either party may waive opening; Employee may want to reserve opening until he presents his case

- Town introduces its first witness and questions same; may also introduce Exhibits through the witness

- Employee cross-examines witness; can also introduce exhibits through witness

- Board or person holding hearing questions witness

- Town introduces its next witness and the same pattern follows

- Town rests its case

- Employee introduces his first witness and questions same; may also introduce Exhibits through the witness

- Town cross-examines witness; can also introduce Exhibits through witness

- Board or person holding hearing questions witness

- Employee introduces its next witness and the same pattern follows

- Employee rests its case

- Town may present rebuttal evidence

- Parties may make closing arguments

- Board takes matter under advisement and eventually renders decision (be careful of time periods involved as to when decision must be rendered)

Objections During Adversarial Hearings-

During the course of the proceedings, either party may object to the other party's questioning of a witness or the introduction of an Exhibit.

If a party is seeking to introduce an Exhibit, be sure that they show it to the other side. Usually the parties know to do this, but sometimes they forget and it is necessary for you to remind to show it to the other side before the board should consider whether to admit it.

After the other side has seen it, the board chair should ask if there is any objection. If there is an objection, person the person making it should be asked to state and explain his objection. The other side (being the party trying to introduce the Exhibit) should then be permitted to respond to the objection.

The board can then decide the issue as to the objection. The board would either "overrule" the objection and allow it to be admitted, or would "sustain" the objection and not allow it to be admitted. The board can also allow it in subject to permitting the objecting party to renew his objection later.

During the questioning of a witness, there may be an objection. In such a situation, the board needs to address it then. The questioning should stop and the witness should not answer until the board permit the answer.

When there is an objection to a question, the board should allow the person making the objection to explain the basis of the objection. Then allow the other party (the one whose question was objected to) to respond.

In dealing with objections, as well as other matters, board members should be told by you that they are not expected to be as familiar with the law as judges or attorneys. Local hearings, as well as many state hearings, are not bound by the strict rules of evidence and judicial procedure. Thus there is some flexibility. The key is to maintain fairness and use common sense. Even if the board allowed a question which a judge would not have allowed, as a general rule as long as the board conducted a fair and reasonable hearing, it should not be a proble.

Practice tip- When there is an objection, and the board may not be sure how to rule on it, the board may want to allow it in, but state that "upon review of the entire matter, the board will give it what weight is appropriate" or words to that effect. It may be that the board does not feel much weight, if any, should be given to the question or Exhibit when it reviews the entire matter.

There may be objections based on legal principles which may disqualify a witness from testifying. An example of this is spousal immunity. When there are objections made based on

such issues, the board needs to consult with legal counsel.

Non-Adversarial Hearings-

Non-Adversarial hearings include license hearings, where someone is appearing before your board seeking a license, such as a liquor license or common victualer license. These are still very important hearings.

Because they are non-adversarial in nature, the format is different from the adversarial hearings discussed above.

In these hearings, usually the applicant, either by himself or through his legal counsel, makes his presentation to the Board as to why he should be granted the license.

He may present witnesses in support of his application. Often this is done to explain various aspects of the business activity, such as parking and traffic, building design, etc.

After the applicant has presented a witness, or at the conclusion of all the applicant's witnesses, the Board may question the applicant or his witnesses. Also, the Board can introduce relevant Exhibits.

There may be others at the hearing who wish to testify. It may be the custom in your community to have certain municipal officials, such as the Police or Fire Chief, Building Commissioner or Health Director speak and provide information on the application. The people associated with the community should be allowed to speak next.

Next would be the general public. The board can start off by asking for those who are in favor of the application to speak first. When that group is done, the board can then ask for those opposed.

An issue often arises as to whether the public can ask questions of the applicant. Usually the applicant is anxious to address any questions or issues. The board need not allow the applicant to be questioned by the public. Often, especially in controversial matters, these questions tend to be hostile. If board is not gong to allow the questioning, the person can still state the questions as issues he is concerned with.

In any event, all such questions should go through the chair.

VIII. DEVELOPING A RECORD-

The record is the history of what went on before the official or board hearing the matter. It contains the documents introduced and to the extent that it exists, the transcript or tape of the matter. It contains the notices and the decision.

It is important to be sure that there is enough evidence before you to make the decision.

Depending on the nature of the hearing, certain matters before the board require findings of good or just cause, or that the public need will be served or that something is not detrimental to the public good and welfare. You must be certain that enough evidence has been presented in order for the board to make such findings.

In all cases therefore, the record which is developed is important. The importance is even greater if the matter is appealed, because, depending on the law of your jurisdiction, some appeals are usually based solely on the record developed by Board, while other appeals involve a new hearing before a new fact finder, whether it be a judge or an administrative law magistrate.

Appeals involving only a review of the record require of necessity more attention to be paid to the record. However, even in other hearings where there will be a new hearing, it is important to have a complete record as you want to be able to show that the decision made was based on sound reason and was not arbitrary, capricious or whimsical.

Particularly in license matters, such as a common victualer, its is critical to have in the record sufficient information to justify your decision if it is a denial. A court in reviewing the denial of a common victualer license is only going to be looking at what was before the Board, unless the Court allows the record to be opened and new evidence introduced or unless a new hearing is held on the appeal. There is one exception of note to that cautionary alert- a court will recognize that a local board is familiar with local conditions and will usually give deference to determinations by a local board which involve knowledge of local conditions.

However, boards acting in their licensing capacity can create a stronger case for upholding their decisions in a denial of a license by being sure that the record contains certain pertinent information which would enable a judge to see that there was some basis for the Board to decide the way they did. This information can even be introduced by the Board itself at the hearing.

Practice tip- In license matters, it is very helpful and prudent to introduce a map of the community showing the location of other similar licenses in the community, particularly serving the same or similar fare. This can easily be done using a local zoning map or a few sheets from the Assessors' Maps. The proposed location and the other locations can be marked.

This enables someone reviewing the decision to see that there was a basis for finding; for example, that the public good would not be served by another pizza parlor where there are several others already in existence.

Practice tip- In business license matters, boards should not get into the issue of competition to other locations. This often happens when a Board denies a license, stating that it would give too much competition to other businesses. This is fraught with danger. The same point is actually whether the public good would be served by this particular licensee. By finding that the public good is already adequately served and that this license would not serve the public

good which is adequately served, a board is able to have a recognized basis to deny the application and can avoid the uncertain issue of competition. While there may be some cases which can be interpreted to suggest that competition, to the point that it causes other places to be unable to serve the public, can be considered, a board is generally better off not dealing with competition as a reason.

You can also have introduced into the record a listing of all or some of the licenses already issued. This is helpful is seeing how many of a certain of license is already in existence.

If traffic is a concern, you can help beef up the record by having someone from the police department testify as to traffic conditions at a certain location. A report can also be prepared on this issue and introduced into the record. Under certain procedures, some boards can have the applicant finance a traffic study.

Photographs are also helpful to have in the record. While sometimes a judge will take a view, it is helpful to have information in the record to show what the area is like so that a fact finder on appeal can get a feeling for the area.

IX. DECORUM-

One of the easiest ways to loose control of a hearing and commit an error which can lead to reversing the decision of the Board or, even worse, create serious legal liability, is for the Board holding the hearing to not maintain proper decorum.

The best rule of thumb is to treat all people and matters before you the same way you would want to be treated if you or a matter you had an interest in was before a Board.

This is easy to say, but in practice it is often hard to observe. Due to the emotions which often arise during hearings or the strong feelings which all persons may have from time to time, history has shown that it is sometimes difficult for boards to treat persons and matters before it properly. However, boards must resolve constantly, and you must reinforce this principle constantly, that they will treat all persons and matters fairly. To do less is to weaken the strength of orderly government and will only cause problems.

The best way to do this is to encourage boards to pause and think before responding to matters before them. They should not fall prey to the occasional wrongful conduct of those before them, whether it be inadvertent on their part or even intentional on their part.

Here are some typical examples which may happen:

- an applicant becomes argumentative at the thought that he needs a license or some approval, even though the law clearly requires it

- an attorney representing a person or party becomes argumentative and "over zealous" in his representing his client, whether it be getting into an argument with the Board or criticizing the Board for some policy

- members of the public are rather harsh in their opposition to the matter before the Board and threaten Board members with revenge at the next election

- members of the Board disagree amongst themselves as to the proper way to proceed

- the matter before the board is one which board and a sizable segment of the community find repulsive, but yet the law allows the matter to come before the board

In instances where things get out of hand, a record is created which can easily form the basis for an appeal or other legal action. Such situations enable an appealing party to show that the hearing was not conducted properly, that there was bias or animosity from the Board which prevented the person from receiving a fair hearing.

Even if the board is able to be successfully defended, it is costly in terms of time and expense to do so and it still presents the board in an unfavorable light to the Court and public.

How does one deal with such situations? Remember the basic rule- the Golden Rule- treat all persons the way you would want to be treated. Board members should pause and think before responding. They should not lower themselves to the depths of an unrulely person before them. They should maintain firm but fair control. You as the municipal attorney must help them do this.

Ejecting disorderly persons-

In many jurisdictions, the law does permit the presiding officer to order a person to leave a meeting for unruly conduct and if he does not do so, to order him to be removed. While it may be tempting to do so, if your jurisdiction has such a law, your boards should still be cautioned to never do so except under the most dire circumstances, and then only with consultation from you. While the law gives officials this right, it is so fraught with danger of a law suit that it is rarely, if ever, worth the risk.

There are several other steps boards can take to maintain decorum as opposed to having to order the person removed.

The best thing to do would be to take a recess. Rarely after a recess does the person continue.

A police officer can be called to speak to the person about being disruptive. Usually this has the effect of restoring calm. Even the police officer has to be careful in doing this however.

When all else fails, the board should consider adjourning the meeting to another date. While a board may not want to appear as if it backed down because of this person's conduct, most people once they ponder the situation will see the wisdom in rescheduling the meeting and avoiding a controversy. In any event, if the person was unruly, the public will know it and he will have to live with that view from the public.

Board members should be most careful not to get involved in a hostile dialogue with the person before them or their attorney. Boards should understand that sometimes there is an attempt to do this in order to show that the hearing was not fair. Boards must resist responding to each remark.

If a board feels that a response is needed, they should make it a neutral one- "We believe that we are conducting a fair and proper hearing. We would ask that all persons please act in a calm manner."

This does not mean that a board can not caution a person about interrupting or being hostile to a witness. You must assist boards in exercising control and in ensuring that the hearing is be conducted fairly and calmly. That includes cautioning someone not to be abusive to a person or witness, to not shout or speak when not recognized. Boards should also not allow members of the public to act hostile to persons before you. Outbursts should not be permitted and boards must protect the stranger before then the same as the longtime resident before them.

X. CONFLICT OF INTEREST AND BIAS-

It is important that boards be sure they are acting not in conflict of interest and free of bias in the matter before them. As municipal counsel, it is important that you educate your boards in recognizing the potential for such issues. While the law may vary from jurisdiction to jurisdiction, the following is a general description, suitable for passing on to local board members. As the law in your jurisdiction may be different, you should be sure you understand the law on this issue so you can recognize the problem and be able to appropriately advise the board.

Conflict of Interest-

A conflict of interest generally may arise when the matter before the board is something which the members or their family or business have a personal or financial interest in.

Usually board members will know prior to the hearing if there is a conflict of interest issue in the matter. In such instances it is important that board members consult with you (preferably before the hearing!!!!) and discuss the matter to see if it disqualifies the board member from participating in the matter or what steps must be taken under your jurisdiction's law to enable the person to continue participating.

It does happen however that even during the hearing a conflict of interest situation can arise. This may happen when certain facts are brought out during the hearing which give rise to a potential conflict of interest. In such a situation you or the board member should ask that the hearing be recessed. You should then discuss the matter with the board member. Board members, as well as municipal counsel, need to be cautioned to not try to ignore the situation. Chances are that if you or the board member think that there might a conflict, others might thinks so too and might raise the issue if it is not addressed properly.

If it does disqualify a board member, the member should not participate. Participating in a matter in which a board member is disqualified because of conflict of interest may not only lead to a reversal of the action, but may subject the member to a violation of the law.

It may also be that it is not a disqualifying conflict.

Some potential conflicts can be addressed under the law by making a disclosure of the situation; if so, such a disclosure will protect the member and enable him or her to participate. It is important that they consult with their local municipal attorney on this and

that you as the municipal attorney know how to deal with the typical- and not so typical- situations which may arise.

A frequent issue which may arise, particularly in small communities, is when the matter before the board relates to property abutting a board member's property. Under many Conflict of Interest Laws, the board member would be prohibited from participating as a municipal official in a particular matter in which he or she had a financial interest. You need to know whether your jurisdiction's law would consider being an abutter to create a conflict. In some jurisdictions, in such a situation it will be presumed until rebutted that there is a financial interest in any matter affecting abutting property. Thus, a board member may not participate as a municipal employee or official in the matter unless he or she- again depending on your jurisdiction's law- can show that he or she does not have a financial interest in the matter. In other words, the board member may have to overcome the presumption that there is a financial interest in the property.

The effect of the interest may be positive or negative to one's financial interest in the property- but it typically does not matter. It is very unlikely that a property owner would be able to sufficiently demonstrate that he or she does not have a financial interest in the property and thus not a financial interest in the matter before the Board.

Likewise, board members need to understand that they can not participate in matters affecting themselves or family or businesses. Any exceptions are very few and narrow. Board members should not attempt to determine themselves if an exception applies, but rather should consult you as the municipal counsel.

The Rule of Necessity-

In some jurisdictions there is a theory called the Rule of Necessity which basically provides that a person who would otherwise be disqualified from participating in a matter because of a conflict of interest can still participate because there is no other way that matter can be decided.

However, the true situations where this rule can be used are so few and rare that board members should not even consider applying this rule without specific guidance from you as the municipal legal counsel. Inconvenience, having to reschedule matters, having to now arrange for someone else legally qualified to perform the function, etc. are generally not sufficient grounds to invoke this rule.

Bias-

Board members should be instructed by you as to what is considered bias in your jurisdiction. Generally, bias exists when a board member is so predisposed to a matter before them that they can not reasonably be expected to fairly and impartially adjudicate the matter. Holding a hearing is generally considered a quasi-judicial function and as such persons conducting hearings are generally expected to observe the impartiality of judicial officers.

No one usually considers themselves biased to the degree that they can not act impartially. However, the person making that conclusion is usually too close to the situation to make that determination in an unbiased manner.

We all have some degree of bias. That is human nature. Thus, not all bias is invalidating bias. The problem arises when the bias is of such a degree that it would interfere with the

responsibility of conducting a hearing fairly.

Often times there may be a community controversy on a matter which may end up before a local Board. This can be for example when a controversial business which will need a license or permit announces that they are coming into the community. Another example is when there may have been some significant misconduct by a public employee and it creates a controversy in the community. Both matters may end up before a local Board.

The problem arises when, because a board member takes a public position on the matter, often in response to pleas by local residents or the media.

Therefore, you must condition board members to think first- is this a matter which may come before the Board in an adjudicatory proceeding?

If the answer is yes, then they should be careful on their public pronouncements. Saying "There is no way that a XXX store is coming into this community." or "This officer should be fired immediately." will only leave them open to charges of bias and motions that they disqualify themselves from the hearing.

What they may usually say is such things as "The Board will hold a very thorough and careful hearing on this matter-to see if it is good for the community. Come and testify if you have anything to say." or "This is a very serious situation and the Board will hold a hearing to find out what happened and what should be done."

Being public officials there is a natural tendency on their part to want to assure the public that they are with them on a matter. However, they can better help the public by being careful in any public positions so that they are not subject to a bias charge.

In sum, if a board member is so predisposed that he or she can not fairly adjudicate the matter before them, they should abstain from participating. Since there are so many variables involved, they should discuss this with their local municipal counsel.

XI. Ex parte Contacts and Personal Investigations-

Ex-parte Contacts-

Board members need to be cautioned about ex-parte communications.

It sometimes occurs that people either for or against a matter which is pending before a board will call board members or stop them on the street to discuss "the Smith disciplinary hearing" or the "pizza shop license". Usually they mean no harm by doing so and local board members normally want to be receptive to what their constituents are saying.

In a hearing situation, the problem with such discussions is that if they relate to the particulars of a hearing before the board member, the contact may constitute "ex parte" contact-contact with an adjudicator out of the presence of the parties involved.

All parties to a quasi-judicial matter are entitled to know the evidence that the fact finder will be using to decide the matter. They are entitled to be able to respond to the "I heard such and such" or the "I don't think they are telling the truth" statements which may arise in an ex parte contact.

When these contact are made they may cause an irregularity in the proceedings and could be the cause of a reversal as well as a charge of violating the rights of the parties before the board.

Without being disrespectful to the people who may innocently want to discuss the matter with board members, local officials should simply tell them that they too are concerned about the matter and that they appreciate their concern but since the matter is presently before the board in a hearing they can not discuss it with them. If they want to comment on the matter, and the proceeding is one which allows public input (typically a license or permit issuance hearing) the board member can tell them that they must come to the hearing and they will be allowed to speak.

You must condition your local officials to resist the temptation to continue such discussions because they may come back to haunt them. In some appeals board members may have their deposition taken and may be asked if they discussed the facts of the case with anyone. In the more typical case someone has overheard the discussion and then tells someone else who then tells someone else. After awhile the conversation is described perhaps much differently than what really happened. However, by that time the damage is done and the appearance of a problem is there, if not an actual problem.

Personal Investigations-

Board members should be informed that they are certainly permitted to know what they see and observe in their everyday travels. The common experiences all of us may have during our life will not disqualify them from participating a local proceeding.

The problem arises when a matter is before a board and a board member decides to do some personal and independent investigation.

An example of this would be re-creating an incident which is the subject of a civil service hearing before a board. Suppose the board member decide to go down to the scene and see if it could happen as the officer claimed. This is fraught with danger. The parties to the proceeding are not there to see what the board member is doing or to be able to address the matter. It is worse if the board member does this and do not even tell anyone, as therefore no one knows they have this additional knowledge which relates to a matter before the board and which the board member obtained on their own. Such situations can easily lead to a reversal.

What a board member can and should do if they feel it is necessary, is to request a site visit or a re-enactment of the incident, if possible. This would be done in the presence of all the parties and the person hearing the matter. This is acceptable and in certain cases appropriate.

If a board member feel that certain matters should be addressed, he or she can raise the issue at the hearing and have the parties address it.

Common sense rules apply. Asking about or knowing on their own that there are 20 restaurant licenses in an area and then producing a map to show them is probably acceptable, as long as it is introduced at the hearing. A board member conducting their own investigation into an incident and speaking to witnesses outside of the hearing is traveling the road to trouble.

It is only a matter of time before charges of civil rights violations for such conduct, innocently intended, become the norm.

XII. Conclusion-

Conducting hearings is one of the most important functions of a local official. It is through holding their position that they are vested with this responsibility to make decisions on behalf of the community.

Incumbent upon you as the legal counsel for the community is to help them exercise that responsibility in a fair and impartial manner.

It is hoped and expected that through this program you will have gained a better appreciation and understanding of the hearing process.

A common theme is apparent. Board members should act reasonably and fairly and treat people before them the way they would want to be treated. Board members should know to consult and work with their local municipal counsel. You as the legal counsel are an integral part of the team for effective and efficient government.

By conducting a fair and proper hearing, your community's decisions will hopefully be error free and you will be in a better position to withstand a challenge and possible overturning of the decision.

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