

FACTS about

Proposed Changes to the DSS Fair Hearing Process

There is a fundamental constitutional due process right to an "impartial" hearing officer, as held by the United States Supreme Court to be required in administrative appeals of agency action. (*Goldberg v. Kelly*, 397 U.S. 254 (1970)). That right is in fact now codified in both state and federal regulations governing the benefit programs administered by DSS. See, e.g., 42 C.F.R. §§ 431.205(d) and 431.240(a)(3).

Despite constitutional and regulatory requirements that DSS hearings be conducted impartially using impartial hearing officers, the reality is that, structurally, the hearings office is not independent from DSS or even from DSS legal counsel.

- DSS hearings are run by their "Office of Legal Counsel, Regulations and Administrative Hearings" (OLCRAH), headed by the chief counsel for the Department.
- All hearing officers report through their supervisors to the chief counsel and all DSS lawyers also report directly to that same individual.
- DSS attorneys represent the Department in a variety of forums, which sometimes include hearings before DSS hearing officers. Significantly, these same DSS lawyers sometimes "advise" DSS hearing officers on legal matters pending before them, with no notice to the appellant that such ex parte communication has occurred or opportunity to rebut.

Thus, a DSS lawyer may represent the department before a hearing officer regarding a particular issue and, behind the scenes, provide ex parte communications with the very same hearing officer regarding the very same legal issue – but, technically, regarding a different claimant.

These due process violations cannot be fixed as long as the DSS hearings office is under the control of DSS legal counsel.

A meaningful separation between the hearing officers and DSS counsel needs to be created and enforced. Targeted changes which would directly alter the DSS hearing structure and process to insure that due process protections are observed include:

- Prohibiting hearing officers from communicating with agency employees around questions of fact or law concerning contested cases without notice to all parties to participate on the record.
- Establishing an Office of Administrative Appeals within DSS independent from DSS Legal Counsel and any other division of DSS, that reports directly to the Commissioner of DSS.