STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:	)	
Local Government Center, Inc., et al.	)	C-2011000036
RESPONDENTS	)	

HEALTHTRUST'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE THE NEW HAMPSHIRE SECRETARY OF STATE'S RECENTLY FILED AFFIDAVIT AND TO DISQUALIFY THE PRESIDING OFFICER

HealthTrust, Inc. ("HealthTrust") submits this memorandum of law in support of its motion to strike the New Hampshire Secretary of State's ("Secretary") recently filed affidavit from the record and to disqualify the Presiding Officer from presiding over the New Hampshire Bureau of Securities Regulation's ("BSR") Motion for Entry of Default Order ("Motion"). In short, the BSR's recent submission of the Secretary's affidavit violates HealthTrust's right to due process pursuant to N.H. Const. part I, article 35 and U.S. Const. Amend. XIV, and the statutory prohibition on *ex parte* communication with the Presiding Officer or the Secretary in RSA 421-B:26-a, XXV, and renders it impossible for HealthTrust to receive a fair hearing.

PROCEDURAL HISTORY AND FACTS

The relevant procedural history in this matter until April 10, 2014 is set forth in HealthTrust's previously filed Memorandum of Law in Support of Motion to Disqualify the Presiding Officer and incorporated by reference. Later in April 2014, the parties argued HealthTrust's motion to dismiss for lack of jurisdiction, the Presiding Officer denied the motion, and the Presiding Officer denied HealthTrust's motion to disqualify him.

On May 9, 2014, the parties submitted their respective motions for summary judgment. Exhibit A to the BSR's motion is an affidavit from New Hampshire Secretary of State William

M. Gardner ("Secretary's affidavit"). The Secretary's affidavit includes eight numbered paragraphs that: (1) identify the affiant as the Secretary of State; (2) note the Legislature's grant of authority over RSA 5-B to the Secretary; (3) represent that the Secretary is familiar with the instant matter; (4) state that, at the time of the Supreme Court argument in November 2013, the Secretary was not aware of the contingent agreement between HealthTrust and Property-Liability Trust, Inc. ("PLT") that is the subject of the Motion ("Agreement");[1] (5) provide the Secretary's interpretation of certain items in the Supreme Court opinion; (6) offer the Secretary's opinion regarding the Agreement; (7) endorse the enforcement action; and (8) announce the conclusion of the affidavit.

Paragraphs 4, 6, and 7 of the Secretary's affidavit state as follows:

> 4. I was not presented with or asked about the October Agreement before it was executed by any of its signatories or their agents or representatives. At the time of the Supreme Court argument held in this matter in November 2013, I was unaware of the terms or existence of the October Agreement. . . .
>
> 6. The October Agreement appears to allow the successor entities to the Local Government Center pooled risk management programs to replicate the organizational structure that was condemned under the hearing officer's final order. The October Agreement may also be utilized to facilitate the illegal subsidization of a financially failing workers compensation program, in violation of RSA 5-B and other statutes.
>
> 7. I fully approve of the enforcement action that is now underway and authorized it.

ARGUMENT

The Secretary's affidavit violates HealthTrust's right to due process pursuant to N.H. Const. part I, article 35 and U.S. Const. Amend. XIV, and the statutory prohibition on *ex parte* communication with the Presiding Officer or the Secretary in RSA 421-B:26-a, XXV.

This proceeding is governed by RSA-B:26-a. The statute contains the procedures for adjudicatory hearings involving alleged RSA 5-B violations, including those necessary to protect

[1] The Secretary's affidavit refers to the Agreement as the "October Agreement."

the due process rights of parties charged with RSA 5-B violations. A critical provision of the statute expressly states that:

> Once a hearing notice has been issued commencing an adjudicatory proceeding, no party shall communicate with the presiding officer or the secretary of state concerning the merits of the case except upon notice to all parties nor shall any party cause another person to make such communications.

RSA 421-B:26-a, XXV.

Here, a hearing notice has been issued that commenced an adjudicatory proceeding. On February 18, 2014, the Presiding Officer issued a Notice of Preliminary Conference. On March 11, 2014, the Presiding Officer issued a Scheduling Order and Notice of Hearing Regarding Issue of Jurisdiction and also issued a Corrected Scheduling Order and Notice of Hearing Regarding Issue of Jurisdiction on March 13, 2014.

On April 15, 2014, and after having orally denied HealthTrust's motion to dismiss for lack of jurisdiction during a hearing on the motion on the previous day, the Presiding Officer issued a Scheduling Order and Notice of Hearing. The Order established dates for the parties' respective motions for summary judgment, objections to those motions, a hearing on those motions, and, if necessary, a hearing on the merits of the Motion. Accordingly, it is beyond dispute that "a hearing notice has been issued commencing an adjudicatory proceeding . . . ." *See* RSA 421-B:26-a, XXV.

It also is beyond dispute that the BSR "communicate[d] with the secretary of state concerning the merits of the case[,]" *see id.*, after the hearing notice issued commencing the adjudicatory proceeding. While the Secretary's affidavit is undated, it states that he "approve[s] of the enforcement action *that is now underway* and authorized it." Secretary's affidavit ¶ 7 (Emphasis added). At a minimum, paragraphs 4 and 6 concern the merits of the case, as follows:

> 4. I was not presented with or asked about the October Agreement before it was executed by any of its signatories or their agents or representatives. At the time of the Supreme Court argument held in this matter in November 2013, I was unaware of the terms or existence of the October Agreement. . . .
>
> 6. The October Agreement appears to allow the successor entities to the Local Government Center pooled risk management programs to replicate the organizational structure that was condemned under the hearing officer's final order. The October Agreement may also be utilized to facilitate the illegal subsidization of a financially failing workers compensation program, in violation of RSA 5-B and other statutes.

Secretary's affidavit ¶¶ 4, 6. HealthTrust was not provided with notice that the BSR would communicate with the Secretary regarding the merits of the case. *See* RSA 421-B:26-a, XXV.

The BSR's *ex parte* communication with the Secretary regarding the merits of the case without notice to HealthTrust violates the plain language of RSA 421-B:26-a, XXV. The statute prohibits *ex parte* communication about the merits of a case with the Presiding Officer or the Secretary after notice of an adjudicatory proceeding has issued. *See id.* The purpose of the prohibition is to afford the parties accused of statutory violations due process pursuant to N.H. Const. part I, article 35 and U.S. Const. Amend. XIV.

In *Asmussen v. Commissioner, N.H. Dept. of Safety*, 145 N.H. 578 (2000), the New Hampshire Supreme Court discussed at length the impact of *ex parte* communications on due process. In *Asmussen*, the specific issue was whether the Assistant Commissioner of Safety's intra-office directive and memorandum to the Department of Safety's own hearings officers regarding procedures and interpretation of relevant law constituted "improper command influence, *ex parte* communications, and rulemaking." 145 N.H. at 591. The Supreme Court first addressed the interplay between due process and the Assistant Commissioner's supervisory responsibility for the agency as follows:

> Part I, Article 35 of the New Hampshire Constitution provides in part that "[i]t is the right of every citizen to be tried by judges as impartial as the lot of humanity

> will admit." This requirement applies to quasi-judicial officers. *See, e.g., Appeal of City of Keene,* 141 N.H. 797, 801, 693 A.2d 412, 415 (1997). "Part I, Article 35 mandates ... an independent judiciary so that the adjudication of individual controversies is fair and remains uninfluenced by outside forces." *Petition of Mone,* 143 N.H. 128, 137, 719 A.2d 626, 633 (1998). RSA 21–P:5, however, delegates to the assistant commissioner the responsibility of supervising the bureau. Thus, the principal issue raised on appeal is the extent to which the assistant commissioner may exercise supervisory authority in a manner that affects the independence of quasi-judicial hearings examiners.

Asmussen, 145 N.H. at 591.

The Supreme Court distinguished between general guidance and influence designed to impact a particular proceeding as follows:

> On issues of policy and legal interpretation, hearings examiners are subject to the direction of the agency by which they are employed, and their independence is accordingly qualified. *See Nash v. Bowen,* 869 F.2d 675, 680 (2d Cir.), *cert. denied*, 493 U.S. 812, 110 S.Ct. 59, 107 L.Ed.2d 27 (1989); 693 *Ass'n of Administrative Law Judges v. Heckler,* 594 F.Supp. 1132, 1141 (D.D.C.1984). Influence ordinarily is not deemed improper unless it is aimed at affecting the outcome of a particular proceeding. *See Sierra Club v. Costle,* 657 F.2d 298, 405–08 (D.C.Cir.1981); 1 C. Koch, Jr., *Administrative Law and Practice* § 6.10, at 454 (1985). Thus, the assistant commissioner's "efforts ... to ensure that [the hearings examiners'] decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with 'live' decisions." *Nash,* 869 F.2d at 680; *cf. Stephens v. Merit Systems Protection Bd.,* 986 F.2d 493, 496 (Fed.Cir.1993) (allegation that federal administrative law judge required to attend training program was not probative that his impartiality or independence in a *particular case* had been impaired). Where, however, an agency's efforts to direct the quasi-judicial officer's interpretation of law or policy effect substantive changes binding on persons outside the agency, the agency's policy constitutes a "rule" that must be promulgated pursuant to the APA. *See* RSA 541–A:1, XV; *Petition of Daly,* 129 N.H. 40, 42, 523 A.2d 52, 53 (1986) (decided under prior law); *Petition of Pelletier,* 125 N.H. at 571, 484 A.2d at 1123.

Asmussen, 145 N.H. at 592-93.

The Supreme Court ultimately found that no due process violation had occurred because the assistant commissioner's "instructions merely circumscribed the discretion of hearings examiners in certain evidentiary and procedural matters." *Id.* at 593. The key for the Court was

that "the efforts of the assistant commissioner to insure that the hearings examiners adhered to his interpretation of relevant law and policy cannot be said to have directly interfered with the outcome of a particular proceeding." *Id.* (citation omitted).

The Court also rejected Asmussen's argument that the assistant commissioner's instructions and memorandum to the hearings officers constituted prohibited *ex parte* communications. *Id.* at 594. The Court noted that the relevant statute, RSA 541-A:36, provides as follows:

> Unless required for the disposition of ex parte matters authorized by law, officials or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate directly or indirectly, in connection with any issue before the agency, with any person or party, except upon notice and opportunity for all parties to participate.

The Court rejected Asmussen's argument because, "[b]y its express terms, RSA 541-A:36 applies only to communications by an administrative official 'assigned to render a decision or to make findings of fact and conclusions of law *in a contested case*.'" *Id.* (emphasis in original). The Court also reiterated that the relevant communications "did not concern any particular individual's case." *Id.* (citation omitted).

Here, the Secretary's affidavit runs afoul of the due process concerns highlighted in *Asmussen.* The Secretary's affidavit plainly is designed to influence this particular case. In fact, the purpose of the Secretary's affidavit was to influence the Presiding Officer to the extreme act of affording the BSR summary judgment. The Secretary's affidavit is improper because the relevant statute, RSA 421-B:26-a, XXV, unlike RSA 541-A:36, does not limit the prohibition on *ex parte* communication to the official assigned to decide a particular adjudicatory proceeding. Instead, RSA 421-B:26-a, XXV prohibits *ex parte* communication with both the Presiding Officer and the Secretary. Thus, the BSR cannot take refuge in the fact that its *ex parte*

communication was with the Secretary, who is not the ultimate decision-maker in the adjudicatory proceeding.

The dual prohibition on *ex parte* communication with the Secretary and the Presiding Officer is required by due process. Unlike the hearings examiners in *Asmussen*, who "are employees of the department of safety, an executive branch agency, and [whose] 'impartiality' must be considered within the policy-making responsibility that officials of the agency, including the assistant commissioner, hold[,]" *Asmussen*, 145 N.H. at 592, the Presiding Officer is not an agency employee. The Presiding Officer is a quasi-judicial officer whose adjudication of the instant matter must be "as impartial as the lot of humanity will admit[,]" New Hampshire Constitution Part I, Article 35, and who must "'remain[] uninfluenced by outside forces.'" *Asmussen*, 145 N.H. at 591 (*quoting Petition of Mone*, 143 N.H. 128, 137 (1998)); *In re Jack O'Lantern, Inc.*, 118 N.H. 445, 449 (1978) ("It is imperative that the neutrality and impartiality of administrative agencies not be impaired.").

HealthTrust originally moved to disqualify the Presiding Officer on the ground that the Secretary's unilateral appointment of the Presiding Officer for one matter on a renewable or extendable contract gives the Presiding Officer an improper financial incentive and creates the appearance and risk of bias. *See* HealthTrust's Memorandum of Law in Support of Motion to Disqualify Presiding Officer at 3-10 (*citing, e.g.*, *Haas v. County of San Bernadino*, 45 P.3d 280, 286 (Cal. 2002); *Lucky Dogs LLC v. City of Santa Rosa*, 913 F.Supp.2d 853, 862 (N.D. Cal. 2012)). The risk of bias has been increased by the recent submission of the Secretary's affidavit.

The Secretary's affidavit taints this proceeding because it is a direction by the Secretary – who appointed the Presiding Officer and is the person who would extend or renew the Presiding Officer's contract – as to the desired outcome of the proceeding. The affidavit is a clear

expression of the Secretary's personal views on the merits of the proceeding. The Secretary's affidavit advises the Presiding Officer that the agreement between HealthTrust and PLT "appears to allow the successor entities to the Local Government Center pooled risk management programs to replicate the organizational structure that was condemned under the hearing officer's final order." Secretary's affidavit ¶ 6. The Secretary's affidavit also informs the Presiding Officer that the agreement "may also be utilized to facilitate the illegal subsidization of a financially failing workers compensation program, in violation of RSA 5-B and other statutes." Secretary's affidavit ¶ 6. Additionally, the Secretary personally endorses the BSR's motion. Id. ¶ 7 ("I fully approve of the enforcement action that is now underway and authorized it.").

The Secretary's personal involvement and his expression of approval of the BSR motion – because the Secretary is the official who unilaterally appointed the Presiding Officer and can unilaterally select him for similar future employment – puts improper pressure on the Presiding Officer to rule for the BSR. In *Jack O'Lantern*, the New Hampshire Supreme Court held that the implied threat by a federal official to deprive the State of federal funds "tainted an otherwise fair and proper State administrative hearing" and required that the administrative order be vacated. 118 N.H. at 448. See *id.* at 449 ("The conduct of Mr. Comstock presents at least the appearance that pressure was applied."). So here, the filing of the Secretary's affidavit presents "at least the appearance" that the Presiding Officer faces pressure to rule for the Secretary.

While the Secretary's affidavit is not an extrajudicial source, and ordinarily might not alone constitute grounds for disqualification under *Grimm*, 141 N.H. at 722 ("For an alleged bias to be disqualifying, it 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the factfinder learned from official participation in the same proceeding.'") (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)

(brackets omitted)), here, other facts exacerbate the situation. As noted above, the Secretary's affidavit violates RSA 421-B:26-a, XXV. Moreover, the confluence of the unilateral selection of the Presiding Officer by the Secretary, the temporary nature of the Presiding Officer's contract with the Secretary, and the Secretary's affidavit personally endorsing the enforcement action create, at the very least, the appearance that the hearing will not be fair and impartial. These are "facts from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge." *Grimm*, 141 N.H. at 721 (quoting *State v. Fennelly*, 123 N.H. 378, 384 (1983)). *See also Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465, 470 (1984) (objective person standard applies) (under RSA 363:12, VII).

Under these circumstances, HealthTrust requests that the Presiding Officer first strike the Secretary's affidavit from the record and then withdraw or recuse himself so that another, impartial hearing officer may be appointed to decide the merits of the BSR's motion without knowledge of the Secretary's affidavit. The procedural statute governing the hearing provides that the Presiding Officer may "at any stage of the hearing process, withdraw from a case" if he finds himself to be personally conflicted or "for any other reason that may interfere with the presiding officer's ability to remain impartial." RSA 421-B:26, XI. It is insufficient that the Presiding Officer strike the Secretary's affidavit from the record. The bell cannot be unrung. Again, regardless of the integrity of the Presiding Officer, there is no remedy short of striking and disqualification that can restore the appearance of justice to this proceeding.

CONCLUSION

For the foregoing reasons, the Presiding Officer should strike the Secretary's affidavit from the record and disqualify himself from consideration of the Motion.

Respectfully submitted,

HEALTHTRUST, INC.

By Its Attorneys,

Dated: June 5, 2014

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CERTIFICATE OF SERVICE

I certify that I have forwarded copies of this pleading to counsel of record via email.

/s/ Michael D. Ramsdell
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27 Cal.4th 1017
Supreme Court of California

Theodore L. HAAS, Plaintiff and Respondent,
v.
COUNTY OF SAN BERNARDINO
et al., Defendants and Appellants.

No. S076868. | May 6, 2002.

Licensee of massage clinic petitioned for writ of administrative mandamus on ground that county's unilateral selection, retention, and payment of hearing officer violated due process. The Superior Court, San Bernardino County, No. RCV 30305, J. Michael Gunn, J., assigned, granted peremptory writ of mandamus setting aside revocation of license. County board of supervisors and county appealed. The Supreme Court granted review superseding opinion of the Court of Appeal. The Supreme Court, Werdegar, J., held that county's practice of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed violated due process.

Affirmed.

Opinion, 81 Cal.Rptr.2d 900, superseded.

Brown, J., concurred in part, dissented in part, and filed opinion.

West Headnotes (15)

[1] **Administrative Law and Procedure**
Bias, prejudice or other disqualification to exercise powers

A temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's good will. West's Ann.Cal.Gov.Code §§ 27720–27728.

26 Cases that cite this headnote

[2] **Constitutional Law**
Bias and prejudice in general

Constitutional Law
Hearings and adjudications

Due process requires fair adjudicators in courts and administrative tribunals alike. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

[3] **Constitutional Law**
Impartiality

When due process requires a hearing, the adjudicator must be impartial. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[4] **Constitutional Law**
Hearings and adjudications

Due process allows more flexibility in administrative process than judicial process, even in the matter of selecting hearing officers, but the rule disqualifying adjudicators with pecuniary interests applies with full force. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[5] **Constitutional Law**
Hearings and adjudications

Counties
Appointment or election of officers

County's practice of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed violated due process by creating a financial interest in the outcome arising from the prospect of future employment by the county and its good will; even if the officer's fee was split with the county, it would be the repeat customer, and the prospect of future employment by the county created a possible temptation to the average person. U.S.C.A. Const.Amend. 14.

21 Cases that cite this headnote

[6] **Constitutional Law**
Bias and prejudice in general
Constitutional Law
Hearings and adjudications

To violate due process, the risk of a judge's or administrative hearing officer's bias caused by financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator; rather, the possible temptation not to be scrupulously fair, alone and in itself, offends the Constitution. U.S.C.A. Const.Amend. 14.

6 Cases that cite this headnote

[7] **Administrative Law and Procedure**
Bias, prejudice or other disqualification to exercise powers
Judges
Pecuniary Interest

A direct, personal, and substantial pecuniary interest exists requiring disqualification of a judge or temporary administrative hearing officer when income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions.

17 Cases that cite this headnote

[8] **Constitutional Law**
Impartiality
Constitutional Law
Bias and prejudice in general

Under the due process clause, a judge's or temporary hearing officer's actual bias requiring disqualification need not be shown when the alleged bias is due to a financial interest in the outcome of the dispute. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[9] **Constitutional Law**
Bias and prejudice in general
Constitutional Law
Hearings and adjudications

The appearance of bias that has significance under the due process clause is not a party's subjective, unilateral perception of the judge or administrative hearing officer; it is the objective appearance that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

[10] **Constitutional Law**
Impartiality

A procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates a financial temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias under the due process clause. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[11] **Constitutional Law**
Hearings and adjudications

A constitutionally significant risk of an administrative hearing officer's bias under the due process clause is not cured when a county board independently reviews the administrative record and decides whether to accept or reject the officer's recommendation. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[12] **Constitutional Law**
Hearings and adjudications
Counties
Appointment or election of officers

The *Mathews* cost-benefit analysis for procedural due process was inapplicable to claim of bias from county's practice of selecting temporary administrative hearing officers on an

ad hoc basis and paying them according to the duration or amount of work performed. U.S.C.A. Const.Amend. 14.

8 Cases that cite this headnote

[13] **Constitutional Law**
Impartiality

The *Mathews* balancing test is not the appropriate inquiry when the due process claim involves an allegation of biased decisionmakers. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[14] **Constitutional Law**
Hearings and adjudications

To satisfy due process in the selection of administrative hearing officers, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Gov.Code §§ 27720, 27724, 27727.

9 Cases that cite this headnote

[15] **Constitutional Law**
Factors considered; flexibility and balancing

Constitutional Law
Impartiality

Constitutional Law
Hearings and adjudications

The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator's future income from judging depends on the good will of frequent litigants who pay the adjudicator's fee. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

***342 **282 Superior Court, San Bernardino County; ***343 J. Michael Gunn,* Judge.

Attorneys and Law Firms

*1019 Alan K. Marks, County Counsel, and Alan L. Green, Deputy County Counsel, for Defendants and Appellants.

*1020 Liebert, Cassidy & Frierson, Larry Frierson, Calistoga, and Jacqueline Kramer Loveless, Santa Rosa, for California School Boards Association's Education Legal Alliance as Amicus Curiae on behalf of Defendants and Appellants.

Richards, Watson & Gershon, Michael G. Colantuono, Los Angeles, Roy A. Clarke, Gabriel K. Coy, Century City; Cohen & Goldfried and Robert M. Goldfried, Beverly Hills, and the California State Association of Counties as Amici Curiae on behalf of Defendants and Appellants.

Roger Jon Diamond, Santa Monica, for Plaintiff and Respondent.

Opinion

WERDEGAR, J.

In this case, we consider a due process challenge to the manner in which some counties select temporary administrative hearing officers. The Government Code authorizes counties to appoint hearing officers to preside when a state law or local ordinance provides that a hearing be held or that findings of fact or conclusions of law be made by any county board, agency, commission or committee. (Gov.Code, § 27721.)[1] Exercising **283 this statutory authority, some counties have adopted the practice of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed. Plaintiff contends this practice gives hearing officers an impermissible financial interest in the outcome of the cases they are appointed to decide, because the officers' prospects for obtaining future ad hoc appointments depend solely on the county's goodwill and because the county, in making such appointments, may prefer those officers whose past decisions have favored the county.[2] We agree. Counties that appoint temporary administrative hearing officers must do so in a way that does not create the risk that favorable decisions will be rewarded with future remunerative work. The ad hoc *1021 procedure used here does create that risk. We thus affirm the Court

of Appeal's decision upholding the superior court's writ of mandate disqualifying the hearing officer.

BACKGROUND

Plaintiff Theodore L. Haas operates a massage clinic in San Bernardino County ***344 (the County) under a license issued by the County. When a deputy sheriff reported that a massage technician had exposed her breasts and proposed a sexual act, the County Board of Supervisors (the Board) revoked Haas's license. Haas timely appealed the notice of revocation, and the Board set the matter for hearing. The notice identified a local attorney, Abby Hyman, as the hearing officer. In his answer to the notice, Haas objected that "the County may not hire its own hearing officer to conduct the hearing, said relationship having created ... an actual conflict of interest and/or potential conflict of interest in violation of the Due Process Clauses of the Federal and State Constitutions." Haas proposed, instead, that the County contract with the state Office of Administrative Hearings for the services of an administrative law judge (Gov.Code, § 27727; see *ante,* 119 Cal.Rptr.2d at 343, fn. 1, 45 P.3d at p. 282, fn. 1), or that Haas hire the hearing officer. Both suggestions were rejected.

Haas renewed his objection to the hearing officer when the hearing convened. Haas's attorney, Roger Jon Diamond, argued that Hyman had an impermissible financial interest in the case, arising from the manner in which the County had selected and paid her, and moved that she recuse herself. Hyman denied the motion, but nevertheless permitted Diamond to pursue the matter for purposes of making the record.

Diamond briefly inquired into the County's arrangements with Hyman. Hyman stated that she had not previously served as a hearing officer and had been hired to hear only the matter at hand. Deputy County Counsel Alan Green, representing the County, explained that he had hired Hyman to avoid using again the same temporary hearing officer who had already recommended that Haas's license be revoked.[3] Green, who had not previously met Hyman, had selected her based on his coworkers' recommendations and *1022 made the arrangements by calling her personally prior to the hearing. Green explained **284 that he did not negotiate the billing rate with Hyman; instead, he informed her that she would be paid the same rate that county counsel charged the County's internal clients for attorneys' time.[4]

During the course of this discussion, Green volunteered, "The intent is that we will use Ms. Hyman on assignment, as the occasion suggests, in the future if she's interested in doing it and if the case should arise." Diamond pursued the matter with further questions to Green, who several times confirmed that he foresaw employing Hyman in the future on an ad hoc basis. When asked, "Is Ms. Hyman's contract with the County only for this case or for future cases?" Green answered, "It's open-ended as far as that's concerned." When asked, "But the County does anticipate using the services of Ms. Hyman in future cases?" Green answered, "Sure." Hyman had not replaced Horspool, Green explained; instead, he anticipated the ***345 County might use either attorney "as their schedules permit." Shortly thereafter the discussion returned to the subject of future employment. Diamond asked Green, "And so certainly you've advised [Hyman] that she might be needed on future hearings." Green responded, "I probably have. I don't recall expressly doing so." When Hyman interjected, "I don't recall that," Diamond asked, "But that's certainly within possibility?" to which Green replied, "Certainly." Diamond then asked, "And she knows that?" Green replied, "I would assume so." (Hyman was, of course, present during this exchange.) To Diamond's further question, "And she's only paid for the work she actually performs; is that right?" Green responded, "In connection with this hearing, correct."

After briefly discussing Hyman's credentials, Diamond asked Green why he did "not select a hearing officer from the Office of Administrative Hearings of the State of California pursuant to Section 12.275[5] of the County Code?" Green answered, tautologically, "Because the County elected to hire a hearing officer independently to serve in this capacity." Diamond then asked, "But you, as the moving party, are, in effect, paying the hearing officer?" Green responded, "So?" When Hyman interjected, "Would you like to split my bill? I don't care," Diamond replied, "The trouble is, we will not be paying for your services in future cases where the County retains your services."

*1023 A brief discussion of the motion ensued. Diamond drew analogies to a prosecutor's being permitted to file cases before the judge of his choice, and to Code of Civil Procedure section 170.1, subdivision (a)(6)(C), which provides that a judge shall be disqualified when "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." "It's not whether there's actual prejudice or bias," Diamond argued, "It's the appearance. I

would submit that if you ask ten persons on a street corner whether they would be comfortable at a hearing where the opposing side contracted with the judge, they would feel that that creates the appearance of prejudice even if there's no actual bias or prejudice." Diamond again offered to pay for the hearing officer if the County would contract for one with the state Office of Administrative Hearings. He also inquired whether the office of County Hearing Officer purportedly established by the San Bernardino County Code[6] in fact existed. Green explained that no "independent department" with that title existed; as Green understood the matter, Hyman held the office and had been "retained to serve in that capacity" for purposes of the hearing. Hyman then confirmed that she **285 continued to be privately employed as an attorney, that payment for the hearing would go to her personally rather than to her employer, and emphatically declined to answer the question whether she was "taking time off from [her] work to be here?" Diamond at that point reiterated his objection to Hyman's conducting the hearing, and the hearing proceeded to other matters.

***346 During the hearing, which lasted one hour and 45 minutes, two witnesses were called: the deputy sheriff who reported the violation, and Haas. Haas did not materially challenge the deputy's account of the incident. He did, however, through his attorney, attempt to show that no similar incident had previously occurred at his establishment. He also argued that revocation—the sole penalty authorized in the San Bernardino County Code for such violations—was disproportionately harsh. The hearing officer took the matter under submission and rendered a brief written decision 47 days later recommending revocation.

Haas pursued his administrative appeal, which took the form of a written request for a hearing before the Board. In that request, Haas reiterated his objection to the hearing officer. At the hearing, the Board approved the hearing officer's recommendation.

Haas petitioned for a writ of administrative mandamus. (Code Civ. Proc., § 1094.5.) The superior court granted the writ. The judgment and writ *1024 merely direct the Board, without further explanation, to set aside the decision revoking Haas's license. The transcript of the hearing before the superior court, however, indicates the court accepted Haas's claim that the hearing officer should have recused herself. The court declined to instruct the County how to select a hearing officer but indicated that the use of a state administrative law judge would be acceptable.

The Board appealed, and the Court of Appeal affirmed. The court rejected Haas's argument "that the possibility of the County retaining Hyman as a hearing officer in the future," standing alone, "created a significant pecuniary interest." The court believed that such an interest was too "remote, contingent and slight" to require Hyman's recusal. Nevertheless, the court found a violation of due process in the "totality of the particular circumstances in this case," namely, that "the hearing officer was unilaterally selected, retained and paid by the party threatening deprivation of an adversary's constitutionally protected property rights; the attorney who retained the hearing officer participated in the hearing; and there was a complete absence of any restrictions on the selection of the hearing officer to ensure a reasonable degree of impartiality." Like the superior court, the Court of Appeal declined "to instruct the County as to what procedures and restrictions should be implemented," although it "emphasize[d] [that] such procedures should attempt to insure reasonable impartiality." We granted review.

DISCUSSION

[1] [2] The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill. We conclude the answer is yes. To summarize the governing principles, due process requires fair adjudicators in courts and administrative tribunals alike.[7] While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges,[8] the rules are not more flexible ***347 on the subject of financial interest.[9] Applying those rules, courts have consistently recognized **286 that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging *1025 depends on the number of cases handled.[10] No persuasive reason exists to treat administrative hearing officers differently. We consider each of these points in more detail below.

[3] When due process requires a hearing, the adjudicator must be impartial. Speaking of trials before judges, the United States Supreme Court has declared that "[a] fair trial in a

fair tribunal is a basic requirement of due process." (*In re Murchison, supra,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942.) Speaking of administrative hearings, and articulating the procedural requirements "demanded by rudimentary due process" in that setting, the court has said that, "of course, an impartial decision maker is essential." (*Goldberg v. Kelly, supra,* 397 U.S. 254, 267, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287.)

Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny. As the high court explained in *Tumey v. Ohio* (1927) 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (*Tumey*), "[a]ll questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. [Citation.] But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Thus, while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality (*Withrow v. Larkin, supra,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712; see *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 820, 106 S.Ct. 1580, 89 L.Ed.2d 823 (*Aetna*)), adjudicators challenged for financial interest have not. Indeed, the law is emphatically to the contrary. The high court has "ma[de] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator challenged for financial interest] was influenced, but only whether sitting on the case ... ' "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." ' " (*Aetna, supra,* 475 U.S. at p. 825, 106 S.Ct. 1580, quoting *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 60, 93 S.Ct. 80, 34 L.Ed.2d 267 (*Ward*), and *Tumey, supra,* 273 U.S. at p. 532, 47 S.Ct. 437.) "[T]he requirement of due process of law in judicial procedure is ***1026** not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *****348** (*Tumey, supra,* 273 U.S. at p. 532, 47 S.Ct. 437.) [11]

In *Withrow v. Larkin, supra,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712, the high court wrote that a claim of bias based on the combination of investigative and adjudicative functions in a state medical board had to "overcome a presumption of honesty and integrity in those serving as adjudicators ...." But never, in the years since *Withrow,* has the high court so much as hinted that a litigant seeking to disqualify an adjudicator *for financial interest* must overcome any such presumption. To the contrary, the high ****287** court has repeatedly and unambiguously held that courts do not, when faced with a claim of bias arising from financial interest, decide whether the adjudicator was in fact influenced. The standard continues instead to be that set out in *Tumey, supra,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749, namely, whether the adjudicator's financial interest would offer a possible temptation to the average person as judge not to hold the balance nice, clear and true. (*Aetna, supra,* 475 U.S. at pp. 824–825, 106 S.Ct. 1580; *Connally v. Georgia* (1977) 429 U.S. 245, 249, 97 S.Ct. 546, 50 L.Ed.2d 444.) Indeed, applying this standard in *Liljeberg v. Health Services Acquisition Corp.* (1988) 486 U.S. 847, 865, footnote 12, 108 S.Ct. 2194, 100 L.Ed.2d 855, the court went so far as to vacate a decision entered by a judge who was not conscious of the circumstances giving a university, on whose board of trustees he served, a financial interest in the case. [12]

[4] The rule declared in these civil and criminal cases also applies to administrative proceedings. In this context, the high court has written: "It is ***1027** sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.... It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators.' " (*Gibson v. Berryhill, supra,* 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488.) Certainly due process allows more flexibility in administrative process than judicial process, even in the matter of selecting hearing officers. But the rule disqualifying adjudicators with pecuniary interests applies with full force. The high court has taken *****349** pains to make this clear, even while holding that due process permits, for example, the combination of investigative and adjudicative functions in administrative proceedings. (*Withrow v. Larkin, supra,* 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712.) An assertion of bias based on that combination of functions, the *Withrow* court explained, needs to "overcome a presumption of honesty and integrity in those serving as adjudicators." (*Id.* at p. 47, 95 S.Ct. 1456.) In contrast, the adjudicator's financial interest in the outcome presents a "situation[ ] ... in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Ibid.*) On this point, the court has applied the same rules to administrative hearing officers and judges alike. (See,

e.g., *id.* at pp. 46–47, 95 S.Ct. 1456; *Gibson v. Berryhill, supra,* 411 U.S. at p. 579, 93 S.Ct. 1689.)

The paradigmatic examples of adjudicators with pecuniary interests in the outcome are (1) adjudicators serving, in effect, as judges of their own cases, and (2) judges whose compensation depends on the result of adjudication. An example of the first type—judging one's own case—is *Aetna, supra,* 475 U.S. 813, 821–825, 106 S.Ct. 1580, 89 L.Ed.2d 823, in which the high court vacated a state supreme court decision recognizing the tort of bad faith refusal to pay insurance claims because a member of the court was a plaintiff in actions pending against insurance companies based on that tort theory. [13] Examples of the second type —compensation dependent ****288** on the outcome—are *Tumey, supra,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, which condemned a Prohibition Era statute that allowed mayors trying cases to be paid from the fines they assessed, and *Connally v. Georgia, supra,* 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444, which struck down a law paying ***1028** magistrates $5 each for search warrants issued and nothing for warrants withheld. [14]

Another example of outcome-dependent compensation factually closer to the case before us was identified and condemned in the so-called fee system cases. [15] The now obsolete fee system gave magistrates a pecuniary incentive to favor frequent litigants by allowing plaintiffs and prosecutors to pick their magistrate and by compensating magistrates according to the number of cases they decided. The leading case is *Brown v. Vance, supra,* 637 F.2d 272 (*Brown*). In that decision by Judge Wisdom, the Fifth Circuit Court of Appeals held unconstitutional Mississippi's system for compensating justices of the peace. The highest courts of West Virginia and South Carolina had already reached the same conclusion (see *State ex* *****350** *rel. Shrewsbury v. Poteet, supra,* 157 W.Va. 540, 202 S.E.2d 628, 631–632; *State ex rel. McLeod v. Crowe, supra,* 272 S.C. 41, 249 S.E.2d 772, 776–777, 778), and the federal district court would soon thereafter do likewise for the State of Georgia (*Doss v. Long, supra,* 629 F.Supp. 127, 129).

At the time of *Brown, supra,* 637 F.2d 272, Mississippi divided its [redacted] into five districts, each with at least one justice of the peace. Justices of the peace had jurisdiction over misdemeanors occurring in their districts and civil cases involving less than $500 in damages arising anywhere in the [redacted]. A prosecutor, typically a highway patrol officer prosecuting a traffic offense, was free to file a complaint before any justice of the peace in the district or any justice in the county if no district justice was available. A civil plaintiff was free to file suit before any justice in the county. Justices were paid $10 for each criminal case, regardless of disposition, and $15 for each civil case, payable by the losing party. (*Id.* at p. 275.) The plaintiffs in *Brown* challenged this fee system as "produc [ing] a temptation to the average man as a judge to favor conviction in criminal cases and judgment for the plaintiffs in civil cases" (*id.* at p. 274) and, thus, as violating due process. More specifically, the *Brown* plaintiffs alleged that, because of the system, "police officers favor[ed] 'convicting judges'; collection agencies and other creditors favor[ed] judges who tend[ed] to decide in their favor." (*Ibid.*)

The lower court in *Brown, supra,* 637 F.2d 272, relying on *Withrow v. Larkin, supra,* 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712, had "concluded that the plaintiffs ... failed to 'overcome a presumption of honesty and integrity as to those serving as ***1029** adjudicators.' " (*Brown, supra,* 637 F.2d at p. 283.) This, the Fifth Circuit explained, was "the wrong standard." (*Ibid.*) "We need find no instance of actual judicial bias to hold the fee system constitutionally infirm," the court wrote. "*Tumey* and *Ward* do not require proof of actual judicial prejudice or of a direct pecuniary interest in the outcome of particular cases. The test is whether a fee system presents a 'possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.' " (*Id.* at p. 282, quoting *Tumey, supra,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749, and *Ward, supra,* 409 U.S. 57, 60, 93 S.Ct. 80, 34 L.Ed.2d 267.) Because the system created that possible temptation, the *Brown* court continued, the plaintiffs' due process claim was not "refuted by evidence that 'on numerous occasions' some justice court judges have judged fairly." (*Brown, supra,* 637 F.2d at p. 284.) "In *Tumey* and *Ward* the Supreme Court ... was not as interested in the probity of an individual judge or perhaps even, of the great majority of judges.... The Court's inquiry there and ****289** our inquiry here is not whether a particular man has succumbed to temptation, but whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge. Here we have no need to be solicitous of the honor of a particular judge; none has been questioned. Nor do concerns of judicial administration necessarily require a high evidentiary barrier. The *Tumey–Ward* test, in sum, is levelled at the system, not the individual judge." (*Ibid.*)

[5] The compensation system at issue in the case before us is functionally similar to the system condemned in *Brown, supra,* 637 F.2d 272, and the other fee system cases (*Doss v. Long, supra,* 629 F.Supp. 127; ***351 *State ex rel. McLeod v. Crowe, supra,* 272 S.C. 41, 249 S.E.2d 772; *State ex rel. Shrewsbury v. Poteet, supra,* 157 W.Va. 540, 202 S.E.2d 628). Here, as there, the prosecuting authority may select its adjudicator at will, the only formal restriction here being that the person selected must have been licensed to practice law for at least five years. (Gov.Code, § 27724.)[16] Here, as there, while the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings. Finally, adjudicators selected and paid in this manner, for the same reason here as there, have a "possible temptation ... not to hold the balance nice, clear and true." *1030 (*Tumey, supra,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749; see *Ward, supra,* 409 U.S. 57, 60, 93 S.Ct. 80, 34 L.Ed.2d 267, and *Brown, supra,* 637 F.2d at p. 280.)

[6] The teaching of the fee system cases and the high court decisions on which they, in turn, rely is that, to violate due process, the risk of bias caused by financial interest need not manifest itself in overtly prejudiced, automatic rulings in favor of the party who selects and pays the adjudicator. The "possible temptation" (*Tumey, supra,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749) not to be scrupulously fair, alone and in itself, offends the Constitution. That such a temptation can arise from the hope of future employment as an adjudicator is easy to understand and impossible in good faith to deny. One commentator described the subtle bias that can result from an unregulated free market in adjudicative services simply as the adjudicator's recognition that "[s]teady customers represent an important asset to any seller" and the resulting tendency on the adjudicator's part to "give steady customers the benefit of the doubt more often than not." (Note, *The California Rent–a–Judge Experiment: Constitutional and Policy Considerations of Pay–As–You–Go Courts* (1981) 94 Harv. L.Rev. 1592, 1608.)[17] This was precisely the risk of bias to which Haas's attorney alluded in his motion to disqualify the hearing officer in this case. The hearing officer's suggestion that Haas split her fee with the County did not obviate that risk because, as Haas's attorney explained, Haas would "not be paying for [the hearing officer's] services in future cases where the County retains [her] services." In other words, the County rather than Haas would be the repeat customer upon whose goodwill, alone, the hearing officer's prospect for future employment in that capacity depended.[18] This **290 is the same risk of bias ***352 that was condemned in the fee system cases. Because the same constitutional principles governing *1031 disqualification for financial interest apply to judges and administrative hearing officers alike, the same conclusion follows: The hearing officer in this case had an impermissible financial interest in the outcome of the litigation arising from the prospect of future employment by the County, measured against the applicable constitutional standard of a "possible temptation to the average man as a judge ... not to hold the balance nice, clear and true." (*Tumey, supra,* 273 U.S. at p. 532, 47 S.Ct. 437; see also *Aetna, supra,* 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823, and *Ward, supra,* 409 U.S. 57, 60, 93 S.Ct. 80, 34 L.Ed.2d 267.)[19]

Against this conclusion, the County has very little to say that was not anticipated and rejected in the cases already discussed. The County has devoted much of its argument to the contention that due process does not preclude the government from either paying or selecting hearing examiners. But to consider payment and selection as separate issues is to miss the point. Certainly due process does not forbid the government to pay an adjudicator when it must provide someone with a hearing before taking away a protected liberty or property interest. Indeed, the government must ordinarily pay the adjudicator in such cases to avoid burdening the affected person's right to a hearing. (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 337–357, 84 Cal.Rptr.2d 425, 975 P.2d 622.) Furthermore, no generally applicable principle of constitutional law permits the affected person in such a case to select the adjudicator. Haas does not argue to the contrary. Neither payment nor selection, considered in isolation, is the problem.

[7] The County also argues that any financial interest Hyman may have had in the prospect of future employment as a hearing officer was too slight to require disqualification. To be sure, the high court has required disqualification only for financial interests that it has characterized as " ' "direct, personal, substantial, [and] pecuniary" ' " rather than "slight." (*Aetna, supra,* 475 U.S. 813, 825–826, 106 S.Ct. 1580, 89 L.Ed.2d 823, quoting *Ward, supra,* 409 U.S. 57, 60, 93 S.Ct. 80, 34 L.Ed.2d 267, and *Tumey, supra,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749.) But the precise teaching of the fee system cases is that a direct, personal, and substantial ***353 pecuniary interest does indeed exist when income from judging depends upon the volume of

cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, ***1032** preferring those who render favorable decisions. In this context, when the danger to be avoided is that the desire for more work will offer a possible temptation to the average person to favor the frequent litigant, even fees of $10 and $15 per case have been considered direct, personal, and substantial. (*Brown, supra,* 637 F.2d 272, 275.) Certainly the amount of money that will induce an attorney to take time away from his or her regular practice of law cannot be dismissed as slight.

Indeed, the types of financial interests that courts have found not to create an unconstitutional ****291** risk of bias have been far more indirect, impersonal, and insubstantial than cash paid in hand to the adjudicator with the prospect of more. The high court in *Aetna, supra,* 475 U.S. 813, 825–826, 106 S.Ct. 1580, 89 L.Ed.2d 823, for example, found to be "slight" the hypothetical interest of six members of the Alabama Supreme Court as unnamed plaintiffs in an as-yet-uncertified class action on behalf of state employees covered by a health insurer that allegedly withheld payment on valid claims. The justices were, thus, not disqualified from participating in a different case presenting the question whether Alabama would recognize a cause of action for bad faith refusal to pay claims. "With the proliferation of class actions involving broadly defined classes," the high court concluded, "the application of the constitutional requirement of disqualification must be carefully limited. Otherwise constitutional disqualification arguments could quickly become a standard feature of class-action litigation." (*Id.* at p. 826, 106 S.Ct. 1580.) In California, the Court of Appeal in *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 228, 79 Cal.Rptr.2d 910, dismissed as "remote, indirect and uncertain," in the context of a disciplinary appeal, the alleged financial interest of a public member of a city personnel commission arising from the member's sale of gasoline to the city. While the member's financial interest would presumably have disqualified him from participating in decisions involving the purchase of fuel, that interest had no clear effect on his ability to judge a disciplinary matter. The speculative claims of financial interest rejected in these cases cannot fairly be compared with the direct, personal, and substantial financial interest of an adjudicator whose future work in that capacity depends entirely on the goodwill of the party paying the adjudicator's fee.

The County also contends we have not required the disqualification of administrative hearing officers absent a showing of actual bias. Although the contention is accurate with respect to claims of bias arising from a hearing officer's personal or political views, it is erroneous as to claims of bias arising from financial interest. The County bases its argument on *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151 (*Andrews*), a plurality opinion signed by only ***1033** two permanent members of this court. At issue was an agricultural employer's motion to disqualify a private attorney chosen by the Agricultural Labor Relations Board (ALRB) as a temporary administrative hearing officer to decide whether the employer had committed unfair labor practices. The attorney chosen by the ALRB to serve as hearing officer belonged to a public interest law firm that had represented farm workers. Interpreting the relevant statutes and regulations then in effect, the plurality concluded the officer was not subject to disqualification absent a showing of actual bias sufficient to render a fair hearing improbable. *****354** (*Id.* at pp. 791–792, 171 Cal.Rptr. 590, 623 P.2d 151.)

In reaching this conclusion, the *Andrews* plurality did not purport to address the requirements of due process. There was no need to do so. Personal bias, such as that which can arise from social and political views, is not necessarily of constitutional significance and is, thus, subject to regulation by the state. (*Aetna, supra,* 475 U.S. 813, 820, 106 S.Ct. 1580, 89 L.Ed.2d 823; *Tumey, supra,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749.) Thus, the *Andrews* plurality appropriately determined by reference to state statutes and regulations, rather than the due process clause, whether a private attorney was disqualified from serving as a hearing officer because his public interest law firm had previously represented farm workers.

[8] Indeed, the *Andrews* plurality alluded to the requirements of due process only once—to recognize that certain well-defined situations, including an adjudicator's financial stake in the outcome of a dispute, create exceptional situations "in which the probability or likelihood of the existence of actual bias is so great that disqualification of a judicial officer is required to preserve the integrity of the legal system, even without proof that the judicial officer is actually biased towards a party." (*Andrews, supra,* 28 Cal.3d 781, 793, fn. 5, 171 Cal.Rptr. 590, 623 P.2d 151, citing *Peters v. Kiff* (1972) 407 U.S. 493, 502, 92 S.Ct. 2163, 33 L.Ed.2d 83, and ****292** *Tumey, supra,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.) In other words, the *Andrews* plurality "specifically recognized actual bias need not be shown when the alleged bias is due to a financial

interest in the outcome of the dispute." (*University Ford Chrysler–Plymouth, Inc. v. New Motor Vehicle Bd., supra,* 179 Cal.App.3d 796, 803–804, 224 Cal.Rptr. 908.) This, of course, is precisely the rule mandated by due process in both judicial and administrative proceedings, and the rule by which the high court has repeatedly "[made] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator] was influenced, but only whether sitting on the case ... ' "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." ' " (*Aetna, supra,* 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823, quoting *Ward, supra,* 409 U.S. 57, 60, 93 S.Ct. 80, 34 L.Ed.2d 267, and *Tumey, supra,* 273 U.S. at p. 532, 47 S.Ct. 437; see also *Withrow v. Larkin, supra,* 421 U.S. 35, 46–47, 95 S.Ct. 1456, 43 L.Ed.2d 712.)

[9] **[10]** ***1034** The County argues that to require the disqualification of hearing officers on account of financial interest without a showing of actual bias would amount to disqualification based on a party's subjective, unilateral perception of bias. The *Andrews* plurality rejected such a standard, reasoning that "a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Andrews, supra,* 28 Cal.3d 781, 792, 171 Cal.Rptr. 590, 623 P.2d 151.) But we adopt no such standard by giving full effect to the cases mandating disqualification for financial interest. The appearance of bias that has constitutional significance is not a party's *subjective, unilateral* perception; it is the *objective* appearance that arises from financial circumstances that would offer a possible temptation to the average person as adjudicator. A procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally *****355** impermissible appearance and risk of bias. (*Brown, supra,* 637 F.2d 272, 284.)

[11] The County also contends that any possibility of bias on the part of a hearing officer is cured when the Board independently reviews the administrative record and decides whether to accept or reject the officer's recommendation. The short answer to the contention is that no court has relied on this argument to uphold a decision reached by an adjudicator found to have suffered from a constitutionally significant risk of bias. Indeed, several courts have expressly rejected the argument. The leading case on point is *Ward, supra,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267, in which the high court rejected the claim that the unfairness of being subjected to trial by a mayor with a financial interest in assessing fines "can be corrected on appeal and trial *de novo* .... We disagree," the high court wrote. "This 'procedural safeguard' does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. *Petitioner is entitled to a neutral and detached judge in the first instance.*" (*Id.* at pp. 61–62, 93 S.Ct. 80, fn. omitted, italics added.) Courts have followed *Ward's* conclusion on this point both in fee system cases (*Brown, supra,* 637 F.2d 272, 279; *State ex rel. Reece v. Gies* (1973) 156 W.Va. 729, 198 S.E.2d 211, 216) and in cases involving administrative tribunals (*Hackethal v. California Medical Assn.* (1982) 138 Cal.App.3d 435, 445–446, 187 Cal.Rptr. 811).

The plurality in *Andrews, supra,* 28 Cal.3d 781, 794, 171 Cal.Rptr. 590, 623 P.2d 151, did suggest that the opportunity for independent review weighed against adopting a hypothetical ***1035** rule requiring the disqualification of an administrative hearing officer based on a party's "subjective belief" that the officer was biased. "We ... fail to see," the plurality wrote, "how a mere subjective belief in the [officer's] appearance of bias, as distinguished from actual bias, can prejudice either party when the [ALRB] is responsible for ****293** making factual determinations, upon an independent review of the record." (*Ibid.*) The *Andrews* plurality's dictum on this point is impossible to reconcile with *Ward, supra,* 409 U.S. 57, 61–62, 93 S.Ct. 80, 34 L.Ed.2d 267. Nor has the *Andrews* dictum been followed even in this state when an adjudicator *was* found to be biased. When a state medical association argued that its own independent review of a licensing matter cured any prejudice due to the involvement of biased adjudicators at a lower level, the Court of Appeal in *Hackethal v. California Medical Assn., supra,* 138 Cal.App.3d 435, 445–446, 187 Cal.Rptr. 811, followed *Ward* rather than *Andrews.*

[12] Next, the County contends that any benefit to the adjudicative process that might come from restricting its freedom to choose hearing officers would not justify the increased burden on the County. The County thus invokes the cost-benefit analysis of *Mathews v. Eldridge* (1976) 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (*Mathews*), in which the high court wrote that the "identification

of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including ***356 the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

[13] The *Mathews* cost-benefit analysis appears to have no legitimate application in this context. As another court has explained, "[a] *Mathews* balancing test ... is not the appropriate inquiry when the due process claim involves an allegation of biased decisionmakers. *Mathews* involved only allegations of insufficient procedural safeguards, not allegations of a biased decisionmaker. The *Mathews* court made no comment on the line of cases that indisputably establish the right to an impartial tribunal. [Citations.] Indeed, since *Mathews,* the Supreme Court has had several occasions to consider claims of due process violations based on allegations of a biased decisionmaker; in none of these cases has the Court resorted to the *Mathews* balancing test to resolve that issue." (*United Retail & Wholesale Emp. v. Yahn & Mc Donnell* (3d Cir.1986) 787 F.2d 128, 137–138, citing *Schweiker v. McClure, supra,* 456 U.S. 188, 102 S.Ct. 1665, 72 L.Ed.2d 1; *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182; *Friedman v. Rogers* (1979) 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100.) Indeed, the high court in *Schweiker v.* *1036 *McClure* gave the *Mathews* cost-benefit analysis no role in its analysis and rejection of a claim of financial bias, even while applying *Mathews* to the distinct question of whether unsuccessful Medicare claimants were entitled to an additional level of administrative review. (See *ante,* 119 Cal.Rptr.2d at p. 348, fn. 12, 45 P.3d at p. 287, fn. 12.)

The justification for applying different analyses to the distinct problems of biased adjudicators and inadequate procedures is that "the requirement of an impartial decisionmaker transcends concern for diminishing the likelihood of error." (*United Retail & Wholesale Emp. v. Yahn & Mc Donnell, supra,* 787 F.2d 128, 138.) "[I]f the only problem with biased decisionmakers was the likelihood of error, it would make sense to apply the *Mathews* balancing test in cases involving allegations of biased decisionmakers and to subsume the problem of bias under the 'risk of erroneous deprivation' prong of the three-part test." (*Ibid.*) However, "[t]he unfairness that results from biased decisionmakers strikes so deeply at our sense of justice that it differs qualitatively from the injury that results from insufficient procedures. In Justice Holmes' famous phrase, 'even a dog distinguishes between being stumbled over and being kicked.' " (*Ibid.,* quoting from Holmes, The Common Law (1881) p. 3.)

Joining the County on this point, amici curiae assert that many local governments and school boards appoint temporary hearing officers under similar ad hoc procedures and will incur additional costs and inefficiencies if their own procedures are disapproved as a **294 result of today's decision.[20] We do not consider the constitutional validity of any rule or practice not presently before us. Moreover, speculation about the possible outcome of hypothetical cases cannot justify tolerating a practice that we have considered and found to create a constitutionally unacceptable risk of bias.

In any event, the problem we address here is limited in scope, and constitutional methods for selecting administrative hearing officers are readily available. The problem arises from the lack of specific ***357 statutory standards governing temporary hearing officers appointed by counties under Government Code section 27724. Many other administrative adjudicators already work under rules that greatly reduce the specific risk of bias present in this case.[21] Formal proceedings under the Administrative Procedure Act (APA) (Gov.Code, § 11340 et seq.) are conducted by administrative law judges from the Office of Administrative Hearings (Gov.Code, § 11512, *1037 subd. (a)), who are subject to the APA's rules governing disqualification (*id.,* §§ 11512, subd. (c), 11425.10, subd. (a)(5), 11425.30, 11425.40) and the disqualification rules set out in the Political Reform Act applicable to all state employees (*id.,* § 87100 et seq.). Informal hearings subject to the APA are sometimes conducted by members of the relevant state agency (*id.,* §§ 11405.80, 11445.40), who are for these purposes subject to the same rules (*id.,* §§ 11425.10, subd. (a)(5), 87100).

[14] [15] The type of hearing at issue here falls under Government Code section 27721, which governs matters not subject to the APA (*id.,* § 11410.30) and in which "a state law or local ordinance provides that a hearing be held or that findings of fact or conclusions of law be made by any [illegible] board, agency, commission, or committee ...." (*id.,* § 27721). In such matters, the Government Code, itself, offers two methods for obtaining adjudicators that do not necessarily pose the problems created by ad hoc selection. These other methods are (1) establishing the office of [illegible]

hearing officer (*id.*, § 27720) and (2) contracting with the state Office of Administrative Hearings for an administrative law judge (*id.*, § 27727). The problem we address in this case arises only when counties forgo these options and, instead, hire temporary hearing officers under Government Code section 27724. Because that section imposes only the requirement that a person selected as hearing officer have been licensed to practice law for at least five years, counties by default have much freedom to experiment and to adopt selection procedures adapted to their individual needs.[22] To satisfy due process, all a county need do is exercise whatever authority the statute confers in a manner that does not create the risk that hearing officers will be rewarded with future remunerative employment for decisions favorable to the county. The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator's future income from judging depends on ****295** the goodwill of frequent litigants who pay the adjudicator's fee.

*****358 *1038 DISPOSITION**

The decision of the Court of Appeal is affirmed.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, CHIN, and MORENO, JJ.

Concurring and Dissenting Opinion by BROWN, J.

I concur in the majority's decision to affirm the judgment of the Court of Appeal because in the circumstances of this case the personal selection of the hearing officer by the county's attorney—who also prosecuted the matter—was sufficient to cause a reasonable person to doubt the adjudicator's impartiality. (Cf.Code Civ. Proc., § 170.1, subd. (a)(6)(C).) I cannot agree, however, that the present facts warrant the wholesale dismantling of a selection process utilized not only by the county but by local governmental entities throughout the state. (See Gov.Code, § 27721.) While common practice does not ipso facto establish or ensure constitutional validity, I am unpersuaded the rationale of *Tumey v. Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 and its fee system progeny should straightjacket the analysis here.

In *Tumey v. Ohio, supra,* 273 U.S. at page 523, 47 S.Ct. 437, the United States Supreme Court found a due process violation where the mayor-adjudicator had a "direct, personal, substantial pecuniary interest in reaching a conclusion against" one of the parties because only upon conviction would costs be imposed on his behalf. (See also *State ex rel. Reece v. Gies* (1973) 156 W.Va. 729, 737 [198 S.E.2d 211].) In addition, the mayor was "charged with the business of looking after the finances of the village" and thus had an interest in the "pecuniarily successful conduct" of the criminal court over which he presided and which generated substantial village revenue through criminal convictions. (*Tumey v. Ohio, supra,* 273 U.S. at p. 533, 47 S.Ct. 437.) The Supreme Court has also allowed that a constitutional violation may arise "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court [by favoring criminal conviction]. This, too, is a 'situation [as in *Tumey*] in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.' [Citation.]" (*Ward v. Village of Monroeville* (1972) 409 U.S. 57, 60, 93 S.Ct. 80, 34 L.Ed.2d 267.)

Invoking the rationale of *Tumey* and *Ward,* the court in *Brown v. Vance* (5th Cir.1981) 637 F.2d 272, 276, found a due process violation where "a judge's bread and butter depend[ed] on the number of cases filed in his ***1039** court" thereby creating the temptation "to enhance his income by leaning in the direction of conviction in criminal cases [thus currying favor with police officers who decided where to file such matters] and judgment for the plaintiff in civil cases [thus currying favor with creditors who decided where to file their collection actions]." (See also *Doss v. Long* (N.D.Ga.1985) 629 F.Supp. 127, 129 [following *Brown, supra,* 637 F.2d 272]; *State ex rel. Shrewsbury v. Poteet* (1974) 157 W.Va. 540, 546 [202 S.E.2d 628].)

The majority acknowledges that a disqualifying pecuniary interest must be direct, personal, and substantial, but makes no attempt to realistically apply this standard rather than an overwrought interpretation of the fee system cases. Indeed, it implies that a due process violation would arise from payment of even $10 or $15 (see *****359** maj. opn., *ante,* 119 Cal.Rptr.2d at p. 353, 45 P.3d at p. 290), an amount that today would not cover a hearing officer's parking in many cities.[1]

****296** The majority grounds its reliance on the reasoning of *Brown v. Vance, supra,* 637 F.2d 272, on the possibility the county may in some future proceeding again solicit Abby Hyman's services as a hearing officer. This pecuniary

interest may be less indirect than in *Dugan v. Ohio* (1928) 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784, in which the mayor's "relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge." (*Ward v. Village of Monroeville, supra,* 409 U.S. at pp. 60–61, 93 S.Ct. 80.) Nevertheless, on this record, I find it sufficiently speculative and insubstantial to dispel any due process concerns. (Cf. *Gibson v. Berryhill* (1973) 411 U.S. 564, 571, 93 S.Ct. 1689, 36 L.Ed.2d 488 [upholding a trial court finding that "a serious question of a personal financial stake in the matter in controversy was raised" where the board adjudicating charges of unprofessional conduct was composed of members who "would fall heir to" the business of those cited if the charges were sustained].)

Hyman was paid a standard hourly rate only for the matter she adjudicated. Unlike the circumstance in *Brown,* however, her primary employment is elsewhere, and from what we can glean from the record it does not appear she had any reasonable expectation of future employment with the county as a hearing officer. There is no conclusive evidence Green even discussed the ***1040** possibility in hiring Hyman for plaintiff's hearing; until plaintiff raised the issue, she apparently had not considered the question. Thus, these hearings are not her "bread and butter" (*Brown v. Vance, supra,* 637 F.2d at p. 276); and she is not "dependent on [them] for subsistence." (*Id.* at p. 281.) Nor is there any evidence she would be "compelled to close [her] office" if the county declined to retain her services for future hearings. (*Id.* at p. 282.) It also appears from the record that such services would, in any event, be limited to license appeals on massage cases lasting only a few hours each. These cases arise with such infrequency that at oral argument county counsel indicated there had not been another such hearing in the eight years since this one. In other words, with respect to these particular matters and unlike the fee system decisions, the "volume of cases" to which the majority alludes (maj. opn., *ante,* 119 Cal.Rptr.2d at p. 353, 45 P.3d at p. 290) is nonexistent. In sum, Hyman could not therefore have had any realistic expectation of future retention. Under these circumstances, the possibility that the average person would be tempted to rule in favor of the county or be led "not to hold the balance nice, clear and true" between the parties (*Tumey v. Ohio, supra,* 273 U.S. at p. 532, 47 S.Ct. 437) is thus remote at best and contingent on factors unrelated to the selection process.

The demands of due process do not require either perfect ignorance or perfect altruism. Under these circumstances, I conclude that, even if "personal," any pecuniary interest on Hyman's part was not "direct" or "substantial" within the rationale of *****360** *Tumey v. Ohio, supra,* 273 U.S. at page 523, 47 S.Ct. 437, and its progeny. (See *Brown v. Vance, supra,* 637 F.2d at pp. 284–285.)

Parallel Citations

27 Cal.4th 1017, 45 P.3d 280, 02 Cal. Daily Op. Serv. 3888, 2002 Daily Journal D.A.R. 4893

Footnotes

* Judge of the former Municipal Court of San Bernardino County, West Valley Division, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Government Code sections 27720 through 27728 generally address hearings before local governmental bodies. Under these provisions, a county may establish "the office of county hearing officer" (*id.,* § 27720) and appoint as "hearing officer, or ... deputy or assistant hearing officer" any attorney who has been admitted to practice in California for at least five years (*id.,* § 27724). Persons so appointed may, as authorized by ordinance or resolution, conduct hearings, issue subpoenas, receive evidence, administer oaths, rule on questions of law and the admissibility of evidence, and prepare records of proceedings. (*Id.,* § 27721.) "Any other local public entity may contract with the county to employ the services of the county hearing officer." (*Id.,* § 27725.) Alternatively, counties and other local public entities may contract with the state Office of Administrative Hearings for the services of an administrative hearing officer. (*Id.,* § 27727.)

2 Lower court decisions have touched upon this issue without squarely deciding it. (*Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770, 775, fn. 10, 49 Cal.Rptr.2d 813 (lead opn. of Haerle, J.); *id.* at pp. 777–779, 49 Cal.Rptr.2d 813 (conc. opn. of Phelan, J.); *id.* at pp. 779–797, 49 Cal.Rptr.2d 813 (dis. opn. of Kline, P.J.); *McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 735, 110 Cal.Rptr.2d 565.)

3 Attorney J. David Horspool, acting as a temporary hearing officer under an ad hoc appointment similar to Hyman's, had conducted a prior evidentiary hearing based on the same incident and recommended that Haas's license be revoked. The Board affirmed this decision twice, and the superior court vacated it twice—the first time because the Board had heard the appeal without giving Haas

notice of the hearing, and the second time because the Board had not considered the record of the evidentiary hearing, which had in the meantime disappeared.

4 Neither Hyman's billing rate nor her contract with the County is in the record. While Diamond invited Green to place the contract in the record, Green instead merely represented that it was "the same basically" as the County's contract with the prior hearing officer, which also does not appear in the record.

5 "The County of San Bernardino or other local public agency within the County may contract with the Office of Administrative Hearings of the State of California pursuant to California Government Code Section 27727 ...." (San Bernardino County Code, ch. 27, § 12.275.)

6 San Bernardino County Code, chapter 27, section 12.271 provides: "There is in the government of the County of San Bernardino the office of County Hearing Officer. The duties of the office are to conduct hearings for the County or any agency thereof with the exception of the Planning Commission."

7 *Goldberg v. Kelly* (1970) 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (administrative tribunals); *In re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (courts).

8 E.g., *Withrow v. Larkin* (1975) 421 U.S. 35, 47–58, 95 S.Ct. 1456, 43 L.Ed.2d 712 (permitting some combination of investigative and adjudicative functions in administrative tribunals).

9 E.g., *Withrow v. Larkin, supra,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712, and *Gibson v. Berryhill* (1973) 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (both acknowledging that the constitutional rules requiring the disqualification of judges for financial interest also apply to administrative hearing officers).

10 *Brown v. Vance* (5th Cir.1981) 637 F.2d 272; *Doss v. Long* (N.D.Ga.1985) 629 F.Supp. 127, 129; *State ex rel. McLeod v. Crowe* (1978) 272 S.C. 41, 249 S.E.2d 772, 776–777, 778; *State ex rel. Shrewsbury v. Poteet* (1974) 157 W.Va. 540, 202 S.E.2d 628, 631–632.

11 The strict rule disqualifying an adjudicator with a pecuniary interest in the outcome of the case has deep roots in our legal tradition. The court in *Tumey, supra,* 273 U.S. 510, 524, 47 S.Ct. 437, 71 L.Ed. 749, noted *Bonham's Case* (K.B.1610) 77 Eng.Rep. 638. In that decision, often cited as establishing the principle that legislative acts are subject to judicial review, Chief Justice Sir Edward Coke concluded that the censors (governing body) of the College of Physicians of the City of London could not simultaneously cite, try, and collect fines from persons charged with practicing medicine without a license, and that an act of Parliament purporting to authorize them to do so was "against common right and reason" and void under the common law principle that no one may be a judge in his own case ("*quia aliquis non debet esse Judex in propria causa* "). (*Bonham's Case, supra,* 77 Eng.Rep. at p. 652.)

12 While the high court did apply a presumption of impartiality in *Schweiker v. McClure* (1982) 456 U.S. 188, 195, 102 S.Ct. 1665, 72 L.Ed.2d 1, the court expressly found no financial interest on the part of the challenged adjudicators, who decided disputed Medicare claims. The adjudicators were employees of health insurance companies who administered the Medicare program under contract with the federal government. The facts did not "reveal any disqualifying interest" (*id.* at p. 196, 102 S.Ct. 1665; see also *id.* at p. 197, 102 S.Ct. 1665) because all claims allowed by the adjudicator-employees were paid out of a federal trust fund rather than the employers' own funds, as were the adjudicators' salaries and all other costs of claims administration (*id.* at pp. 191, 192, fn. 3, 102 S.Ct. 1665).

13 See also *Gibson v. Berryhill, supra,* 411 U.S. 564, 578–579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (a state board of optometry composed exclusively of optometrists in private practice may not adjudicate disciplinary matters against optometrists employed by corporations, because decisions by the board to revoke the latter's licenses would increase business opportunities for board members); *University Ford Chrysler–Plymouth, Inc. v. New Motor Vehicle Bd.* (1986) 179 Cal.App.3d 796, 224 Cal.Rptr. 908 (an administrative board with jurisdiction to settle disputes between automobile dealers and manufacturers does not satisfy due process when the board includes dealers but not manufacturers).

14 See also *Ward, supra,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (extending the principle of *Tumey, supra,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, to an adjudicator's official, institutional financial interests and, thus, disqualifying a mayor from serving as judge when fines assessed by his court added to the village's income).

15 See *ante,* 119 Cal.Rptr.2d at p. 347, footnote 10, 45 P.3d at p. 286, footnote 10.

16 "Any county hearing officer, or any deputy or assistant hearing officer, appointed pursuant to this chapter, shall be an attorney at law having been admitted to practice before the courts of this state for at least five years prior to his or her appointment." (Gov.Code, § 27724.)

17 The specific context about which the cited commentator wrote—the trial of civil cases before judicial referees and temporary judges—is now governed by rules designed to eliminate the risk of bias arising from a paid adjudicator's repeated service for the same party. (Cal. Rules of Court, rules 244(c)(2), 244.1(c)(2), 244.2(e)(2).) In addition, the Judicial Council recently adopted, under legislative mandate (Code Civ. Proc., § 1281.85, added by Stats.2001, ch. 362, § 4), a set of ethical standards for contractual arbitrators (Cal. Rules of Court, appen., div. VI, Ethics Standards for Neutral Arbitrators in Contractual Arbitration, eff. July 1, 2002).

18 Even though Deputy County Counsel Green unambiguously referred several times to the possibility that Hyman would be offered future employment as a hearing officer (see *ante,* 119 Cal.Rptr.2d at p. 344, 45 P.3d at 284.), Justice Brown concludes that "Hyman

could not ... have had any realistic expectation of future retention" because "such services would, in any event, be limited to license appeals on massage cases lasting only a few hours each" and because "at oral argument county counsel indicated there had not been another such hearing in the eight years since this one." (Conc. & dis. opn., *post,* 119 Cal.Rptr.2d at p. 359, 45 P.3d at p. 296.) In fact, nothing in the record indicates that Green told Hyman, before she made the decision not to recuse herself, that he would consider hiring her only for cases involving massage clinics. Indeed, the statute under which he hired her applies generally to matters in which "a state law or local ordinance provides that a hearing be held or that findings of fact or conclusions of law be made." (Gov.Code, § 27721.) Nor could Hyman have known, at the time she made her decision, that the possible future employment mentioned by Green would not in fact materialize.

19 These constitutional principles address the risks inherent in certain systems for selecting adjudicators rather than the ethical behavior of specific participants in those systems. For this reason, the County's assertions that licensed attorneys should be presumed to act ethically when serving as hearing officers, and that no one representing the County attempted to influence the hearing officer in this case, are irrelevant. We have no reason to believe that anyone involved in this proceeding acted unethically.

20 To illustrate the point, amicus curiae 110 California Cities asks us to take judicial notice of portions of the Beverly Hills and Hollywood municipal codes authorizing the appointment of hearing officers. The motion is granted.

21 Judicial referees and temporary judges are subject to detailed conflict of interest rules, and the Legislature has recently mandated the adoption of ethical rules for arbitrators. (See *ante,* 119 Cal.Rptr.2d at p. 351, fn. 17, 45 P.3d at 289, fn. 17.)

22 While we do not require any particular set of rules, or pass judgment on rules not before us, to suggest some procedures that might suffice to eliminate the risk of bias may be helpful. For example, a county that wished to continue appointing temporary hearing officers on an ad hoc basis might adopt the rule that no person so appointed will be eligible for a future appointment until after a predetermined period of time long enough to eliminate any temptation to favor the county. Under such a rule, an attorney might be appointed to hear all cases arising during the designated period. A county that needed more hearing officers might, under similar rules, appoint a panel of attorneys to hear cases under a preestablished system of rotation. None of these options would likely entail significant additional costs. Finally, it bears repeating that counties may use their existing statutory authority to contract with the state for the services of an administrative law judge (Gov.Code, § 27727) or to establish and staff the office of county hearing examiner (*id.,* § 27720).

1 At footnote 22, the majority suggests the county could devise a constitutionally acceptable selection process by precluding future appointment "until after a predetermined period of time long enough to eliminate any temptation to favor the county." (Maj. opn., *ante,* 119 Cal.Rptr.2d at p. 357, fn. 22, 45 P.3d at 294, fn. 22.) If even $10 or $15 remuneration is sufficient to compel disqualification, one must wonder how long a period would be necessary to eliminate such a "temptation."

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913 F.Supp.2d 853
United States District Court,
N.D. California.

LUCKY DOGS LLC, Plaintiff,
v.
CITY OF SANTA ROSA, Defendant.

No. C 10–03381 CRB. | Dec. 21, 2012.

Synopsis
Background: Owner of apartment buildings brought § 1983 action against city and city officials, challenging the imposition of business taxes and tax penalties against owner on due process grounds. Parties cross-moved for summary judgment.

Holdings: The District Court, Charles R. Breyer, J., held that:

[1] owner was deprived of due process with respect to city's imposition of business taxes and penalties;

[2] city was not liable under § 1983 for due process violation based on lack of adequate notice of hearing;

[3] city's policy of hiring temporary hearing officers to determine business tax liabilities violated due process;

[4] policy of unilaterally appointing a hearing officer to preside over tax liability dispute did not violate due process; and

[5] publishing notice of and prosecuting charges against owner for failure to pay business taxes did not violate due process.

Motions granted in part, and denied in part.

West Headnotes (10)

[1] **Federal Civil Procedure**
Burden of proof

The non-moving party in a motion for summary judgment must identify with reasonable particularity the evidence that precludes summary judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.App.(2006 Ed.)

Cases that cite this headnote

[2] **Constitutional Law**
Notice

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[3] **Constitutional Law**
Notice

When notice is a person's due, process which is a mere gesture is not due process. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[4] **Constitutional Law**
Taxation

Licenses
Municipal corporations

Owner of apartment buildings was deprived of due process with respect to city's imposition of business taxes and tax penalties against it, where city sent notice of administrative hearing regarding the taxes and penalties to owner by mail with return-receipt-requested, and no signed return receipt was returned in advance of the hearing, so that owner lacked notice of the hearing. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[5] **Civil Rights**
Property and housing

City was not liable under § 1983 for deprivation of due process rights of owner of apartment buildings, with respect to lack of adequate notice

to owner of administrative hearing prior to imposition of business taxes and tax penalties against owner, where there was no evidence that the inadequate notice of the hearing was part of a custom, policy, or widespread practice, or that there were such repeated due process violations for which the errant municipal officers were not held accountable. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[6] **Constitutional Law**
Taxation
Municipal Corporations
Probationary or temporary appointment

City's policy of hiring temporary hearing officers, under two-year employment contracts, to preside over business tax liability disputes violated business owners' due process rights; in any given case, the hearing officer was awarded fees from the losing party, but city was always a party to the tax dispute, so hearing officer had incentive to find in favor of city in all cases, in order to curry favor and encourage city to renew officer's contract in future. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[7] **Administrative Law and Procedure**
Bias, prejudice or other disqualification to exercise powers

Actual bias by a particular hearing officer need not be shown for a system of hiring hearing officers to be unconstitutional.

Cases that cite this headnote

[8] **Constitutional Law**
Taxation
Municipal Corporations
Appointment or Employment

City's policy of unilaterally appointing a hearing officer to preside over business owner's business tax liability dispute with city did not violate due process. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[9] **Constitutional Law**
Hearings and adjudications
Municipal Corporations
Appointment or Employment

A hearing officer being unilaterally appointed by the city is not, in and of itself, a due process violation. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[10] **Constitutional Law**
Taxation
Municipal Corporations
Pleading and evidence

City's publishing notice of and prosecuting charges against owners of apartment buildings for failure to pay city business taxes did not violate owners' due process rights; even though owners disputed that they owed such taxes, buildings were located within the city, owners earned rental income from those buildings, and the tax liability was supported by credible evidence. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

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John Jeffrey Fritsch, City Attorney's Office, Santa Rosa, CA, for Defendant.

Opinion

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT;

GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CHARLES R. BREYER, District Judge.

Plaintiff Lucky Dogs LLC and former plaintiff David Spangenberg brought suit against the City of Santa Rosa and others in connection with the taxes levied on Lucky Dogs and the process by which Santa Rosa imposes tax penalties. *See generally* FAC (dkt. 26). On September 9, 2011, the Court had an initial hearing on a motion for partial summary judgment, brought by Plaintiff (dkt. 52), a motion for summary judgment, brought by the City of Santa Rosa (dkt. 39), and a motion to *855 dismiss, brought by the City of Napa (dkt. 32). *See* 9/9/11 Transcript. At that hearing, the Court resolved a number of issues—and granted the motion to dismiss—but did not reach the bulk of the summary judgment motions, directing the parties to return after the completion of an administrative hearing. *See id.* The hearing has now taken place, and the parties have returned to ask the Court to resolve the summary judgment motions. As explained below, the Court GRANTS IN PART Plaintiff's Motion, and GRANTS IN PART Santa Rosa's Motion.

I. BACKGROUND

Plaintiff Lucky Dogs owns two apartments in Santa Rosa, California. Statement of Undisputed Facts at 1. Former plaintiff David Spangenberg is Lucky Dogs's agent for process. *Id.* Non-party Main Street Management is an apartment rental company based in Napa, with a business license from Napa. *Id.* at 2. It manages the two Santa Rosa apartments owned by Lucky Dogs. *Id.*

On May 5, 2010 Spangenberg received in the mail from Santa Rosa an Administrative Notice and Order for a Hearing scheduled for April 21, 2010. *Id.* at 4. The Notice and Order identified Spangenberg and Lucky Dogs as "Responsible Party." *Id.* It stated:

> YOU ARE FURTHER ORDERED to appear at an Administrative Hearing to determine whether penalties and costs should be imposed against you. The hearing is scheduled for *April 21, 2010* at 1 p.m. in the City Council Chambers at 100 Santa Rosa Ave., 2nd floor Santa Rosa, CA. Any penalties and costs assessed against you at this hearing may constitute a special assessment lien against the real property on which the violation occurred. In addition, your failure to comply with these Orders may result in additional penalties and costs being assessed against you.

Id. (emphasis added). The hearing had already taken place.

The City's hearing officer, Lynda Millspaugh, issued her Administrative Enforcement Orders in both cases on May 21, 2010. *Id.* The Order identified Spangenberg and Lucky Dogs LLC as the "Responsible Party." *Id.* The Administrative Enforcement Order stated that "A hearing was held on April 21, 2010, before the undersigned regarding violations alleged by the City of Santa Rosa ("City") ... No one appeared on behalf of the Responsible Party ... The City has complied with all applicable notice requirements." *Id.* at 4–5. The Order concluded that there was substantial evidence that the Responsible Party had conducted a business in Santa Rosa without paying business tax for the years 2007–2010. FAC Ex. H at 1. It assessed numerous costs, fees, and fines against Plaintiff, including assessed fees of $689.20 and $565.34, administrative costs of $738.83, and Millspaugh's costs of $273.82. FAC Exs. H and I.

Millspaugh is a lawyer contracted to furnish hearing officer services to Santa Rosa at $200.00 per hour. Statement of Undisputed Facts at 3. Millspaugh began such work in May 2004. *Id.* at 3–4. The contract under which she was operating during the events described above ran from July 1, 2008 through June 30, 2010. *See* Fritsch Decl. Ex. D. The City renewed her contract for a term of July 1, 2010 through June 30, 2012. Millspaugh Decl. Ex. T.[1] "In late 2011, [Millspaugh] determined to *856 fully retire and end [her] work as a contract Hearing Officer for the County of Sonoma and City of Santa Rosa when [she] completed [her] 2012 calendar for each agency, [she] communicated [her] intentions to City of Santa Rosa Senior Code Enforcement Officer Michael Reynolds well before April 18, 2012." Millspaugh Decl. ¶ 6.

Plaintiff and Spangenberg brought suit against Santa Rosa, Napa, field collection representative Wayne Gornowicz, and Millspaugh. FAC ¶¶ 5–8. They alleged due process violations relating to Santa Rosa's process for imposing tax penalties (specifically they complain that they were not given an

opportunity to be heard, that Millspaugh has a financial interest in the outcome of the proceeding, that Millspaugh was unilaterally selected, and that no evidence supported the filing and prosecuting of charges against them) and they sought a declaratory judgment as to whether Napa or Santa Rosa is owed business taxes on the Santa Rosa apartment income. *Id.* ¶¶ 19–47. Plaintiff and Santa Rosa each moved for summary judgment, and Napa moved to dismiss.

At the September 9, 2011 hearing on all three motions, the Court granted the motion to dismiss and addressed some issues in connection with the motions for summary judgment, but held that "the hearing officer may rule in favor of the plaintiffs" and that if that happened, "Lucky Dogs doesn't have standing to complain about an unfair hearing officer who rules in their favor." 9/9/11 Transcript at 4, 12–13. The Court found that "the appropriate thing to do ... is for me to stay the action, pending a hearing, which they've requested, and the outcome of the hearing." *Id.* at 15.

The City scheduled two such hearings before two of its other hearing officers, only to cancel the hearings the day before they were to occur. Spangenberg Decl. ¶¶ 2–3.[2] The City scheduled the hearing for a date on which Millspaugh was to preside over the hearing. *Id.* ¶ 3. Millspaugh ultimately held a hearing as to the two Lucky Dogs properties.[3] At the hearing, Millspaugh advised Lucky Dogs "that the Hearing Officer previously had determined to retire and cease work in 2012 as a contract Hearing Officer for City of Santa Rosa, and that the Hearing Officer had notified staff that she did not intend to undertake contract Hearing Officer work for City of Santa Rosa in the future." Millspaugh Decl. ¶ 8. Spangenberg maintained Lucky Dogs's objection to the City's unilaterally selected hearing officer, but proceeded with the hearing. Spangenberg Decl. ¶ 3.

On May 30, 2012, Millspaugh issued Administrative Enforcement Orders on the cases, finding:

> The record contains substantial evidence that the Responsible Party, by itself or through its appointed agent, Main Street Management, has been carrying on a business in the City of Santa Rosa, *857 and that the Responsible Party is subject to business taxation by the City of Santa Rosa as it conducts a business within the City making it subject to the provisions of SRCC Chapter 6–04.

Fritsch Decl. Ex. S at 3. The parties each filed supplemental briefs and now ask the Court to resolve their summary judgment motions.

II. LEGAL STANDARD

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if the fact may affect the outcome of the case. *See id.* at 248, 106 S.Ct. 2505.

"In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.1997). A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *See id.* at 323, 106 S.Ct. 2548. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *See id.*

[1] Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir.1995), and noting that it is not a district court's task to "scour the record in search of a genuine issue of triable fact"). If the non-moving party fails to make this showing, the moving party is entitled

to judgment as a matter of law. *See Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548.

III. DISCUSSION

Plaintiff moves for partial summary judgment on all of its claims, *see generally* P. Mot.,[4] and Santa Rosa moves for summary judgment as to all of Plaintiff's claims, *see generally* D. Mot. The Court already dismissed Count 5 in connection with the motion to dismiss. *See* Order Dismissing. Counts 1–4, which assert Due Process violations under section 1983 related to Santa Rosa's process for adjudicating and imposing tax penalties, remain. Defendant responded to Plaintiff's Motion by arguing that (1) Plaintiff Spangenberg lacks standing to bring such claims; (2) its procedure does not violate due process; and (3) Millspaugh and Gornowicz are entitled to immunity. The Court has already ***858** ruled as to Spangenberg's standing, *see* 9/9/11 Transcript at 15–16 ("I don't believe that Mr. Spangenberg has standing. I don't believe it makes a difference of any consequence in this case. He's—Lucky Dogs has standing. Pursue it."). Millspaugh was already dismissed per stipulation. *See* Stipulation. And the Court held at the September 9, 2011 hearing that Gornowicz had qualified immunity, leaving Santa Rosa as the only Defendant in the case. *See* 9/9/11 Transcript at 17. Therefore, the only issue remaining at this time is whether the City's procedure violates due process.

A. Count 1 (notice and opportunity to be heard)

In *Count One,* Plaintiff alleges a due process violation based on lack of notice and an opportunity to be heard at the administrative hearing. *See* FAC ¶ ¶ 19–24. Plaintiff asserts that "[t]he City of Santa Rosa and Wayne Gornowicz had both actual and constructive knowledge on April 21, 2010 that Plaintiffs, as the asserted 'Responsible Parties,' had not been served," because Defendant had not received a return receipt for the letter sent to Spangenberg alerting him to the April 21, 2010 hearing date. *Id.* ¶ 20. Plaintiff argues that "by failing to continue the Hearing until after service of the allegations had been made on Plaintiffs, ... Defendants, and each of them, violated Plaintiff's Due Process rights under the 5th and 14th Amendments." *Id.* ¶ 24.

[2] **[3]** **[4]** The parties confirmed at the 2011 motion hearing that Lucky Dogs did not receive notice in advance of the hearing. *See* 9/9/11 Transcript at 5–7. As to the requirements of notice, the Supreme Court has explained:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.... The notice must be of such nature as reasonably to convey the required information, ... and it must afford a reasonable time for those interested to make their appearance.... But when notice is a person's due, process which is a mere gesture is not due process.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–15, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In that case, the Court found that where the "trustee ha[d] on its books the names and addresses of the [interested parties], ... we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses." *Id.* at 318, 70 S.Ct. 652. The Court added: "However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication." *Id.* at 319, 70 S.Ct. 652. It allowed, however, that there would be some circumstances in which the law would "require greater precautions" for notice. *Id.* Plaintiff argues that this is such a circumstance, because the notices to Plaintiff were sent return-receipt-requested, and no signed return receipt was returned in advance of the hearing. *See* P. Opp'n at 18–19.

In *Jones v. Flowers,* 547 U.S. 220, 225, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006), the Court addressed adequacy of notice procedures where the government sent a taxpayer a notice of a tax sale, and that notice was returned undelivered. The Court reiterated that due process does not require "actual notice," just notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 226, 126 S.Ct. 1708 (citing ***859** *Mullane,* 339 U.S. at 314, 70 S.Ct. 652). The Court went on to conclude that "someone who actually wanted to alert [the taxpayer] that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done." *Id.* at 238, 126 S.Ct. 1708.

There are two possible grounds for distinguishing *Jones* here. First, *Jones* involved the return of mail as undelivered, rather than a return receipt that was not returned. Defendant does not even argue this point, and indeed it seems a distinction without a difference: in either case, the City was on notice that the mail had not been delivered. *But see Orange Cty. Com'r of Finance v. Helseth,* 24 Misc.3d 204, 875 N.Y.S.2d 754, 759 (2009) (distinguishing between "unclaimed" and "undeliverable" mail).[5] Second, as Defendant argue, the hearing in *Jones* posed the irreversible danger of losing a house, rather than simply having fees assessed. *See* D Mot at 13. While it is true that the Supreme Court found that a greater effort at notice was needed "especially given that it concerns the important and irreversible prospect of losing a house," *Jones,* 547 U.S. at 221, 126 S.Ct. 1708, the Court did not make its holding contingent on that fact. Moreover, the Ninth Circuit, applying *Jones* has not limited it to the context of noticees losing houses. *See, e.g., Collette v. U.S.,* 247 Fed.Appx. 87, 88–89 (9th Cir.2007) (DEA notices of administrative forfeitures inadequate under *Jones* where returned as undeliverable); *Yi Tu v. Nat'l Transp. Safety Bd.,* 470 F.3d 941, 945 (9th Cir.2006) (FAA notices of license suspension sent via certified mail inadequate under *Jones* where FAA knew that certified mail would not reach plaintiff but first class mail would); *Rendon v. Holder,* 400 Fed.Appx. 218, 219 (9th Cir.2010) (INS notice was adequate under *Jones* where, when certified mail was returned unclaimed, INS took "additional reasonable steps" to notify litigant of intent to deny application).

Jones cannot be meaningfully distinguished, and Defendant's service was inadequate under *Jones.* There was indeed a constitutional deprivation here. But that is not the end of the Court's inquiry.

[5] Defendant argues in its supplemental brief that municipal liability can only attach in section 1983 actions "where plaintiff has shown that a constitutional deprivation was directly caused by a municipal policy." *See* Def. Supp. Br. at 7–8 (quoting *Nadell v. Las Vegas Metro. Police Dep't,* 268 F.3d 924, 929 (9th Cir.2001), abrogated on other grounds as recognized by *Beck v. City of Upland,* 527 F.3d 853, 862 n. 8 (9th Cir.2008)). Plaintiff does not answer this argument in its own, subsequent supplemental brief. *See generally* P. Supp. Br., and indeed the Court is aware of no evidence that the woefully inadequate service to [redacted] was part of a custom, policy, or "widespread practice," or that there is evidence of "repeated constitutional violations for which the errant municipal officers" were not held accountable. *See Nadell,* 268 F.3d at 929. In the absence of such evidence, there is no genuine issue of material fact on this issue, and the Court grants summary judgment for Defendant on Count One.

***860 B. Count 2 (financial interest)**

[6] In *Count Two,* Plaintiff alleges a due process violation based on Defendant's subjecting Plaintiff to an adjudicator with a financial interest in the outcome of the proceeding. FAC ¶ 25. Plaintiff asserts that Santa Rosa allows their hearing officers to award themselves fees from the losing party, which gives them a financial interest in the outcome of the case. *Id.* ¶ 26. Plaintiff also asserts that the prospects of the hearing officers obtaining future appointments by the City of Santa Rosa depends solely on the City's good will, *id.,* which violates Plaintiff's due process rights, *id.* ¶¶ 27–28. The Court agrees.

On any individual case, that a hearing officer is awarded fees from the losing party does not create a problem; the hearing officer simply wants to be paid for that one case, and is paid no matter which side loses. But there is a problem where there are multiple cases, or the possibility of multiple cases, and where the City is a repeat player. Then the hearing officer has a financial incentive to rule in the City's favor, because the hearing officer presumably would like the City to hire her again, and she might reasonably believe that it is more likely to do so if she rules in its favor. Being paid by the losing party under such circumstances creates an additional incentive for the hearing officer to try to ingratiate herself with the City; ruling for the City then would not only entitle the City to the tax award/penalties sought, but would spare the City the cost of the hearing officer.

That such a system is unconstitutional is essentially the holding of *Haas v. Cty. of San Bernardino,* 27 Cal.4th 1017, 119 Cal.Rptr.2d 341, 45 P.3d 280 (2002). In that case, the court answered in the affirmative the question of "whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill." *Id.* at 1024, 119 Cal.Rptr.2d 341, 45 P.3d 280. The court explained that "while adjudicators challenged for reasons other than financial interest have been afforded a presumption of impartiality ... adjudicators challenged for financial interest have not." *Id.* at 1025, 119 Cal.Rptr.2d 341, 45 P.3d 280.[6]

Importantly, a plaintiff need not show that an adjudicator was actually biased, just that "the economic realities make the design of the ... system vulnerable to a 'possible temptation' to the 'average man' as judge.' " *Id.* at 1029, 119 Cal.Rptr.2d 341, 45 P.3d 280 (citing *Brown v. Vance,* 637 F.2d 272, 284 (5th Cir.1981)).

In *Haas,* the prosecuting authority could select its adjudicator at will, so long as the adjudicator had five years of law practice. *Id.* at 1029, 119 Cal.Rptr.2d 341, 45 P.3d 280. The hearing officer in that case was hired directly by the prosecuting attorney, and only to hear that case. *Id.* at 1021–22, 119 Cal.Rptr.2d 341, 45 P.3d 280. The government's intent was to "use [the hearing officer] on assignment, as the occasion suggests, in the future if she's interested in doing it and if the case should arise." *Id.* at 1022, 119 Cal.Rptr.2d 341, 45 P.3d 280. The court explained: "while the adjudicator's pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators ***861** and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings." *Id.* at 1030, 119 Cal.Rptr.2d 341, 45 P.3d 280. The court recognized that there is a "subtle bias" at issue where "the County rather than [the taxpayer] would be the repeat customer upon whose goodwill, alone, the hearing officer's prospect for future employment in that capacity depended." *Id.* Therefore, the court found that "the hearing officer ... had an impermissible interest in the outcome of the litigation arising from the prospect of future employment by the County, measured against the constitutional standard of a 'possible temptation to the average man as a judge ... not to hold the balance nice, clear and true.' " *Id.* at 1031, 119 Cal.Rptr.2d 341, 45 P.3d 280 (quoting *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

Defendant initially argued that *Haas* is distinguishable, largely because Santa Rosa "did not hold a 'hearing officer try out,' " hiring her for one case only, but has a two year contract with Millspaugh that it cannot terminate without good cause. Opp'n to P. Mot at 6; D. Mot. at 16 ("MILLSPAUGH's future work is governed by a public contract and express term.... MILLSPAUGH's future adjudicative work is governed by contract right."). Millspaugh's contract as a hearing officer was indeed for a two-year term. *See* Fritsch Decl. Ex. D. Nonetheless, while a two-year contract is preferable to a case-by-case, *ad hoc* appointment, it does not eliminate the *Haas* court's concern about "[a] procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions," which that court found created "an objective, constitutionally impermissible appearance and risk of bias." 27 Cal.4th at 1034, 119 Cal.Rptr.2d 341, 45 P.3d 280. "Future employment" here is not an individual case but an additional two year term. Indeed, here there is not only a hypothetical possibility of future employment—Millspaugh's contract began in 2004 and was renewed every two years thereafter. *See* Fritsch Decl. Ex. D. The risk that a hearing officer in that position would be incentivized to stay in the City's good graces in order to continue to have her contract renewed every two years is real.[7] Theoretically, a long enough contract term could be constitutionally acceptable (for example, a lifetime term would provide no such problematic incentives), and the Court recognizes that it would be difficult to pinpoint exactly where to draw the line between permissibly long and impermissibly short; nonetheless, a two year term is not even in the gray zone.

Defendant argues, also, that the 2010 Administrative Hearing Calendar was posted in advance, and listed twelve hearing dates, divided between four different hearing officers. *See* D. Mot. at 16; Fritsch Decl. Ex. C (calendar). It argues that every participant in the administrative hearing process may move to continue the hearing to a different time, which effectively means that a party wanting to avoid a given hearing officer can move the hearing to a date when another officer has been assigned. *See* D. Mot. at 16–17. But that argument misses the mark. The problem is not with any individual hearing officer (as *Haas* noted, "actual bias need ***862** not be shown," 27 Cal.4th at 1033, 119 Cal.Rptr.2d 341, 45 P.3d 280), but with a system that creates an improper financial incentive for *all hearing officers;* switching from one to another is no solution.[8]

[7] Defendant argues in its supplemental brief that *Haas* is distinguishable, because, in light of Millspaugh's determination that she would retire at the end of her term, she did not intend to engage in future adjudicative work, and so her future income did not depend on the government's goodwill. *See* Def. Supp. Br. at 4–6. This argument fails to recognize that "actual bias need not be shown" by a particular officer for a system to be unconstitutional. *See Haas,* 27 Cal.4th at 1033, 119 Cal.Rptr.2d 341, 45 P.3d 280. "[T]he Constitution is concerned not only with actual bias but also with 'the appearance of justice.' " *Exxon Corp. v. Heinze,* 32 F.3d 1399, 1403 (9th Cir.1994); *see also Caperton v. A.T. Massey Coal Co., Inc.,* 556 U.S. 868, 878, 129 S.Ct. 2252,

173 L.Ed.2d 1208 (2009) (explaining that in *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 822, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), the Court found that it was not required to decide whether the particular justice was influenced, but whether the situation "would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true," further explaining that "it was important that the test have an objective component").

Millspaugh's announcement that she "did not intend" to renew her contract in the future is also not nearly as significant as Santa Rosa suggests, as it was not legally binding. Although the City of Santa Rosa argued at the motion hearing that Millspaugh's was a disclaimer of the kind of future employment at issue in *Haas,* the disclaimer was entirely unenforceable. What would prevent Millspaugh from announcing later that she wished to renew her contract after all? What would prevent Millspaugh from adjudicating Lucky Dogs's cases while thinking in the back of her head that she might renew her contract after a all? People rethink inclinations to retire with some frequency. [9] Millspaugh's personal circumstances therefore do not save the City from itself.

There are some solutions at Santa Rosa's disposal. For example, the *Haas* court explained that a county could either establish an office of county hearing officer or contract with the state Office of Administrative Hearings for an administrative law judge. *See* 27 Cal.4th at 1037, 119 Cal.Rptr.2d 341, 45 P.3d 280. It also posited that "a county that wished to continue ***863** appointing temporary hearing officers on an ad hoc basis might adopt the rule that no person so appointed will be eligible for a future appointment until after a predetermined period of time long enough to eliminate any temptation to favor the county." *Id.* at 1038, 119 Cal.Rptr.2d 341, 45 P.3d 280. This is reminiscent to the Court's observation at the motion hearing that all hearing officers could make legally binding "disclaimers" against future employment. In *Coffman Specialties, Inc. v. Dept. of Transp.,* 176 Cal.App.4th 1135, 1152–53, 98 Cal.Rptr.3d 643 (2009), the court found that an arbitral process in which both parties had to mutually agree to the arbitrator if the arbitrator has previously been a hearing officer meant that the arbitrator was not depending on the government's goodwill "alone" for future employment. There too, a neutral committee made up of an equal number of government and industry voting representatives picked the potential arbitrators, and the arbitrators had to be recertified every seven years. *Id.* at 1153, 98 Cal.Rptr.3d 643.

Santa Rosa's current system of unilaterally selecting hearing officers and hiring them to renewable two year terms "[holds] out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions," and creates "an objective, constitutionally impermissible appearance and risk of bias." *See Haas,* 27 Cal.4th at 1034, 119 Cal.Rptr.2d 341, 45 P.3d 280. In short, it deprives taxpayers of due process. Accordingly, the Court grants summary judgment to Plaintiff on Count Two.

C. Count Three (unilateral appointment)

[8] **[9]** In *Count Three,* Plaintiff complains that Millspaugh was unilaterally appointed, which "violated Plaintiffs' Due Process rights." Comp. ¶ 30. [10] But a hearing officer being unilaterally appointed by the city is not, in and of itself, a due process violation. Thus, in *Morongo Band of Mission Indians,* 45 Cal.4th 731, 734–36, 88 Cal.Rptr.3d 610, 199 P.3d 1142 (2009), where the Morongo Band requested a hearing about a water license, and the State Water Resources Control Board selected as a hearing officer a member of the Board (which also employed the prosecuting attorney), who had also advised the Board on unrelated matters, the California Supreme Court found that there was no due process violation. *Id.* at 741, 88 Cal.Rptr.3d 610, 199 P.3d 1142. The court explained, "[i]n the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias." *Id.* [11] If the Board's process in *Morongo Band* was proper, then certainly the lone fact of a hearing officer being unilaterally appointed is insufficient to support a due process violation here. *See also Haas,* 27 Cal.4th at 1031, 119 Cal.Rptr.2d 341, 45 P.3d 280 ("no generally applicable principle of constitutional law permits the affected person in such a case to select the adjudicator."). [12] To the extent this claim ***864** relies only on Millspaugh's unilateral appointment, the Court grants summary judgment to [redacted] on Count Three.

D. Count Four (prosecuting charges)

[10] In *Count Four,* Plaintiff alleges that "by making, publishing and prosecuting and causing to be made, printed, published, and prosecuted charges against David Spangenberg with respect to the operations of [the [redacted]

Rosa apartments] without credible evidence supporting such charges," and by doing the same "against David Spangenberg and Lucky Dogs LLC" when Main Street Management managed the apartments, Santa Rosa violated Plaintiff's substantive and procedural due process rights. FAC ¶¶ 32, 33. Plaintiff further alleges that Santa Rosa's conduct "shocks the conscience." *Id.* ¶ 34.

It is not entirely clear what Plaintiff is arguing, and the parties' papers hardly address this count. To the extent Plaintiff objects to Defendant's pursuing charges against Lucky Dogs, that objection is not well founded. Indisputably, the apartments were in Santa Rosa, and Lucky Dogs, the owner of the apartments, had not paid taxes on income earned from the apartments to the City of Santa Rosa. Whether it is in fact appropriate for Lucky Dogs to pay taxes to Santa Rosa, given that Main Street Management paid taxes on that same income in Napa, is not for this Court to say, in light of the Tax Injunction Act (the basis for this Court granting Napa's motion to dismiss). But to argue that there is no "credible evidence" that charges were appropriate against Lucky Dogs is wrong.

To the extent Plaintiff's argument is that identifying Spangenberg as the "responsible party" and pursuing charges against him is a constitutional violation, that argument makes more sense, but should nonetheless lose. Given Spangenberg's roles as Lucky Dogs's agent for service of process, attorney, and principal, it makes sense that Santa Rosa identified him as a person responsible for Lucky Dogs's tax payments. While Santa Rosa would have been wrong if it concluded that Spangenberg was personally liable for any of Lucky Dogs's debts, it is not clear that that was its conclusion.[13] In addition, Plaintiff points to no authority finding that such a mistake constitutes a due process violation. Santa Rosa's mistake, if indeed it was a mistake, was all the more reasonable in light of Spangenberg's conversation with Gornowicz in advance of the hearing in which Spangenberg allegedly stated, "he is atty and says he just doesn't pay any bill *865 city sends him to collect money...." Ex. I to Admin. Hearing Packet. Gornowicz could have reasonably understood from this conversation that Spangenberg pays the bills for Lucky Dogs—and in fact, he does. *See* P. Reply at 1 ("Santa Rosa was paid ... by Mr. Spangenberg from Lucky Dogs LLC's business account"). Santa Rosa's listing of Spangenberg as a Responsible Person might have been legally inaccurate, but Plaintiff offers no legal support for it being a due process violation.

The Court therefore grants summary judgment to Santa Rosa on Count Four.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS summary judgment for Plaintiff on Count 2, and GRANTS summary judgment for Santa Rosa on Counts 1, 3 and 4. The Court will issue an injunction pertaining to Count 2 in a separate order.

IT IS SO ORDERED.

Footnotes

1 The contract provides, in part, that Millspaugh is an independent contractor, and not a City employee, *id.* ¶¶ 14, 20, that she undertakes to comply with all applicable federal, state and local laws, *id.* ¶ 11, and that the City can terminate the agreement for cause "unrelated to the outcome of any hearing," *id.* ¶ 6B.

2 Santa Rosa argues in its supplemental brief that the FAC does not include allegations about the subsequent administrative hearings and so fails to state a claim. *See* Def. Supp. Br. at 7. To the extent that this is even an appropriate argument on summary judgment, the Court rejects it. The parties proceeded as the Court instructed, and the Court deems the FAC to include allegations of the subsequent administrative hearing, as it finds that the record is replete with evidence that such hearing occurred, and occurred in the manner described herein.

3 The parties seem to disagree about when the hearing took place. Spangenberg declares that the hearing was on March 21, 2012. *Id.* Millspaugh declares that it was on April 18, 2012. Millspaugh Decl. ¶ 7. The precise date does not matter, although other evidence supports the conclusion that it was on April 18, 2012. *See, e.g.,* Def. Supp. Br. at 1.

4 The motion is "partial" because Plaintiff only seeks declaratory and injunctive relief at this time, and does not address in the motion its further requests for "damages and related claims." *Id.* at 2 n. 1. The Court will address any remaining issues with the parties at an upcoming case management conference.

5 In that case—not cited by either party—the return receipt requested was returned, but returned as "unclaimed," and, particularly given the fact that a regular first class mailing of the notice was never returned, the court found that it was reasonable for the county

to believe that the noticee was attempting to avoid notice by ignoring the certified mail. *Id.* Here, there is no evidence that the return receipt was returned at all, or that Defendant sent notice by regular first class mail.

6 The court further explained that due process allowed for some flexibility in administrative process, such that even the combination of investigative and adjudicative functions was permissible, but that "the rule disqualifying adjudicators with pecuniary interests applies with full force." *Id.* at 1027, 119 Cal.Rptr.2d 341, 45 P.3d 280.

7 Millspaugh denies "that the prospect of future compensation from the City of Santa Rosa at any time has biased or impaired [her] professional judgment as a Hearing Officer" as "[t]he remuneration and terms offered by the City of Santa Rosa do not match those offered in local private practice." Millspaugh Decl. ¶ 11; *but see Connally v. Georgia,* 429 U.S. 245, 251, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977) (paying magistrates a $5 fee for granting a search warrant application, but nothing for denying warrant applications, violates due process).

8 The argument is particularly ineffective in this case, where Santa Rosa twice moved the date of the subsequent hearing and it ended up back in front of Millspaugh. Spangenberg Decl. ¶¶ 2–3.

9 *See, e.g.,* Perez Hilton, *Cher Says This 'Farewell Tour' Is Her Last* (March 6, 2012, 11:30 PM), http://perezhilton.com/2012–03–06–cher–says–farewell–tour–is–her–last# .UNNojqxSmSo ("The news has some fans (and haters) asking just how many farewell tours can one artist have? ... There you have it! Ya know, unless she changes her mind."); *Brett Favre,* Wikipedia, http://en.wikipedia.org/wiki/Brett_Favre ("Retirement Speculation Through the Years ... 2008: In early March, Favre announces that he is retiring from the Green Bay Packers.... In June, Favre said he told head coach Mike McCarthy he wanted to come back to the team.... 2009: In February, Favre said he retired.... In July, Childress said Favre would not be coming out of retirement. However in August Favre announced he would come back and play for the Vikings .... 2010: ... he informed the team that he would not be coming back for another season. However, two weeks later he told teammates ... he was coming back for another season. 2011: In January, Favre filed retirement papers with the NFL. In December, a report from ESPN–Chicago indicated that Favre would be open to coming back from retirement if the Chicago Bears were interested.").

10 The Complaint is somewhat unclear. While Count Three only discusses the unilateral appointment of Millspaugh, *see* FAC ¶ 30, its title references not only Millspaugh's unilateral appointment but also her pecuniary interest, *See id.* at 9. This Order assumes that Count Three is based only on her unilateral appointment.

11 Plaintiff cited *Morongo Band* to support the opposite point, *see* P. Mot. at 18–19; it does not.

12 Plaintiff raises *United States v. Washington,* 157 F.3d 630, 656 (9th Cir.1998), in which the Ninth Circuit held, where each of four parties proposed a special master and then one was chosen at random, that "due process is violated if there is a seventy-five percent chance that Appellants' [three defendants adverse to an Indian tribe] master will be selected." *See* P. Supp. Br. at 4–5. Here, as Plaintiff notes, "the City has 100 percent control of the selection of the hearing officer." *Id.* at 5. But *Washington* can be distinguished here for a couple of reasons. First, it was the district court there that set up a defective system for appointing special masters—no one would argue that one party to a district court litigation should be permitted to unilaterally select a special master—while here there is ample precedent for cities appointing hearing officers. Moreover, in *Washington,* 157 F.3d at 660–61, the court found that each master had been selected "because of a real or perceived bias." Here, the Court is assuming that this Count does not challenge Millspaugh's pecuniary interest, and "adjudicators challenged for reasons other than financial interest have been afforded a presumption of impartiality." *See Haas,* 27 Cal.4th at 1025, 119 Cal.Rptr.2d 341, 45 P.3d 280.

13 According to Santa Rosa's municipal code section 1–30.030(B), " 'responsible person' means the person or persons responsible for the event or incident and may include any of the following regarding the property where the violation exists ... (1) An owner of record; (2) A manager of the property; (3) One in charge of the premises; (4) An occupant of the premises; (5) A user." Fritsch Decl. Ex. B.

End of Document

86 S.Ct. 1698
Supreme Court of the United States

UNITED STATES, Appellant,
v.
GRINNELL CORPORATION et al.
GRINNELL CORPORATION, Appellant,
v.
UNITED STATES.
AMERICAN DISTRICT
TELEGRAPH CO., Appellant,
v.
UNITED STATES.
HOLMES ELECTRIC PROTECTIVE CO., Appellant,
v.
UNITED STATES.
AUTOMATIC FIRE ALARM CO., Appellant,
v.
UNITED STATES.

Nos. 73—77. | Argued March 28 and 29, 1966. | Decided June 13, 1966.

Civil antitrust suit. The United States District Court for the District of Rhode Island, entered a decree for the government, 236 F.Supp. 244, and all parties appealed. The Supreme Court, Mr. Justice Douglas, held that the entire accredited central station service business, including such services as automatic burglar alarms, automatic fire alarms, sprinkler supervisory service, and watch signal service, was properly treated as a single 'relevant market' in determining existence of monopolization, warranting judgment against defendants who exercised monopoly power over 87% of the business.

Affirmed in part, and remanded for further hearing on nature of the relief to be awarded.

Mr. Justice Harlan dissented, Mr. Justice Fortas and Mr. Justice Stewart dissented in part.

West Headnotes (24)

[1] **Antitrust and Trade Regulation**
Market Power; Market Share

"Monopoly" under section 2 of Sherman Act has two elements: possession of monopoly power in relevant market and willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Sherman Anti-Trust Act, §§ 1, 2 as amended 15 U.S.C.A. §§ 1, 2.

987 Cases that cite this headnote

[2] **Antitrust and Trade Regulation**
Market Power; Market Share

Existence of "monopoly power," defined as power to control prices or exclude competition, may be inferred from predominant share of market. Sherman Anti-Trust Act, §§ 1, 2 as amended 15 U.S.C.A. §§ 1, 2.

231 Cases that cite this headnote

[3] **Antitrust and Trade Regulation**
Particular Industries or Businesses

The entire accredited central station service business including such services as automatic burglar alarms, automatic fire alarms, sprinkler supervisory service, and watch signal service, was properly treated as a single "relevant market" in determining existence of monopolization, warranting judgment against defendants who exercised monopoly power over 87% of the business. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

66 Cases that cite this headnote

[4] **Antitrust and Trade Regulation**
Product market

In case of a product, "relevant market" may be such that substitute products must also be considered, as customers may turn to them if there is a slight increase in price of main product. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

31 Cases that cite this headnote

[5] **Antitrust and Trade Regulation**
Product market

A number of different products or services may be combined in a single market in determining existence of monopoly power where that combination reflects commercial realities. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

47 Cases that cite this headnote

[6] **Antitrust and Trade Regulation**
Particular Industries or Businesses

There may be submarkets that are separate economic entities for anti-trust purposes, but this possibility need not be considered with regard to accredited central station services, which made up a relevant market so that domination or control thereof made out a monopoly of a "part" of trade or commerce within meaning of statute. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2.

166 Cases that cite this headnote

[7] **Antitrust and Trade Regulation**
Insurance

Central station service which is accredited by insurance underwriters, as distinguished from nonaccredited service, is a relevant part of commerce for antitrust purposes. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

6 Cases that cite this headnote

[8] **Antitrust and Trade Regulation**
Particular Industries or Businesses

The geographic market for accredited central station service, for antitrust purposes, is national rather than local in view of manner in which the business was built and conducted. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

21 Cases that cite this headnote

[9] **Antitrust and Trade Regulation**
Monopolization or attempt to monopolize

Antitrust and Trade Regulation
Pricing

Evidence authorized determination that monopoly in accredited central station service business was achieved by unlawful and exclusionary practices, including restrictive agreements that preempted for each of cooperating companies a segment of market where it was free of competition of the others, pricing practices that contained competitors, and acquisition of corporations. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

130 Cases that cite this headnote

[10] **Antitrust and Trade Regulation**
Damages and Other Relief

Antitrust and Trade Regulation
Injunction

Adequate relief in a monopolization case should put an end to the combination and deprive defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly found to be in violation of statute. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

9 Cases that cite this headnote

[11] **Antitrust and Trade Regulation**
Forfeiture and seizure of property; divestiture

Mere dissolution of monopolistic combination in accredited central station service business, through divestiture of one company's interests in other companies, was inadequate relief and divestiture on part of other company which operated in 115 cities of which 92 had no other accredited central stations was necessary.

2 Cases that cite this headnote

[12] **Federal Courts**
Particular cases

The United States Supreme Court could not resolve on record exact extent of divestiture to be required in monopolization case, but left details to be determined by district court on remand.

3 Cases that cite this headnote

[13] **Antitrust and Trade Regulation**
Monopolization or attempt to monopolize

Federal Courts
Need for further evidence, findings, or conclusions

Record established that practices in central station service business, of requiring subscribers to sign five-year contracts and of retaining title to equipment installed on subscriber's premises constituted substantial barriers to competition and that relief against them was appropriate, but exact extent of relief should be determined by district court on remand. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

11 Cases that cite this headnote

[14] **Federal Courts**
Mandate; effect of decision in lower court; proceedings on remand

Concession in pretrial discussion by defendants in antitrust case, that certain relief would be appropriate if antitrust violations were found, could be taken into account by district judge on remand.

3 Cases that cite this headnote

[15] **Antitrust and Trade Regulation**
Damages and Other Relief

Antitrust and Trade Regulation
Injunction

Appropriate relief in antitrust case should include requiring defendants to sell, on nondiscriminatory terms, any devices manufactured by them for use in furnishing central station service, so as to assure potential competitors of replacement parts to maintain systems. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

Cases that cite this headnote

[16] **Antitrust and Trade Regulation**
Injunction

Visitation rights, including requiring reports, examining documents and interviewing company personnel to determine whether defendant has complied with an antitrust decree, constitute an important and customary provision in antitrust decree, which district court should consider. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

2 Cases that cite this headnote

[17] **Antitrust and Trade Regulation**
Injunction

Record did not establish such predatory conduct by president and board chairman of defendant in antitrust case as to warrant decree barring him from employment by any of the defendants. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

5 Cases that cite this headnote

[18] **Antitrust and Trade Regulation**
Injunction

Antitrust decree should specifically enjoin the precise practices found to have violated the act. Sherman Anti-Trust Act, § 2 as amended 15 U.S.C.A. § 2; Clayton Act, § 7, 15 U.S.C.A. § 18.

1 Cases that cite this headnote

[19] **Antitrust and Trade Regulation**
Forfeiture and seizure of property; divestiture

Antitrust and Trade Regulation
Injunction

Relief in antitrust case, of requiring dominating company to divest itself of holdings in three other defendant companies, and barring them

from future acquisition of interest in firms in monopolized business, was justified.

3 Cases that cite this headnote

[20] **Federal Courts**
Particular cases

In remanding antitrust case to district court, United States Supreme Court would leave question of requiring reports to Department of Justice to discretion of district court, in view of other extensive changes in decree which might make such relief unnecessary.

3 Cases that cite this headnote

[21] **Judges**
Bias and Prejudice

Where any adverse attitudes evinced by trial judge in antitrust case toward defendants were based on his study of depositions and briefs which parties had requested him to make, and reflected only view that if facts were as government alleged, stringent relief was called for, they did not manifest disqualifying bias and prejudice. 28 U.S.C.A. § 144.

271 Cases that cite this headnote

[22] **Judges**
Bias and Prejudice

Alleged bias and prejudice, claimed to disqualify judge, must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. 28 U.S.C.A. § 144.

838 Cases that cite this headnote

[23] **Judges**
Statements and expressions of opinion by judge

Remarks of trial judge when lawyer persisted in offering evidence which had previously been ruled irrelevant did not manifest closed mind on merits of case, so as to disqualify judge. 28 U.S.C.A. § 144.

150 Cases that cite this headnote

[24] **Judges**
Bias and Prejudice

Record did not establish bias and prejudice of trial judge in antitrust case. 28 U.S.C.A. § 144.

140 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case presents an important question under s 2 of the Sherman Act,[1] which makes it an offense for any person to 'monopolize * * * any part of the trade or commerce among the several States.' This is a civil suit brought by the United States against Grinnell Corporation (Grinnell), American District Telegraph Co. (ADT), Holmes Electric Protective Co. (Holmes) and Automatic Fire Alarm Co. of Delaware (AFA). The District Court held for the Government and entered a decree. All parties appeal,[2] the United States because it deems the relief inadequate and the defendants both on the merits and on the relief and on the ground that the District Court denied them a fair trial. We noted probable jurisdiction. 381 U.S. 910, 85 S.Ct. 1538, 14 L.Ed.2d 432.

Grinnell manufactures plumbing supplies and fire sprinkler systems. It also owns 76% of the stock of ADT, 89% of the stock of AFA, and 100% of the stock of Holmes.[3] ADT provides both burglary and fire protection services;

Holmes **1702 provides burglary services alone; AFA supplies only fire protection service. Each offers a central station service under which hazard-detecting devices installed on the protected premises automatically *567 transmit an electric signal to a central station.[4] The central station is manned 24 hours a day. Upon receipt of a signal, the central station, where appropriate, dispatches guards to the protected premises and notifies the police or fire department direct. There are other forms of protective services. But the record shows that subscribers to accredited central station service (i.e., that approved by the insurance underwriters) receive reductions in their insurance premiums that are substantially greater than the reduction received by the users of other kinds of protection service. In 1961 accredited companies in the central station service business grossed $65,000,000. ADT, Holmes, and AFA are the three largest companies in the business in terms of revenue: ADT (with 121 central stations in 115 cities) has 73% of the business; Holmes (with 12 central stations in three large cities) has 12.5%; AFA (with three central stations in three large cities) has 2%. Thus the three companies that Grinnell controls have over 87% of the business.

Over the years ADT purchased the stock or assets of 27 companies engaged in the business of providing burglar or fire alarm services. Holmes acquired the stock or assets of three burglar alarm companies in New York City using a central station. Of these 30, the officials *568 of seven agreed not to engage in the protective service business in the area for periods ranging from five years to permanently. After Grinnell acquired control of the other defendants, the latter continued in their attempts to acquire central station companies—offers being made to at least eight companies between the years 1955 and 1961, including four of the five largest nondefendant companies in the business. When the present suit was filed, each of those defendants had outstanding an offer to purchase one of the four largest nondefendant companies.

In 1906, prior to the affiliation of ADT and Holmes, they made a written agreement whereby ADT transferred to Holmes its burglar alarm business in a major part of the Middle Atlantic States and agreed to refrain forever from engaging in that business in that area, while Holmes transferred to ADT its watch signal business and agreed to limit its activities to burglar alarm service and night watch service for financial institutions. While this agreement was modified several times and terminated in 1947, in 1961 Holmes still restricted its business to burglar alarm service and operated only in those areas which had been allocated to it under the 1906 agreement. Similarly, ADT continued to refrain from supplying burglar alarm service in those areas earlier allocated to Holmes.

In 1907 Grinnell entered into a series of agreements with the other defendant companies and with Automatic Fire Protection Co. to the following effect:

AFA received the exclusive right to provide central station sprinkler supervisory and waterflow alarm and automatic fire alarm service in New York City, Boston and Philadelphia, and agreed not to provide burglar alarm service **1703 in those cities or central station service elsewhere in the United States.

*569 Automatic Fire Protection Co. obtained the exclusive right to provide central station sprinkler supervisory and waterflow alarm service everywhere else in the United States except for the three cities in which AFA received that exclusive right, and agreed not to engage in burglar alarm service.

ADT received the exclusive right to render burglar alarm and nightwatch service throughout the United States. (Under ADT's 1906 agreement with Holmes, however, it could not provide burglar alarm services in the areas for which it had given Holmes the exclusive right to do so.) It agreed not to furnish sprinkler supervisory and waterflow alarm service anywhere in the country and not to furnish automatic fire alarm service in New York City, Boston or Philadelphia (the three cities allocated to AFA). ADT agreed to connect to its central stations the systems installed by AFA and Automatic.

Grinnell agreed to furnish and install all sprinkler supervisory and waterflow alarm actuating devices used in systems that AFA and Automatic would install, and otherwise not to engage in the central station protection business.

AFA and Automatic received 25% of the revenue produced by the sprinkler supervisory waterflow alarm service which they provided in their respective territories; ADT and Grinnell received 50% and 25%, respectively, of the revenue which resulted from such service. The agreements were to continue until February 1954.

The agreements remained substantially unchanged until 1949 when ADT purchased all of Automatic Fire Protection Co.'s rights under it for $13,500,000. After these 1907 agreements expired in 1954, AFA continued to honor the prior division of territories; and ADT and AFA entered into a new contract providing for the continued sharing of revenues

on substantially the same *570 basis as before.[5] In 1954 Grinnell and ADT renewed an agreement with a Rhode Island company which received the exclusive right to render central station service within Rhode Island at prices no lower than those of ADT and which agreed to use certain equipment supplied by Grinnell and ADT and to share its revenues with those companies. ADT had an informal agreement with a competing central station company in Washington, D.C., 'that we would not solicit each other's accounts.'

ADT over the years reduced its minimum basic rates to meet competition and renewed contracts at substantially increased rates in cities where it had a monopoly of accredited central station service. ADT threatened retaliation against firms that contemplated inaugurating central station service. And the record indicates that, in contemplating opening a new central station, ADT officials frequently stressed that such action would deter their competitors from opening a new station in that area.

The District Court found that the defendant companies had committed per se violations of s 1 of the Sherman Act as well as s 2 and entered a decree. 236 F.Supp. 244.

**1704 I.

[1] [2] [3] The offense of monopoly under s 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition *571 or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. We shall see that this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose. In United States v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264, we defined monopoly power as 'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market. In American Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S.Ct. 1125, 1133, 90 L.Ed. 1575, we said that 'over two-thirds of the entire domestic field of cigarettes, and * * * over 80% of the field of comparable cigarettes' constituted 'a substantial monopoly.' In United States v. Aluminum Co. of America, 2 Cir., 148 F.2d 416, 429, 90% of the market constituted monopoly power. In the present case, 87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power—power which, as our discussion of the record indicates, they did not hesitate to wield—if that business is the relevant market. The only remaining question therefore is, what is the relevant market?

[4] In case of a product it may be of such a character that substitute products must also be considered, as customers may turn to them if there is a slight increase in the price of the main product. That is the teaching of the du Pont case (supra, 351 U.S. at 395, 404, 76 S.Ct. at 1007, 1012), viz., that commodities reasonably interchangeable make up that 'part' of trade or commerce which s 2 protects against monopoly power.

The District Court treated the entire accredited central station service business as a single market and we think it was justified in so doing. Defendants argue that the different central station services offered are so diverse that they cannot under du Pont be lumped together to *572 make up the relevant market. For example, burglar alarm services are not interchangeable with fire alarm services. They further urge that du Pont requires that protective services other than those of the central station variety be included in the market definition.

[5] But there is here a single use, i.e., the protection of property, through a central station that receives signals. It is that service, accredited, that is unique and that competes with all the other forms of property protection. We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities. To repeat, there is here a single basic service—the protection of property through use of a central service station—that must be compared with all other forms of property protection.

[6] In s 2 cases under the Sherman Act, as in s 7 cases under the Clayton Act (Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510) there may be submarkets that are separate economic entities. We do not pursue that question here. First, we deal with services, not with products; and second, we conclude that the accredited central station is a type of service that makes up a relevant market and that domination or control of it makes out a monopoly of a 'part' of trade or commerce within the meaning of s 2 of the Sherman Act. The defendants have not made out a case for fragmentizing the types of services into lesser units.

**1705 Burglar alarm service is in a sense different from fire alarm service; from waterflow alarms; and so on. But it

would be unrealistic on this record to break down the market into the various kinds of central station protective services that are available. Central station companies recognize that to compete effectively, they must offer all or nearly all types of service.[6] The different *573 forms of accredited central station service are provided from a single office and customers utilize different services in combination. We held in United States v. Philadelphia Nat. Bank, 374 U.S. 321, 356, 83 S.Ct. 1715, 1737, 10 L.Ed.2d 915, that 'the cluster' of services donoted by the term 'commercial banking' is 'a distinct line of commerce.' There is, in our view, a comparable cluster of services here. That bank case arose under s 7 of the Clayton Act where the question was whether the effect of a merger 'in any line of commerce' may be 'substantially to lessen competition.' We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act. See United States v. First Nat. Bank & Trust Co., 376 U.S. 665, 667—668, 84 S.Ct. 1033, 1034, 12 L.Ed.2d 1. In the s 7 national bank case just mentioned, services, not products in the mercantile sense, were involved. In our view the lumping together of various kinds of services makes for the appropriate market here as it did in the s 7 case.

There are, to be sure, substitutes for the accredited central station service. But none of them appears to operate on the same level as the central station service so as to meet the interchangeability test of the du Pont case. Nonautomatic and automatic local alarm systems appear on this record to have marked differences, not the low degree of differentiation required of substitute services as well as substitute articles.

*574 Watchman service is far more costly and less reliable. Systems that set off an audible alarm at the site of a fire or burglary are cheaper but often less reliable. They may be inoperable without anyone's knowing it. Moreover, there is a risk that the local ringing of an alarm will not attract the needed attention and help. Proprietary systems that a customer purchases and operates are available; but they can be used only by a very large business or by government and are not realistic alternatives for most concerns. There are also protective services connected directly to a municipal police or fire department. But most cities with an accredited central station do not permit direct, connected service for private businesses. These alternate services and devices differ, we are told, in utility, efficiency, reliability, responsiveness, and continuity, and the record sustains that position. And, as noted, insurance companies generally allow a greater reduction in premiums for accredited central station service than for other types of protection.

Defendants earnestly urge that despite these differences, they face competition from these other modes of protection. They seem to us seriously to overstate the degree of competition, but we recognize that (as the District Court found) they 'do not have unfettered power to **1706 control the price of their services * * * due to the fringe competition of other alarm or watchmen services.' 236 F.Supp., at 254. What defendants overlook is that the high degree of differentiation between central station protection and the other forms means that for many customers, only central station protection will do. Though some customers may be willing to accept higher insurance rates in favor of cheaper forms of protection, others will not be willing or able to risk serious interruption to their businesses, even though covered by insurance, and will thus be unwilling to consider anything but central station protection.

*575 [7] The accredited, as distinguished from nonaccredited service, is a relevant part of commerce. Virtually the only central station companies in the status of the nonaccredited are those that have not yet been able to meet the standards of the rating bureau. The accredited ones are indeed those that have achieved, in the eyes of underwriters, superiorities that other central stations do not have. The accredited central station is located in a building of approved design, provided with an emergency lighting system and two alternate main power sources, manned constantly by at least a required minimum of operators, provided with a direct line to fire headquarters and, where possible, a direct line to a police station; and equipped with all the devices, circuits and equipment meeting the requirements of the underwriters. These standards are important as insurance carriers often require accredited central station service as a condition to writing insurance. There is indeed evidence that customers consider the unaccredited service as inferior.

[8] We also agree with the District Court that the geographic market for the accredited central station service is national. The activities of an individual station are in a sense local as it serves, ordinarily, only that area which is within a radius of 25 miles. But the record amply supports the conclusion that the business of providing such a service is operated on a national level. There is national planning. The agreements we have discussed covered activities in many States. The inspection, certification and rate-making is largely by national insurers. The appellant ADT has a national schedule of prices, rates, and terms, though the rates may be varied to meet local conditions. It deals with multistate businesses on the basis of nationwide contracts. The manufacturing business of ADT is interstate. The fact that Holmes is more nearly local than the

others does not *576 save it, for it is part and parcel of the combine presided over and controlled by Grinnell.

As the District Court found, the relevant market for determining whether the defendants have monopoly power is not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they built and conduct their business.

[9] We have said enough about the great hold that the defendants have on this market. The percentage is so high as to justify the finding of monopoly. And, as the facts already related indicate, this monopoly was achieved in large part by unlawful and exclusionary practices. The restrictive agreements that pre-empted for each company a segment of the market where it was free of competition of the others were one device. Pricing practices that contained competitors were another. The acquisitions by Grinnell of ADT, AFA, and Holmes were still another. Grinnell long faced a problem of competing with ADT. That was one reason it acquired AFA and Holmes. Prior to settlement of its dispute and controversy with ADT, Grinnell prepared to go into the central station service business. By acquiring ADT in 1953, Grinnell eliminated that alternative. Its control of the three other defendants eliminated any possibility of an outbreak of competition that might have occurred **1707 when the 1907 agreements terminated. By those acquisitions it perfected the monopoly power to exclude competitors and fix prices. [7]

*577 II.

The final decree enjoins the defendants in general terms from restraining trade or attempting or conspiring to restrain trade in this particular market, from further monopolizing, and attempting or conspiring to monopolize. The court ordered the alarm companies to file with the Department of Justice standard lists of prices and terms and every quotation to customers that deviated from those lists and enjoined the defendants from acquiring stock, assets, or business of any enterprise in the market. Grinnell was ordered to file, not later than April 1, 1966, a plan of divestiture of its stock in each of the other defendant companies. It was given the option either to sell the stock or distribute it to its stockholders or combine or vary those methods. [8] The court further enjoined any of the defendants from employing in any capacity the President and Chairman of the Board of Grinnell, James D. Fleming. Both the Government and the defendants challenge aspects of the decree.

[10] We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act. That is the teaching of our cases, notably Schine Chain Theatres v. United States, 334 U.S. 110, 128—129, 68 S.Ct. 947, 957, 92 L.Ed. 1245.

[11] [12] We largely agree with the Government's views on the relief aspect of the case. We start with ADT, which presently does 73% of the business done by accredited central stations throughout the country. It is indeed the keystone of the defendants' monopoly power. The mere *578 dissolution of the combination through the divestiture by Grinnell of its interests in the other companies does not reach the root of the evil. In 92 of the 115 cities in which ADT operates there are no other accredited central stations. Perhaps some cities could not support more than one. Defendants recognized prior to trial that at least 13 cities can; the Government urged divestiture in 48 cities. That there should be some divestiture on the part of ADT seems clear; but the details of such divestiture must be determined by the District Court as the matter cannot be resolved on this record.

[13] [14] Two of the means by which ADT acquired and maintained its large share of the market are the requirement that subscribers sign five-year contracts and the retention by ADT of title to the protective services equipment installed on a subscriber's premises. On this record it appears that these practices constitute substantial barriers to competition and that relief against them is appropriate. The pros and cons are argued with considerable vehemence here. [9] **1708 Again, we cannot resolve them on this record. The various aspects of this controversy must be explored by the District Court and suitable protective provisions included in the decree that deprive these two devices of the coercive power that they apparently have had towards restraining competition and creating a monopoly.

*579 [15] The Government proposed that the defendants be required to sell, on nondiscriminatory terms, any devices manufactured by them for use in furnishing central station service. It seems clear that if the competitors are to be able to compete effectively for the existing customers of the defendants when the present service contracts expire, they must be assured of replacement parts to maintain those systems. [10]

[16] The Government urges visitation rights, that is, requiring reports, examining documents, and interviewing company personnel, a relief commonly granted for the purpose of determining whether a defendant has complied with an antitrust decree. See United States v. United States Gypsum Co., 340 U.S. 76, 95, 71 S.Ct. 160, 172, 95 L.Ed. 89. The District Court gave no explanation for its refusal to grant this relief. [11] It is so important and customary a provision that the District Court should reconsider it.

[17] [18] Defendants urge and the Government concedes that the barring of Mr. Fleming from the employment of any of the defendants is unduly harsh and quite unnecessary on this record. While relief of that kind may be appropriate where the predatory conduct is conspicuous, we cannot see that any such case was made out on this record.

The Government objects, as do the defendants, to the broad and generalized terms of the restraining order. They properly point out, as we emphasized in Schine Chain Theatres v. United States, supra, 334 U.S. at 125—126, 68 S.Ct. at 955—956, that the precise practices found to have violated the Act should *580 be specifically enjoined. On remand we suggest that that course be taken.

[19] [20] The defendants object to the requirements that Grinnell divest itself of its holdings in the three alarm company defendants, but we think that provision is wholly justified. Dissolution of the combination is essential as indicated by many of our cases, starting with Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 78, 31 S.Ct. 502, 523, 55 L.Ed. 619. The defendants object to that portion of the decree that bars them from acquiring interests in firms in the accredited central station business. But since acquisition was one of the methods by which the defendants acquired their market power and was the method by which Grinnell put the combination together, an injunction against the repetition of the practice seems fully warranted. The defendants further object to the requirement in the decree that the alarm company defendants report to the Department of Justice any deviation they make from their list prices. We make no comment on that because in view of the other extensive changes necessary in the decree, the District Court might well **1709 deem it to be unnecessary in the fashioning of the new decree. In other words, we leave that matter open, to rest finally in the discretion of the District Court.

III.

[21] The defendants contend that Judge Wyzanski, who tried the case, was personally biased and prejudiced and should have been disqualified from sitting in the case, and that he denied them a fair trial. We think this point is without merit.

The complaint was filed in April 1961, the answers in July 1961. Shortly thereafter extensive taking of depositions began. The District Court in January 1963 directed that no depositions be taken after September 1, 1963. In response to an inquiry from the court both sides suggested that the trial be set no earlier than January 1964.

*581 At a pretrial conference in December 1963, government counsel told the court that the parties had been trying to reach agreement on a consent decree but were far apart and asked how the court would like to handle the presentation of the evidence in the event a settlement was not reached. Grinnell's lawyer suggested that the next appropriate procedure would be a pretrial on the question of relief—a suggestion that the District Court construed as an invitation to the court to discuss the relief apart from the merits. The Government objected. The court then asked for a brief from each side setting forth its views on relief if the Government prevailed on the merits. In response to the court's statement that 'as I understand it, you want to find out what kind of relief I would be likely to allow if the government's case stood virtually uncontradicted,' Grinnell's counsel replied: 'That is what I had in mind, your Honor, yes.'

Thereupon the court set a day for such a hearing. At the next pretrial conference Grinnell's counsel stated that 'if your Honor would indicate the relief that might be appropriate in this case that would help both sides to come to a better understanding.'

Then the following colloquy occurred:
'THE COURT. I don't think it would help very much.

'MR. MCINERNEY. Well, your Honor, I think it would help both the plaintiff and the defendants to know what is really at stake here in this trial.

'THE COURT. I assure you that you would not be helped by anything I would say. You would do better to get together with the government rather than run the risk of what I would

say from what I have seen. Let me just assure you of that. * * *'

The case was then set for trial on June 15, 1964. When Grinnell's counsel sought to argue further, the court stated: 'There is no use in discussing it with me. I have *582 read enough to know that if I have to decide this case on what I have seen from the government you will not be in a position at this stage to agree to it.'

On June 3, 1964, defendants argued for a postponement of the trial, saying they needed more time. The court denied the motion. Then they argued that the relief issues to be tried be limited to those raised by the pleadings so as to eliminate what they considered to be extraneous issues raised by the Government. To that the court replied:

> 'I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial. You have invited me, therefore, into what I regard as, from your point of view, a rather undesirable situation. I think I made that clear at the beginning. I have told you that, forced by you to look, my views are more extreme than those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up **1710 third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases.'

Shortly thereafter defendants filed a motion[12] for the disqualification of Judge Wyzanski on the grounds of personal bias and prejudice.[13]

*583 [22] The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481. Any adverse attitudes that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. What he said reflected no more than his view that, if the facts were as the Government alleged, stringent relief was called for.

[23] During the trial he repeatedly stated that he had not made up his mind on the merits. During the trial he ruled certain evidence to be irrelevant to the issues and when the lawyer persisted in offering it Judge Wyzanski said, 'Maybe you will persuade somebody else. And if you think so, all right. I just assure you it is a great ceremonial act, as far as I am concerned.' We do not read this statement as manifesting a closed mind on the merits of the case but consider it merely a terse way of repeating the previously stated ruling that this particular evidence was irrelevant.

[24] We have examined all the other claims of the defendants made against Judge Wyzanski and find that the claim of bias and prejudice is not made out. Our discussion of the relief which he granted shows indeed that he was in several critical respects, too lenient with those who now charge him with bias and prejudice.

The judgment below is affirmed except as to the decree. We remand for further hearings on the nature of the relief consistent with the views expressed herein. It is so ordered.

Affirmed in part and remanded.

Mr. Justice HARLAN, dissenting in Nos. 73—77.

I cannot agree with the Court that the relevant market has been adequately proved. I do not dispute that a *584 national market may be found even though immediate competition takes place only within individual communities, some of which are themselves natural monopolies. For a national monopoly of such local enterprises may still have serious long-term impact on competition and be vulnerable on its own plane to the antitrust laws. In the product market also the Court seems to me to make out a good enough case for lumping together the different kinds of central station protective service (CSPS). But I cannot agree that the facts so far developed warrant restricting the product market to accredited CSPS.

Because the ultimate issue is the effective power to control price and competition, this Court has always recognized that the market must include products or services 'reasonably interchangeable' with those of the alleged monopolist. **1711 [illegible] v. E. I. du Pont De Nemours & Co., 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264. In this instance, there is no doubt that the accredited CSPS business

does compete in some measure with many other forms of hazard protection: watchmen, local alarms, proprietary systems, telephone-connected services, unaccredited CSPS, direct-connected (to police and fire stations) systems, and so forth. The critical question, then, is the extent of competition from these rivals.

The Government and the majority have stressed that differences in cost, reliability and insurance discounts may disqualify a competing form of protection for a particular customer. For example, it is said that proprietary systems are too expensive for any but large companies and local alarms may go unanswered in some neighborhoods. But if in general a CSPS customer has a feasible alternative to CSPS, it does not much matter that other ones are foreclosed to him, nor that other CSPS customers have different second choices. From this record, it may well be that other forms of protection are each competitive enough with segments of the CSPS *585 market so that in sum CSPS rarely has a monopoly position.

From the defense standpoint, there is substantial evidence showing that the defendants do feel themselves under pressure from other forms of protection, that they do compete for customers, and that they do lower prices even in areas where no CSPS competition is present. This concrete evidence of market behavior seems to me to rank higher than the kind of inference proof heavily relied on by the Government—physical differences between competing forms of protection, self-advertising claims of CSPS companies that they represent a superior service and varying insurance discounts. Given that the burden of proof rests upon the Government, the record leaves me with such misgivings as to the validity of the District Court's findings on this score that I am not prepared to agree that the Government has made the showing of market domination that the law demands before a business is sundered.

At the same time the case must be recognized as a close one, and I am not ready to say at this stage that the findings and conclusions of the District Court might not be supportable. All things considered, I join with my Brothers Fortas and Stewart to the extent of voting to remand the case for further proceedings so that new findings can be made as to the relevant product market. This course seems to me the more appropriate in light of the fact that because of the Expediting Act, 15 U.S.C. s 29 (1964 ed.), we have not had the benefit of any intermediate appellate sifting of this record. In view of the disposition I propose, I do not consider any of the other questions in the case.

Mr. Justice FORTAS, with whom Mr. Justice STEWART joins, dissenting in Nos. 73 and 77.

I agree that the judgment below should be remanded, but I do not agree that the remand should be limited to *586 reshaping the decree. Because I believe that the definition of the relevant market here cannot be sustained, I would reverse and remand for a new determination of this basic issue, subject to proper standards.

We have here a case under both s 1 and s 2 of the Sherman Act, which proscribe combinations in restraint of trade, and monopolies and attempts to monopolize. The judicial task is not difficult to state: Does the record show a combination in restraint of trade or a monopoly or attempt to monopolize? If so, what are its characteristics, scope and effect? And, finally, what is the appropriate remedy for a court of equity to decree?

Each of these inquires depends upon two basic referents: definition of the geographical area of trade or commerce restrained or monopolized, and of the products or services involved. In s 1 **1712 cases this problem ordinarily presents little difficulty because the combination in restraint of trade itself delineates the 'market' with sufficient clarity to support the usual injunctive form of relief in those cases. See, e.g., United States v. Griffith, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236. In the present case, however, the essence of the offense is monopolization, achieved or attempted, and the major relief is divestiture. For these purposes, 'market' definition is of the essence, just as in s 7 cases [1] the kindred definition of the 'line of commerce' is fundamental. We must define the area of commerce that is allegedly engrossed before we can determine its engrossment; and we must define it before a decree can be shaped to deal with the consequences of the monopoly, and to restore or produce competition. See *587 United States v. E. I. du Pont De Nemours & Co. (the Cellophane Case), 351 U.S. 377, 389—396, 76 S.Ct. 994, 1003—1008, 100 L.Ed. 1264; United States v. Aluminum Co. of America, 148 F.2d 416 (C.A.2d Cir. 1945).

In s 2 cases, the search for 'the relevant market' must be undertaken and pursued with relentless clarity. It is, in essence, an economic task put to the uses of the law. Unless this task is well done, the results will be distorted in terms of the conclusion as to whether the law has been violated and what the decree should contain.

In this case, the relevant geographical and product markets have not been defined on the basis of the economic facts of the industry concerned. They have been tailored precisely to fit

defendants' business. The Government proposed and the trial court concluded that the relevant market is not the business of fire protection, or burglary protection, or protection against waterflow, etc., or all of these together. It is not even the business of furnishing these from a central location. It is the business, viewed nationally, of supplying 'insurance accredited central station protection services.' (CSPS)—that is, fire, burglary and other kinds of protection furnished from a central station which is accredited by insurance companies. The business of defendants fits neatly into the product and geographic market so defined. In fact, it comes close to filling the market so defined.[2] This Court has now approved this Procrustean definition.

The geographical market is defined as nationwide. But the need and the service are intensely local—more local by far, for example, than the market which this Court found to be local in United States v. Philadelphia Nat. Bank, 374 U.S. 321, 357—362, 83 S.Ct. 1715, 1738—1740, 10 L.Ed.2d 915.[3] The premises protected *588 do not travel. They are fixed locations. They must be protected where they are. Protection must be provided on the spot. It must be furnished by local personnel able to bring help to the scene within minutes. Even the central stations can provide service only within a 25-mile radius. Where the tenants of the premises turn to central stations for this service, they must make their contracts locally with the central station and purchase their services from it on the basis of local conditions.

**1713 But because these defendants, the trial court found, are connected by stock ownership, interlocking management and some degree of national corporate direction, and because there is some national participation in selling as well as national financing, advertising, purchasing of equipment, and the like,[4] the court concluded that the competitive area to be considered is national. This Court now affirms that conclusion.

This is a non sequitur. It is not permissible to seize upon the nationwide scope of defendants' operation and to bootstrap a geographical definition of the market from this. The purpose of the search for the relevant geographical market is to find the area or areas to which a potential buyer may rationally look for the goods or services that he seeks. The test, as this Court said in United States v. Philadelphia Nat. Bank, is 'the geographic structure of supplier-customer relations,' 374 U.S. 321, 357, 83 S.Ct. 1715, 1738, quoting Kaysen & Turner, Antitrust Policy 102 (1959). And, as Mr. Justice Clark put it in Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580, the definition of the relevant market requires *589 'CAREFUL SELECTION OF THE MARKET AREA IN which the seller operates, and to which the purchaser can practicably turn for supplies.'[5] The central issue is where does a potential buyer look for potential suppliers of the service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency.

The incidental aspects of defendants' business which the court uses cannot control the outcome of this inquiry. They do not measure the market area in which buyer and sellers meet. They have little impact upon the ascertainment of the geographical areas in which the economic and legal questions must be answered: have defendants 'monopolized' or 'restrained' trade; have they eliminated or can they eliminate competitors or prevent or obstruct new entries into the business; have they controlled or can they control price for the services? These are the issues; and, in defendants' business, a finding that the 'relevant market' is national is nothing less than a studied failure to assess the effect of defendants' position and practices in the light of the competition which exists, or could exist, in economically defined areas—in the real world.

Here, there can be no doubt that the correct geographic market is local. The services at issue are intensely local: they can be furnished only locally. The business as it is done is local—not nationwide. If, as might well be the case on this record, defendants were found to have violated the Sherman Act in a number of these local areas, a proper decree, directed to those markets, as well as to *590 general corporate features relevant to the condemned practices, could be fashioned. On the other hand, a gross definition of the market as nationwide leads to a gross, nationwide decree which does not address itself to the realities of the market place. That is what happened here: The District Court's finding that the market was nationwide logically led it to a decree which operated on the only national aspect of the situation, the parent company nexus, instead of on the economically realistic areas—the local situations. This **1714 Court now directs the trial court to require 'some (unspecified) divestiture' locally by the alarm companies. This is a recognition of the economic reality that the relevant competitive areas are local. In plain terms, the Court's direction to the trial court means a 'market-by-market' analysis for the purpose of breaking up defendants'

monopoly position and creating competitors and competition wherever feasible in particular cities. In my view, however, by so directing, the Court implies that which it does not command: that the case should be reconsidered at the trial court level because of the improper standard it used to define the relevant geographic markets.

The trial court's definition of the 'product' market even more dramatically demonstrates that its action has been Procrustean —that it has tailored the market to the dimensions of the defendants. It recognizes that a person seeking protective services has many alternative sources. It lists 'watchmen, watchdogs, automatic proprietary systems confined to one site, (often, but not always), alarm systems connected with some local police or fire station, often unaccredited CSPS (central station protective services), and often accredited CSPS.' The court finds that even in the same city a single customer seeking protection for several premises may 'exercise its option' differently for different locations. It may choose ***591** accredited CSPS for one of its locations and a different type of service for another.

But the court isolates from all of these alternatives only those services in which defendants engage. It eliminates all of the alternative sources despite its conscientious enumeration of them. Its definition of the 'relevant market' is not merely confined to 'central station' protective services, but to those central station protective services which are 'accredited' by insurance companies.

There is no pretense that these furnish peculiar services for which there is no alternative in the market place, on either a price or a functional basis. The court relies solely upon its finding that the services offered by accredited central stations are of better quality, and upon its conclusion that the insurance companies tend to give 'noticeably larger' discounts to policyholders who use accredited central station protective services. This Court now approves this strange red-haired, bearded, one-eyed man-with-a-limp classification.

The unreality of the trial court's market definition may best be illustrated by an example. Consider the situation of a retail merchant in Pittsburgh who wishes to protect his store against burglary. The Holmes Electric Protective Company, a subsidiary of [redacted], operates an accredited central station service in Pittsburgh. It provides only burglary protection.

The gerrymandered market definition approved today totally excludes from the market consideration of the availability in Pittsburgh of cheaper but somewhat less reliable local alarm systems, or of more expensive (although the expense is reduced by greater insurance discounts) watchman service, or even of unaccredited central station service which virtually duplicates the Holmes service.

Instead, and in the name of 'commercial realities,' we are instructed that the 'relevant market'—which totally ***592** excludes these locally available alternatives—requires us to look only to accredited central station service, and that we are to include in the 'market' central stations which do not furnish burglary protection and even those which serve such places as Boston and Honolulu. [6]

Moreover, we are told that the 'relevant market' must assume this strange and curious configuration despite evidence ****1715** in the record and a finding of the trial court that 'fringe competition' from such locally available alternatives as watchmen, local alarm systems, proprietary systems, and unaccredited central stations has, in at least 20 cities, forced the defendants to operate at a 'loss' even though defendants have a total monopoly in these cities of the 'market'—namely, the 'accredited central station protective services.' And we are led to this odd result even though there is in the record abundant evidence that customers switch from one form of property protection to another, and not always in the direction of accredited central station service.

I believe this approach has no justification in economics, reason or law. It might be supportable if it were found that the accredited central stations offer services which are unique in the sense that potential buyers—or at least a substantial, identifiable part of the trade—look only to them for the services in question, and that neither cost, type, quality of service nor other factors bring competing services into the market. The findings here and the record do not permit this conclusion.

The Government's market definition, accepted by the trial court, is a distortion which inevitably leads to a superficial and distorted results even in the hands of a highly skilled judge. As this Court held in Brown Shoe, supra, the 'reasonable interchangeability of use or the ***593** cross-elasticity of demand,' determines the boundaries of a product market. 370 U.S., at 325, 82 S.Ct., at 1523. See also the Cellophane Case, 351 U.S., at 380, 76 S.Ct., at 998. In plain language, this means that the court should have defined the relevant market here to include all services which, in light of geographic availability, price and use characteristics, are in realistic rivalry for all or some part of the business of furnishing protective services to premises. In the present situation, however, the court's own findings show

that practical alternatives are available to potential users—although they vary from market to market and possibly from user to user. These have been arbitrarily excluded from the court's definition.

I do not suggest that wide disparities in quality, price and customer appeal could never affect the definition of the market. But this follows only where the disparities are so great that they create separate and distinct categories of buyers and sellers. The record here and the findings do not approach this standard. They fall far short of justifying the narrowing of the market as practiced here. I need refer only to the exclusion of non-accredited central stations, which the court seeks to justify by reference to differentials in insurance discounts. These differentials may indeed affect the relative cost to the consumer of the competing modes of protection. But, in the absence of proof that they result in eliminating the competing services from the category of those to which the purchaser 'can practicably turn' for supplies,[7] they do not justify such total exclusion. This sort of exclusion of the supposedly not-quite-so-attractive service from the basic definition of the kinds of business and service against which defendants' activity will be measured, is entirely unjustified on this record.[8]

**1716 *594 The importance of this kind of truncated market definition vividly appears if we are to say, as the trial court here held, that if defendant has so large a fraction of the market as to constitute a 'predominant' share, a rebuttable presumption of monopolization follows. The fraction depends upon the denominator (the 'market') as well as the numerator (the defendants' volume). Clearly, this 'presumption' is unwarranted unless the 'market' is defined to include all competitors. The contrary is not supported by this Court's decisions in either the Cellophane Case, supra, or United States v. E. I. du Pont De Nemours & Co. (General Motors), 353 U.S. 586, 77 S.Ct. 872, 1 L.Ed.2d 1057. The latter case defined the market in terms of the total products which could be used for the defined purposes: automobile fabrics and finishes. This embraces the total range of options for customers seeking these products. On the contrary, as the record here shows and as the findings, candidly read, imply, substantial options exist for services other than through accredited central stations providing protective services. Those options, whether for all or a part of the services in issue, must be included in the assessment of the market.

In the opinion which this Court hands down today, there is considerable discussion of defendants' argument that the market should be 'broken down' by different *595 type of service: e.g., Burglar protection, fire protection, etc. The Court rejects this on the ground that it is appropriate to evaluate a 'cluster' of services as such. It points to Philadelphia Nat. Bank, supra, for support for its approach. In that case, Mr. Justice Brennan's opinion for the Court carefully set out the distinctive characteristics of banking services: that some of these services (e.g., checking accounts) are virtually free of competition from other types of institutions, and that other services are distinctive in cost or other characteristics. 374 U.S., at 356—357, 83 S.Ct., at 1737—1738. See also United States v. First Nat. Bank, 376 U.S. 665, 668, 84 S.Ct. 1033, 1034, 12 L.Ed.2d 1 (per Douglas, J.). Similarly, in United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260, and International Boxing Club of N.Y. v. United States, 358 U.S. 242, 249—252, 79 S.Ct. 245, 249—251, 3 L.Ed.2d 270, 'first-run' moving pictures and championship boxing matches were held sufficiently distinctive in terms of demand in the market place to warrant consideration as separate markets.

But no such distinctiveness exists here. As I have discussed, neither this record nor the trial court's findings show either a distinctive demand or a separable market for 'insurance accredited central station protective services.' The contrary is evident. None of the services furnished by accredited central stations is unique, as I have discussed. Nor is there even a common or predominant 'cluster' of services offered by the central stations. One of the defendants, Holmes, is engaged only in the burglary alarm business. Another, AFA, furnishes only fire and waterflow service. Only ADT among the defendants makes available to its customers the full 'cluster.'

I do not mean to suggest that the Government must prove its case, service by service. But in defining the market, individual services, even if furnished in isolation, ought to be specified and here, as distinguished from the conclusion impelled by the circumstances in *596 Philadelphia Nat. Bank, supra, competitors for individual services ought to be taken into account.

I do not intend by any of the foregoing to suggest that, on this record, the relief granted by the trial court and the substantially more drastic relief ordered by this Court would necessarily be unjustified. It is entirely possible that monopoly or attempt to monopolize may be found—and perhaps found with greater force—in local situations. Relief on a pervasive, system-wide, national basis might **1717 follow, as decreed by the trial court, as well as divestiture in appropriate local situations, as directed by this Court. It

is impossible, I submit, to make these judgments on the findings before us because of the distortion due to an incorrect and unreal definition of the 'relevant market.' Now, because of this Court's mandate, the market-by-market inquiry must begin for purposes of the decree. But this should have been the foundation of judgment, not its superimposed conclusion. This inquiry should—in my opinion, it must—take into account the total economic situation—all of the options available to one seeking protection services. It should not be limited to central stations, and certainly not to 'insurance accredited central station protective services' which this Court sanctions as the relevant market. Since I am of the opinion that defendants and the courts are entitled to a reappraisal of the liability consequences as well as the appropriate provisions of the decree on the basis of a sound definition of the market, I would reverse and remand for these purposes.

Parallel Citations

86 S.Ct. 1698, 16 L.Ed.2d 778

Footnotes

1 26 Stat. 209, as amended, 15 U.S.C. s 2 (1964 ed.).

2 Expediting Act s 2, 32 Stat. 823, as amended, 15 U.S.C. s 29 (1964 ed.); United States v. Loew's, Inc., 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11.

3 These are the record figures. Since the time of the trial, Grinnell's holdings have increased. Counsel for Grinnell has advised this Court that Grinnell now holds 80% of ADT's stock and 90% of the stock of AFA.

4 Among the various central station services offered are the following:
(1) automatic burglar alarms;
(2) automatic fire alarms;
(3) sprinkler supervisory service (any malfunctions in the fire sprinkler system—e.g., changes in water pressure, dangerously low water temperatures, etc.—are reported to the central station); and
(4) watch signal service (night watchmen, by operating a key-triggered device on the protected premises, indicate to the central station that they are making their rounds and that all is well; the failure of a watchman to make his electrical report alerts the central station that something may be amiss).

5 In 1959, ADT complained that AFA's share of the revenues was excessive. AFA replied, in a letter to the president of Grinnell (which by that time controlled both ADT and AFA), that its share was just compensation for its continued observance of the service and territorial restrictions: '(T)he geographic restrictions placed upon us plus the requirement that we confine our activities to sprinkler and fire alarm services exclusively, since 1907 and presumably into the future, has definitely retarded our expansion in the past to the benefit of ADT growth. * * * (AFA's) contribution must also include the many things that helped make ADT big.' (Emphasis added.)

6 Thus, of the 38 nondefendant firms operating a central service station protective service in the United States in 1961, 24 offered all of the following services: automatic fire alarm; waterflow alarm and sprinkler supervision; watchman's reporting and manual fire alarm; and burglar alarm. Of the other firms, 11 provided no watchman's reporting and manual fire alarm service; six provided no automatic fire alarm service; and two offered no sprinkler supervisory and waterflow alarm service. Moreover, of the 14 firms not providing the full panoply of services, 10 lacked only one of the above-described services. Appellant ADT's assertion that 'very few accredited central stations furnish the full variety of services' is flatly contradicted by the record.

7 Since the record clearly shows that this monopoly power was consciously acquired, we have no reason to reach the further position of the District Court that once monopoly power is shown to exist, the burden is on the defendants to show that their dominance is due to skill, acumen, and the like.

8 Although the Government originally urged that the decree was inadequate as to divestiture in that it permitted Grinnell to distribute the stock of the other companies to Grinnell's shareholders, it has abandoned that point in this Court.

9 Specifically, the areas of disagreement are: (1) Defendants urge that barring them from offering five-year contracts would put them at a competitive disadvantage vis-a -vis nondefendant firms; the Government responds that since they violated the law, they may properly be subjected to restrictions not borne by others. See United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723—724, 64 S.Ct. 805, 813—814, 88 L.Ed. 1024. (2) Some customers of defendants may wish to have long-term contracts; the Government responds that this may be explored on remand. (3) There is some dispute as to whether, if the central station company cannot retain title to the equipment it installs, the insurance companies will accredit the system. This, too, is a proper subject for inquiry on remand.

10 Prior to trial, the defendants agreed that this would be an appropriate provision in a decree were the Government to prevail in all its claims of antitrust violations. Although defendants now maintain that this pretrial discussion was 'settlement talk,' that earlier concession is a relevant factor that the District Judge can properly take into account on remand.

11 This provision, too, gained pretrial acceptance. See n. 10, supra.

12 28 U.S.C. s 144 (1964 ed.) provides in relevant part:
'Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.'

13 Judge Wyzanski referred the question of his disqualification to Chief Judge Woodbury of the Court of Appeals for the First Circuit who after hearing oral argument held that no case of bias and prejudice had been made out under s 144.

1 United States v. Continental Can Co., 378 U.S. 441, 447—458, 84 S.Ct. 1738, 1741—1747, 12 L.Ed.2d 953; United States v. Alcoa, 377 U.S. 271, 273—277, 84 S.Ct. 1283, 1285—1287, 12 L.Ed.2d 314; United States v. Philadelphia Nat. Bank, 374 U.S. 321, 356, 83 S.Ct. 1715, 1737, 10 L.Ed.2d 915; Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510.

2 The defendants constitute 87% of the market as defined. One of the defendants alone, ADT, has 73%.

3 See also United States v. First Nat. Bank, 376 U.S. 665, 668, 84 S.Ct. 1033, 1034, 12 L.Ed.2d 1 (per Douglas, J.); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387, 398 (D.C.S.D.N.Y.1957), aff'd, 259 F.2d 524 (C.A.2d Cir. 1958).

4 There is a danger that this Court's opinion, ante, at 1706, will be read as somewhat overstating the case. There is neither finding nor record to support the implication that rates are to any substantial extent fixed on a nationwide basis, or that there are nationwide contracts with multi-state businesses in any significant degree, or that insurers inspect or certify central stations on a nationwide basis.

5 See also Brown Shoe Co. v. United States, 370 U.S. 294, 336—337, 82 S.Ct. 1502, 8 L.Ed.2d 510.

6 None of the stations operated by defendant Automatic Fire Alarm Company offers burglary protection, just as none of Holmes' stations protects against the risk of fire.

7 Tampa Electric Co. v. Nashville Coal Co., 365 U.S., at 327, 81 S.Ct., at 627.

8 The example used by the court in its findings is illuminating and disturbing. In explanation of its narrow market definition, the court says that the diference between the accredited central station protective services and all others 'could be compared' to the difference between a compact six-cylinder car and a chauffeur-driven sedan. It is probably true that the degree of direct competition between luxury automobiles and compacts is slight, but it is by no means as clear-cut as the trial court seems to suggest. The question would require careful analysis in light of the total facts and issues. For example, if the antitrust problem at hand involved an acquisition of the business of a manufacturer of compacts by a maker of luxury cars, it is by no means inconceivable that sufficient competitive overlap would be found to place both products in the 'relevant market.'